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SAVE LAFAYETTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

SAVE LAFAYETTE, a non-profit corporation, Petitioner, v. CITY OF LAFAYETTE, a municipality; LAFAYETTE CITY COUNCIL, a municipal body; and LAFAYETTE PLANNING COMMISSION, a municipal body, Respondents, O'BRIEN LAND COMPANY, LLC, a California limited liability company; and ANNA MARIA DETTMER as trustee for the AMD FAMILY TRUST, Real Parties in Interest.	CASE NO.: N20-1413 VERIFIED PETITION FOR WRIT OF MANDATE (Code Civ. Proc., §§ 1085, 1094.5; Pub. Resources Code, §§ 21000 et seq. (CEQA); Gov. Code § 65915) FOR ASSIGNMENT TO CEQA DEPARTMENT (Pub. Resources Code § 21167.1)

PER LOCAL RULE, THIS CASE IS ASSIGNED TO DEPT 39 FOR ALL PURPOSES.

INTRODUCTION

Petitioner SAVE LAFAYETTE ("Petitioner") petitions this Court for a writ of mandate directed to Respondents CITY OF LAFAYETTE, LAFAYETTE CITY COUNCIL, LAFAYETTE PLANNING COMMISSION (collectively "Respondents" or "City") and Real Party in Interest O'BRIEN LAND COMPANY, LLC, and ANNA MARIA DETTMER as trustee for the AMD FAMILY TRUST ("Real Parties" or "Applicants"), and by this verified petition alleges as follows:

1. Petitioner brings this action to challenge the unlawful actions of Respondents in approving the Terraces of Lafayette Project and related approvals ("Project") based on an environmental impact report ("EIR") that was inadequate as an informational document, and without preparing a revised or recirculated Environmental Impact Report ("REIR") or in the alternative, a subsequent Environmental Impact Report ("SEIR"), in violation of the California Environmental Quality Act, Public Resources Code § 21000 *et seq*. ("CEQA") and the CEQA Guidelines, title 14, California Code of Regulations, § 15000 *et seq*. Instead, the City approved the Project based on an Addendum to an EIR prepared in 2013 for the Terraces of Lafayette ("2013 EIR"), which analyzed a project proposed in 2011 ("2011 Project"), which was different in many respects from the Project approved in 2020.

2. The 2013 EIR is inadequate as an informational document because it fails to adequately analyze numerous significant adverse impacts of the Project.

3. The City never granted final approvals for the 2011 Project because the Real Parties in Interest withdrew the 2011 Project and submitted a different project in December 2013 known as the Homes at Deer Hill. ("Deer Hill Project").

4. Since the 2011 Project was never approved, no challenge to the project or the 2013 EIR could have been made – until now. See, *Coalition for Clean Air v. Visalia* (2012) 209 Cal.App.4th 408.

5. The citizens of Lafayette obtained signatures to place a referendum on the ballot to reverse the City Council's approval of the Deer Hill Project, but the City refused to place the referendum on the ballot. Save Lafayette successfully sued the City to force the City to place the referendum on the ballot. *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657. The citizens of Lafayette rejected the Deer Hill Project in a referendum in 2018.

6. On June 15, 2018, Real Parties submitted the current Project to the City for approval.

Real Parties sought to rely upon the 2013 EIR and an Addendum to the 2013 EIR.

7. The Project includes the development of 315 residential units within 14 buildings, a clubhouse building, a leasing office, and more than 550 surface-level parking spaces on 22.27 acres of land located at the southwest corner of Deer Hill Road and Pleasant Hill Road at 3233 Deer Hill Road (APN 232-15-027) in Lafayette, California (the "Property"). The Project includes several significant changes from the 2011 Project, including that the Project also includes the removal of 101 protected trees, which is 10 more than previously analyzed in the 2013 EIR, and destruction of 2 acres of native blue wildrye. The Project also requires a new southbound lane on Pleasant Hill Road, and the extension of the northbound left-turn lane at Pleasant Hill Road and Deer Hill Road/Stanley Boulevard.

8. Petitioner submitted evidence from experts explaining that the proposed Project will have significant environmental effects on biological resources, protected trees, wildrye areas, traffic, indoor air quality, health risk impacts, greenhouse gas ("GHG") emissions, and wildlife risks that were not analyzed in the 2013 EIR. Respondents violated CEQA by relying on the 2013 EIR which is inadequate as an informational document and failing to prepare an SEIR or REIR for the Project despite: 1) substantial evidence in the record of 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 2013 EIR was certified showing new or more substantially severe impacts not discussed in the 2013 EIR, and 2) substantial changes that have occurred with respect to the circumstances under which the Project is undertaken which will require major revisions of the previous EIR due to the substantial increase in the severity of previously identified significant effects.

9. Petitioner also brings this action because the City abused its discretion and failed to proceed in a manner required by law by approving a Project that does not comply with applicable General Plan and zoning provisions. The Project fails to comply with the City's current General Plan and Zoning as well as the General Plan and Zoning that existed in 2011.

10. Petitioner respectfully requests that the Court direct Respondents to set aside any and all approvals related to the Project, including the certification of the 2013 EIR and the CEQA Addendum, the CEQA findings, and any and all permits, authorizations or entitlements granted for the Project by Respondents to Real Parties in Interest.

PARTIES

11. Petitioner SAVE LAFAYETTE is a California non-profit corporation whose members include residents living in and around the City. The primary mission of Save Lafayette is to support the City's historic character, the right housing in the right locations to maintain proper local jobs and a local business/housing balance. Save Lafayette opposes excessive urbanization that threatens the health and safety of the City. Save Lafayette, many of its members and its legal counsel commented during the administrative process.

12. Respondent CITY OF LAFAYETTE is a municipal corporation in whose jurisdiction the Project is located, and is the lead agency for the Project.

13. Respondent the LAFAYETTE CITY COUNCIL ("City Council") serves as the legislative body of the City of Lafayette for the planning and provision of services related to public needs and the requirements of state laws. As the elected representatives of the people of the City of Lafayette, the members of the City Council establish overall City priorities and set policy. Respondent City Council is the governing body of the City, and is ultimately responsible for reviewing and approving or denying the Project. On August 25, 2020, the City Council approved the Addendum for the Project.

14. Respondent LAFAYETTE PLANNING COMMISSION is a decision-maker for the "lead agency" for the Project for purposes of Public Resources Code section 21067 and has principal responsibility for conducting environmental review for the Project and taking other actions necessary to comply with CEQA.

15. Real Party in Interest O'BRIEN LAND COMPANY, LLC is a California limited liability company with a principal place of business at 873 Santa Cruz Avenue, Suite 204, Menlo Park, CA 94025. O'BRIEN LAND COMPANY, LLC is listed on the Notice of Determination as the "Project Applicant."

16. Real Party in Interest ANNA MARIA DETTMER as trustee for the AMD FAMILY TRUST is the owner of the Property on which the Project is proposed to be constructed (APN 232-15-027) in Lafayette, California.

JURISDICTION AND VENUE

17. This Court has jurisdiction over the matters alleged in this Petition pursuant to Code of Civil Procedure sections 1085 and 1094.5, and Public Resources Code sections 21167, 21168 and 21168.5.

18. Venue is proper in Contra Costa County Superior Court in accordance with Code of Civil Procedure section 395 because the Project at issue is located in the County of Contra Costa.

19. Venue is proper in this Court under California Code of Civil Procedure section 394 (actions against a city, county, or local agency) and section 395 (actions generally) because Respondents include a city and local agencies based in the County of Contra Costa and because the cause of action alleged in this Petition arose in the County of Contra Costa and the Project will occur within the County of Contra Costa.

20. Petitioner has complied with the requirements of Public Resources Code section 21167.5 by serving a written notice on September 15, 2020 of Petitioner's intention to commence this action against Respondents pursuant to CEQA. A copy of the written notice is attached hereto as **Exhibit A**.

21. This action is being filed within 30 days of the posting of the City's Notice of Determination with the Contra Costa County Clerk's office, in accordance with Public Resources Code section 21167(b).

22. Petitioner has complied with the requirements of Public Resources Code section 21167.6 by filing a notice of their election to prepare the record of administrative proceedings relating to this action. A copy of the notice is attached hereto as **Exhibit B**.

23. Petitioner will comply with the requirements of Public Resources Code section 21167.7 and Code of Civil Procedure section 388 by sending a copy of this Petition and Complaint to the California Attorney General within the required time period.

24. Petitioner has performed any and all conditions precedent to filing this instant action and has exhausted any and all available administrative remedies to the extent required by law.

25. Petitioner is an interested person because it has members who live in the City of Lafayette and will be directly affected by the Project and are interested in and concerned about the Project's impacts on the local community and environment.

26. Petitioner has no plain, speedy or adequate remedy in the course of ordinary law unless this Court grants the requested writ of mandate to require Respondents set aside the City's actions taken in violation of CEQA and the Housing Accountability Act, to require Respondents to prepare an EIR or other legally adequate CEQA document for the Project, and to enjoin the City from approving the Project pending completion of legally adequate CEQA review. In the absence of such remedies, Respondents' decision will remain in violation of state law.

FACTUAL ALLEGATIONS

27. On or about March 21, 2011, Real Parties in Interest filed an application for a project with City, known as the Terraces of Lafayette project ("2011 Project"). The project consisted of 315 moderate income, multi-family apartment units in 14 residential buildings on the "Property". City deemed said application for the 2011 Project substantially complete within the meaning of the California Permit Streamlining Act on or about July 5, 2011.

28. On August 12, 2013, the City Council certified the final EIR for the 2011 proposed project ("2013 EIR"). The 2013 EIR found that the 2011 Project would have 13 significant unmitigated environmental impacts in five different subject areas of aesthetics, air quality, biological resources, land use and planning, and transportation.

29. Said certification of the 2013 EIR commenced a 180-day timeline for determination of the application under Gov. Code §65950(a), which would have expired by February, 2014. The Legislature has declared that the time limit of §65950 could be extended for a period not to exceed 90 days and that no other extension, continuance, or waiver of these time limits either by the project applicant or lead agency shall be permitted. Stats. 1998, c.283 (S.B. 2005), §4. The 2011 substantially complete determination for the proposed 2011 Project under the California Permit Streamlining Act expired and was of no force and effect no later than February, 2014.

30. On December 9, 2013, Real Parties in Interest abandoned the 2011 Project. On January 22, 2014, the City and Real Parties in Interest entered into a Process Agreement to "suspend" consideration of the entitlements for the 2011 Project.

31. On March 21, 2014, Real Parties in Interest submitted a different project for approval, known as the Homes at Deer Hill ("Deer Hill Project"). The Deer Hill Project included the

development of 44 single-family homes, a community park with a multi-purpose athletic field, a playground, a dog park, and a parking lot.

32. On August 10, 2015, by Resolution no. 2015-51, the City Council adopted a General Plan Amendment for a Land Use Designation for the Property of Low Density Single Family Residential (SFR-LD), which allows up to 2 dwellings per acre. On August 10, 2015, the City Council also certified a Supplemental EIR for the Deer Hill Project ("Deer Hill EIR").

33. On September 14, 2015, by Ordinance no. 641, the City Council rezoned the Property from the Administrative/Professional Office District to Low Density Single Family Residential (SFR-LD) and Planned Unit development, and approved a development agreement, Hillside Development Permit, design review, Tree Permit, Grading Permit, thereby approving the Deer Hill Project.

34. On October 14, 2015, Petitioner filed a referendum petition requesting that the legislative acts in Ordinance no. 641 and the approval of the Deer Hill Project be repealed or that a referendum be placed on the ballot. The Contra Costa County Clerk Recorder- Elections Department verified the signatures from registered voters qualified the referendum for the ballot and on November 25, 2015 notified the City that the referendum petition met the statutory requirements of the Elections Code. However, on December 14, 2015, the City Council refused to put the referendum on the ballot. The referendum did not seek repeal of the August 10, 2015 General Plan Amendment for a Land Use Designation of Low Density Single Family Residential (SFR-LD) adopted for the Property, which remains in effect.

35. Save Lafayette filed action no. MSN16-0390 in Contra Costa Superior Court for a peremptory writ of mandate. On February 21, 2018, in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, the Court of Appeal ruled the City improperly interfered with the referendum process and that City had a mandatory duty to submit the referendum to public vote.

36. The referendum was submitted for public vote in the Measure L election of June 5, 2018, and a substantial majority of Lafayette voters rejected the Deer Hill Project. In conformity with the Court of Appeal ruling and Gov. Code §65860(c), after a brief moratorium, on July 23, 2018, by Ordinance no. 668, the City adopted Single Family Residential District-65 (R-65) zoning for the Property, codified in LMC 6-7121.

37. On June 15, 2018, Real Parties in Interest proposed the current Project. The proposed Project also proposes to develop 315 residential units within 14 buildings, and a clubhouse building on the 22.27-acre parcel located at the southwest corner of Deer Hill Road and Pleasant Hill Road at 3233 Deer Hill Road. However, the Project would require the removal of an additional 10 protected trees than the 2011 Project, would destroy more blue wildrye than the 2011 Project, requires a new southbound lane on Pleasant Hill Road unlike the 2011 Project, does not include a median break on Pleasant Hill Road, extends the northbound left-turn lane at Pleasant Hill Road and Deer Hill Road/Stanley Boulevard to Acalanes Avenue, and generates higher noise levels than the 2011 Project at the nearby Acalanes High School.

38. Pursuant to Gov. Code §65943(a), this submittal started a new 30-day period for determination the application was substantially complete under the Permit Streamlining Act. Although inconsistent therewith, said application for the Project did not seek amendment of the August 10, 2015 General Plan Land Use Low Density Single Family Residential (SFR-LD) Designation nor Single Family Residential District-65 (R-65) zoning for the Property.

39. In December 2018, Real Parties in Interest submitted a CEQA Addendum for the Project prepared by consultant First Carbon ("2018 Addendum").

40. The City retained an independent consultant to review the 2018 Addendum, who determined that the 2018 Addendum was legally inadequate, and that a Subsequent EIR was required due to changed circumstances since the 2013 EIR was certified.

41. On April 7, 2020, traffic consultant TJKM, working directly for Real Parties, issued a memo in response to a March 5, 2020 letter from Caltrans to the City, which raised concerns relating to the Project's traffic impacts.

42. On April 15, 2020, Petitioner submitted a letter to the Planning Commission ("April 15 Comment") with expert comments from traffic consultant Elite Transportation Group ("Elite") responding to TJKM's March 5 memo. Elite noted numerous errors in the TJKM memo. Specifically, the Delay Indices used for Pleasant Hill Road and Highway 24 were based on outdated (2013) information instead of more recent 2017 CCTA MTSO results, despite the fact that TJKM conducted their own travel time runs for the 2017 Pleasant Hill Road Corridor study but chose to ignore them.

Additionally, TJKM downplayed the impacts of the Project by stating that under the Institute of Transportation Engineers ("ITE") Trip Generation, 10th Edition, the Project could now be classified as "Multi-family Housing, Mid-rise" and would have a lower per unit daily trip generation rate than the data TJKM was directed to use by City staff. The Project is not a Mid-rise project because there are seven 2-story and seven 3-story apartment buildings. Lastly, TJKM failed to respond to the safety concerns raised by Caltrans and Elite about the weaving that would be caused by the Pleasant Hill Road left turn lane extension.

43. On May 4, 2020, the City released a new CEQA Addendum ("2020 Addendum"). The 2020 Addendum admitted that the Project would have significant unavoidable impacts, including: scenic vistas including scenic resources with a State scenic highway; visual character; air quality emissions from nitrogen oxides (NOx); cumulative air quality impacts; cancer risk of 47 per million (exceeding the 10 per million CEQA significance threshold); elimination of 2 acres of blue wildrye native grasslands; destruction of 101 of 117 healthy mature trees that are protected under the City's Tree Protection Ordinance, including a 58-inch valley oak; greenhouse gas emissions of 2,674 metric tons/year (exceeding the1,100 metric tons/year threshold); land use and planning inconsistencies (Policies LU-2, LU-2.1, LU-2.2, LU-2.3, LU-13, LU-20.1); inconsistencies with Hillside Development Permit Requirements set forth in the Municipal Code; significant noise impacts; traffic impacts on Pleasant Hill Road at Deer Hill Road; and conflict with Gateway Constraint Policy due to widening of southbound Pleasant Hill Road.

44. On May 18, 2020, Petitioner submitted written comments to the Planning Commission regarding the Project ("May 18 Comment").

45. The May 18 Comment noted that the 2020 Addendum admitted that the Project would have significant unavoidable impacts and the City could therefore disapprove the Project.

46. The May 18 Comment also noted that the changes to the Project's description from the 2013 EIR required the preparation of a subsequent EIR, not an Addendum.

47. The May 18 Comment also noted that 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 showed significant impacts not discussed in the previous EIR,

including significant biological impacts, significant impacts on protected trees, the significant impact of widening Pleasant Hill Road, significant indoor air quality impacts, significant impacts related to General Plan and Zoning inconsistencies, significant wildfire impacts, and traffic impacts.

48. The May 18 Comment included the comments of expert wildlife biologist, Dr. Shawn Smallwood, Ph.D. ("Dr. Smallwood"). Dr. Smallwood conducted a site inspection of the Project site on May 10, 2020. Dr. Smallwood noted that the Project site provides a valuable riparian habitat for many special status species due to the creek and mature trees. Dr. Smallwood personally observed six (6) special-status species of birds at the Project site. Dr. Smallwood identified forty-two (42) special-status species of birds that have been detected in the area and logged in authoritative databases, as well as ten (10) special-status species of mammals, amphibians, and reptiles. Dr. Smallwood concluded that the riparian woodland habitat created by the creek on the Project site creates potential habitat for San Francisco dusky-footed woodrat, and the stream likely serves as a movement corridor for California red-legged frog. Multiple special-status species of bats likely roost in the trees on site and generally use the riparian corridor for movement. Dr. Smallwood concluded that the Project's impact on special-status species would likely be significant due to the direct destruction of habitat and collisions with windows associated with the Project.

49. Dr. Smallwood also calculated that the Project's windows will cause 616 bird deaths per year. Dr. Smallwood also noted that bird-safe window treatments and other mitigation would be possible for this impact if analyzed in a supplemental EIR.

50. Dr. Smallwood noted that the both the 2013 EIR and the 2020 Addendum concluded that there were no special status species on the Project site. The Project site now has many special-status species on the site, which is an impact that was not known and could not have been known in 2013.

51. The May 18 Comment noted that the Project proposes to destroy 10 more mature trees on the Project site than the 2013 EIR analyzed. The City's Tree Protection Ordinance protects these trees, so the destruction of these additional trees is a significant impact under CEQA. Since the Project will have a greater adverse impact than what was analyzed in the 2013 EIR, this is a new significant impact that was not known and could not have been known in 2013.

52. The May 18 Comment noted that the Project proposes to add a new southbound lane to

Pleasant Hill Road, beginning north of Deer Hill Road and extending south to become a trap lane for the SR-24 westbound on-ramp, which would conflict with the Gateway Constraint Policy of the Lamorinda Action Plan. The conflict with this plan is a significant impact under CEQA which was not known and could not have been known in 2013 because the 2011 Project did not include this traffic lane.

53. The May 18 Comment noted that the Project's indoor air quality impacts were not addressed in the 2013 EIR or 2020 Addendum, but were analyzed in the 2018 Addendum and mitigation measures were imposed, but not included in the 2020 Addendum. The 2018 Addendum concluded that future residents of the Project will suffer a cancer risk of over 51 per million due largely to the Project's adjacency to SR-24, exceeding the Bay Area Air Quality Management District ("BAAQMD") CEQA significance threshold of 10 per million by over five hundred percent. As a result, the 2018 Addendum recommended a mitigation measure of requiring MERV 13 air filtration, which would allegedly reduce the impact to less than significant levels. However, the 2020 Addendum ignored this impact and relies on the analysis from the 2013 EIR, which included mitigation measure requiring MERV 9-12 filtration. However, the 2018 Addendum found that this mitigation failed to reduce the impact to less than significant, and that much more stringent MERV 13 or higher was required. MERV 16 air filtration is now available and would further reduce pollution levels but was not available at the time of the 2013 EIR.

54. The May 18 Comment noted that MERV filters do not work if residents open their windows or engage in outdoor activities, and the Project will include operable windows and outdoor recreation areas. If Project residents open their windows or recreate outdoors, they may be exposed to very high levels of cancer-causing air pollution from nearby SR-24.

55. The May 18 Comment introduced a 2018 study by Chan et al, which analyzed indoor concentrations of formaldehyde for homes built mostly with California Air Resources Board ("CARB") Phase 2 compliant materials, and concluded that while these buildings had a lower median formaldehyde concentration and cancer risk, the median lifetime cancer risk for homes built with CARB Phase 2 compliant composite wood products still greatly exceeded the BAAQMD 10 in one million cancer risk threshold. Assuming all of the Project's building materials are compliant with

CARB's airborne toxics control measure, Petitioner believes the Project's future residents and employees will be exposed to a cancer risk from formaldehyde greater than the BAAQMD's CEQA significance threshold for airborne cancer risk of 10 per million.

56. The May 18 Comment noted that the Project fails to comply with the current General Plan and Zoning designation for the property, which limits the development to no more than 14 units.

57. The May 18 Comment noted that in 2019, the California Office of Planning and Research ("OPR") amended the CEQA Guidelines to add Section XX, concerning wildfire impacts. Section XX requires the analysis of whether a proposed project would:

- "Substantially impair an adopted emergency response plan or emergency evacuation plan";
- "Due to slope, prevailing winds, and other factors, exacerbate wildfire risks, and thereby expose project occupants to, pollutant concentrations from a wildfire or the uncontrolled spread of a wildfire";
- "Require the installation or maintenance of associated infrastructure (such as roads, fuel breaks, emergency water sources, power lines, or other utilities) that may exacerbate fire risk or that may result in temporary or ongoing impacts to the environment"; or
- "Expose people or structures to significant risks, including downslope or downstream flooding or landslides, as a result of runoff, post-fire slope instability, or drainage changes."

58. In the fall of 2019, the immediate project area suffered a catastrophic fire that destroyed the nearby Lafayette Tennis Club. On June 24, 2013, the City adopted Ordinance 620, designating the Project site as being within a Very High Fire Hazard Severity Zones (VHFHSZ) on the City's adopted map that depicts compiled data from the Contra Costa County Fire Protection District fire hazards map and CAL FIRE. The area to the east of the Project site across Pleasant Hill Road is designated by the City's Emergency Operation Plan as Zone 6. The Quandt Road toward Pleasant Hill Road is the designated evacuation route for this zone. The evacuation route for the Project would be Pleasant Hill Road and/or Deer Hill Road.

59. Since the 2013 EIR, several changes have occurred increasing the risks of wildfires in the area, including: ordinance 620 was enacted by the City establishing a very high fire hazard severity zone for the Project site and adjacent area; climate change and/or a developing long-term dry period

have worsened fire risk, and increasingly severe fire events have caused significant loss of life and property damage in northern California in recent fire seasons; Pleasant Hill Road, under these developing fire risk conditions, has heightened significance as a route of evacuation in the event of significant fire events; on October 26, 2019, a major fire occurred on the hillside opposite the Project site; and Pacific Gas & Electric instituted a policy of eliminating electrical service during periods of fire danger conditions. The 2013 EIR did not analyze the Project's traffic impacts under these conditions nor has the 2020 Addendum. To mitigate the risk that the Project may interfere with emergency vehicle access to areas north of the Project, the 2020 Addendum proposes that the Project will contribute its "Fair share" to the cost of a signal optimization equipment intended to clear traffic for emergency vehicles, known as "Opticom" or "EVP."

60. The May 18 Comment introduced expert evidence from Elite Transportation Group, which found that EVP equipment can help reduce emergency response time under non-congested or slightly-congested traffic conditions, but for a congested and gridlocked arterial such as Pleasant Hill Road during peak hours, the impact on emergency response time due to additional congestion caused by the Project is unlikely to be fully mitigated by installing EVP equipment. Further, no analysis in the updated traffic report has shown emergency response time reduction by using EVP equipment on Pleasant Hill Road. Nor will the Opticom system work if PG&E shuts down power during a period of fire danger conditions.

61. Elite found that the Project will have more significant traffic impacts than analyzed in the 2013 EIR due to changed circumstances. Elite critiqued Real Parties in Interest's traffic consultant TJKM, concluding: the delay indices used by TJKM for Pleasant Hill Road and Highway 24 were based on outdated information and were therefore underestimated; the emergency vehicle preemption system recommended by TJKM as a mitigation measure to offset the impact of the Project on emergency vehicle access would not work during congested or peak time; the impacts during construction incorrectly assumed an 8-hour workday and therefore underestimated the impacts of dump truck traffic on local streets during grading; the impact of the significant reduction in the size of the passenger pick-up zone on the west side of Pleasant Hill Road, south of Deer Hill Road had not been considered; the safety conflicts between the proposed bike lane, trap lane, loading zone and entrance

driveway on Pleasant Hill Road had not been adequately reviewed; the property's location in VHFHSZ fire zone and the Project's impact on evacuation routes and emergency first-responder access had not been considered; and the impact of the Project on the intersection of Deer Hill Road and Laurel Drive had not been considered.

62. The May 18 Comment noted that the City retained traffic consulting firm TJKM for the 2020 Addendum, but noted that the Real Parties in Interest retained TJKM for the 2018 Addendum and that TJKM was therefore biased and its conclusions did not constitute substantial evidence.

63. The May 18 Comment also noted that a subsequent EIR was required because the 2020 Addendum eliminated mitigation measures imposed by the Deer Hill EIR. The Deer Hill EIR required "real time" air monitoring to monitor construction dust. However, the 2020 Addendum failed to include this measure despite the fact that the Project would involve much more earth moving, excavation and dust creation than the 2013 Project.

64. The May 18 Comment also noted that the City should not consider issues under the Housing Accountability Act ("HAA) until a subsequent EIR is prepared because the HAA requires CEQA compliance and preserves the City's authority under CEQA.

65. The HAA provides that the City may decline to approve a project if it has significant unmitigated effects on public health and safety, which the Project does, such as cancer risks to residents, interference with wildfire evacuation routes, traffic impacts, and impacts related to traffic safety.

66. The HAA also provides that the City may decline to approve a Project if it is inconsistent with the General Plan and Zoning as it existed at the time the application was "deemed complete." Real Parties in Interest contends the Project was deemed complete in 2011. However, Petitioner provided evidence that the 2011 Project was inconsistent with the General Plan and Zoning as it existed in 2011, and the proposed Project is inconsistent with the current General Plan. Further, the Project was inconsistent with the applicable August 10, 2015 General Plan Low Density Single Family Residential (SFR-LD) Land Use Designation for the Property, which allows up to 2 dwellings per acre. The City must also apply the current General Plan and Zoning if a developer amends a project since the time it was "deemed complete" to change the number of units by more than 20%. If deemed complete

in 2011, Real Parties in Interest changed the Project into the Deer Hill Project, which only had 44 units, resulting in much more than a 20% reduction in the number of units. Then, Real Parties in Interest changed the Project again, increasing the number of units back to 315, increasing the number of units by more than 20% requiring the application of the current General Plan and Zoning. The HAA also provides that a developer may not rely on the prior General Plan and Zoning if more than two and a half years following the date of a project receiving final approval.

67. Petitioner commented that the Respondents and Real Parties in Interest cannot rely on the "Process Agreement" to avoid application of this HAA provision because process agreements are not mentioned in the HAA and has no meaning under any of California's land use laws. Also, the Process Agreement violates the Permit Streamlining Act ("PSA"), which establishes a 180-day timeline for project approval, (Gov. Code section 65950(a)) and allows for only one 90-day extension. Gov. Code section 65957.

68. On May 18, 2020, the Planning Commission held a teleconferenced meeting with the Project on the agenda. During the hearing, City Attorney Robert Hodil stated that exceedance of the BAAQMD numerical significance thresholds would provide a cognizable basis to deny Project approval under the HAA.

69. Petitioner made oral comments during the public hearing on the Project.

70. At the conclusion of the May 18 Planning Commission hearing, the Commission moved to continue the public hearing on the Project to June 15, 2020.

71. On June 10, 2020, Petitioner submitted comments to the Planning Commission ("June 10 Comment") supplementing its May 18 Comment.

72. The June 10 Comment introduced the expert comment of Dr. Paul Rosenfeld, Ph.D., and Matt Hagemann, PG, C.Hg., of environmental consulting firm Soil Water Air Protection Enterprise ("SWAPE"). SWAPE concluded that the Project will have significant air quality impacts, exceeding numerical significance thresholds established by the BAAQMD. Specifically, SWAPE concluded that composite wood products commonly used in construction of this type off-gas formaldehyde, and even if the Project uses CARB-compliant composite wood products, it will create a cancer risk for future residents of 112 per million, exceeding the BAAQMD CEQA significance threshold of 10 per million.

SWAPE also pointed out that there are feasible mitigation measures to reduce this risk, such as requiring no-added formaldehyde ("NAF") composite wood products. SWAPE also concluded that the Project will generate significant diesel particulate matter ("DPM") emissions, during both the major earth moving during the Project's construction and during ongoing operation from trucks and other diesel powered equipment that will service the Project. SWAPE calculated that the cancer risk at the maximally exposed individual receptor ("MEIR") would be 130 per million, exceeding the BAAQMD's 10 per million CEQA significance threshold. SWAPE also noted that the 2020 Addendum based its conclusions on several erroneous assumptions. Lastly, SWAPE concluded that the Project will have significant greenhouse gas ("GHG") impacts, in excess of CEQA significance thresholds. SWAPE also pointed out that the 2020 Addendum invented its own GHG significance threshold of 2.77 metric tons of CO2e per service population per year, but this was invented by the 2020 Addendum's author and has not been endorsed by any authoritative agency. Instead, SWAPE concluded that the Association of Environmental Professions GHG threshold of 2.6 MT CO2/SP/year should be used. Applying that threshold, the Project's GHG emissions of 2.88 MT CO2/SP/year are significant.

73. The June 10 Comment reiterated that the Project will have significant indoor and outdoor air quality impacts due to the proximity to SR-24 which were not analyzed in the 2013 EIR or the 2020 Addendum but were analyzed in the 2018 Addendum.

74. The June 10 Commented noted that City Attorney Robert Hodil stated at the May 18, 2020 Planning Commission hearing that exceedance of the BAAQMD numerical significance thresholds would provide a cognizable basis to deny Project approval under the HAA.

75. The June 10 Comment reiterated that the City should not consider issues under the HAA until a subsequent EIR is prepared because the HAA requires CEQA compliance.

76. On June 15, 2020, the Planning Commission continued the public hearing on the Project to June 29, 2020 to allow staff time to provide additional information regarding the traffic impact analysis and potential impacts on emergency evacuations.

77. On June 24, 2020, Petitioners submitted a comment letter to the Planning Commission ("June 24 Comment").

78. The June 24 Comment introduced the expert evidence of Elite responding to a memo

prepared by TJKM on May 15, 2020. Elite noted numerous significant issues and shortcomings with the TJKM memo. First, the property is located in a VHFHSZ fire zone, but the Project's impact on evacuation routes and emergency first-responder access to the neighborhood had not been studied. Second, TJKM continued to understate the existing delays on Pleasant Hill Road and Highway 24 by using outdated information to calculate the Delay Indexes. Third, Caltrans also raised concerns about the Project's impacts on queuing onto Highway 24. Fourth, the safety and traffic impacts during construction had not been adequately analyzed. Fifth, TJKM continued to downplay the congestion and safety concerns raised by Caltrans and Elite about the weaving that would be caused by traffic trying to get to the Pleasant Hill Road left turn lane extension from the freeway off-ramps. Sixth, TJKM's traffic study collected intersection turning movement counts at 16 intersections on just a single day, running the risk that it picked an abnormal day and therefore did not perform an adequate analysis. Lastly, TJKM used actual signal timings for the intersections on Pleasant Hill Road but used timings based on standard traffic signal assumptions for all other intersections in the study.

79. On or about June 23, 2020, City posted the June 30, 2020 Planning Commission Agenda and Staff Report for the Project. The Staff Report in part responded to Petitioner's May 18 Comment.

80. On June 27, 2020, Petitioner submitted comments to the Planning Commission ("June 27 Comment"), responding to the Staff Report posted on or about June 23, 2020.

81. The June 27 Comment noted that the HAA does not preempt CEQA because the HAA contains a "savings clause" that preserves the City's authority and requirements under CEQA. The letter pointed out that the staff was therefore mistaken in contending that the HAA requires the City to issue a statement of overriding considerations for the Project under CEQA despite the Project having numerous significant unmitigated impacts.

82. On June 30, 2020, Petitioner submitted comments to the Planning Commission ("June 30 Comment"), with environmental consulting firm SWAPE's responses to an air quality analysis submitted by consulting firm Impact Sciences in the June 23 Staff Report.

83. The June 30 Comment noted that Impact Sciences disputed some of the input parameters used by SWAPE in the June 10 Comment. SWAPE did not agree with Input Science's response, because Impact Sciences did not conduct any health risk assessments ("HRAs") to support its

conclusion that the Project will have less than significant airborne cancer impacts. However, SWAPE conducted a new HRA using Impact Science's parameters and found that the Project would create a cancer risk at the point of MEIR of 93 per million, which exceeds the BAAQMD CEQA significance threshold of 10 per million.

84. On July 1, 2020, the Planning Commission continued the public hearing on the Project.

85. Petitioner made oral statements at the public hearing on the Project.

86. At the conclusion of the public hearing on the Project, the Planning Commission adopted Resolution No. 2020-14 finding the Addendum to the 2013 EIR adequate under CEQA, making CEQA findings and adopting a Statement of Overriding Considerations, and approving a Land Use Permit, Hillside Development Permit, Ridgeline Exception, Grading Permit, Design Review Permit, and Tree Permit for the Project, subject to conditions of approval. There was no application for nor amendment of the applicable August 10, 2015 General Plan Low Density Single Family Residential (SFR-LD) Land Use Designation for the Property, nor of the Single Family Residential District-65 (R-65) zoning for the Property the City adopted on July 23, 2018, by Ordinance no. 668, codified in LMC 6-7121.

87. On July 13, 2020, pursuant to Lafayette Municipal Code Section 6-228(a), City Council member Cameron Burks appealed the decision of the Planning Commission to the City Council.

88. On August 3, 2020, Petitioner submitted comments to the City Council ("August 3 Comment") highlighting the grounds for denial of the Project. Specifically noting that the Project fails to comply with the SFR-LD General Plan land use designation and R-65 Zoning, and that the Project should be denied under the HAA because it is inconsistent with the City's General Plan and Zoning designation.

89. On August 10, 2020, Petitioner submitted supplemental comments to the City Council ("August 10 Comment").

90. The August 10 Comment introduced expert evidence from SWAPE in response to the City's responses to SWAPE's previous comments at the June 30, 2020 Planning Commission hearing. SWAPE concluded that the City continued to fail to evaluate the Project's indoor air quality impacts, continued to include unsubstantiated input parameters in its model to estimate the Project's emissions,

failed to adequately evaluate the Project's DPM emissions, and failed to adequately evaluate the Project's GHG impacts. SWAPE also provided feasible mitigation measures the City could implement to reduce the Project's emissions.

91. On August 10, 2020, the City Council held a public hearing on the appeal of the Planning Commission's July 1, 2020 approval of the Project and 2020 Addendum.

92. Petitioner made oral statements during the public hearing on the Project.

93. At the conclusion of the City Council meeting, the City Council continued the Project to the August 24, 2020 City Council meeting.

94. On August 14, 2020, Petitioner submitted comments to the City Council ("August 14 Comment") stating that the HAA's "5-Meeting Rule" does not apply to the Project for several reasons. First, CEQA review must precede HAA review and time requirements. Second, the Project failed to comply with the applicable objective general plan and zoning standards at the time the application was deemed complete in 2011.

95. On August 20, 2020, Petitioner submitted comments to the City Council recommending actions the City Council should take on the Project.

96. On or about August 19, 2020, the City published the City Council Agenda and Staff Report for the August 24, 2020 City Council meeting. The Staff Report, in part, responded to Petitioner's previous comments.

97. On August 21, 2020, Petitioner submitted a comment letter to the City Council ("August 21 Comment") noting significant misstatements made in the staff report dated August 24, 2020 for the August 24, 2020 City Council meeting.

98. The August 21 Comment noted that the staff report made misstatements regarding Government Code section 66300 and the 2015 General Plan land use designation and 2018 zoning, and that the Project site is not within the Very High Fire Hazard Severity Zone designated by the City on June 10, 2013 in Ordinance No. 620.

99. On August 24, 2020, Petitioner submitted a comment to the City Council ("August 24 Comment") noting the serious public health and safety risks posed by the Project due to wildfires. The letter pointed out that TJKM made material misstatements to the City Council, stating in particular that

County Connection would provide 27 buses to evacuate students from nearby schools in the case of a wildfire. However, the CEO of County Connection submitted a letter to the City stating that this conversion appears never to have occurred and that County Connection cannot commit to providing such emergency evaluation facilities.

100. At the August 24 City Council hearing, a representative of TJKM stated that she had spoken to a staff person at County Connection, but did not make a note of the conversation and could not remember the person's name. The TJKM representative stated that in her undocumented conversation with County Connection she merely verified the size and seating capacity of County Connection's buses. The TJKM representative did not rebut the assertion that County Connection never committed to provide 27 buses (or any number of buses) to evacuate students in the case of an emergency, despite the fact that TJKM's analysis was premised on these buses being used to evacuate students rather than hundreds of automobiles.

101. The August 24 Comment also introduced expert evidence from Elite, who prepared a new report finding that the Project will cause massive delays in the case of an emergency evacuation.

102. The August 24 Comment introduced additional expert evidence from SWAPE. SWAPE responded to Impact Sciences and concluded that the Project will create significant indoor air quality impacts above CEQA significance thresholds and that the Project's GHG impacts will also be significant.

103. Petitioner submitted a second comment letter to the City Council on August 24, 2020 providing a recommended action for the City Council to take at that day's hearing on the Project.

104. Petitioner made oral statements during the public hearing on the Project.

105. At the conclusion of the City Council meeting, on the morning of August 25, 2020, the City Council adopted Resolution No. 2020-33 approving the CEQA findings with amendments to the Statement of Overriding Considerations, Mitigation Monitoring & Reporting Program (MMRP) and Conditions of Approval, thus approving the Project and the 2020 Addendum, finding the Addendum to the 2013 EIR adequate under CEQA, making CEQA findings, and approving a Land Use Permit, Hillside Development Permit, Ridgeline Exception, Grading Permit, Design Review Permit, and Tree Permit for the Project, subject to conditions of approval. Again, there was no application for nor

amendment of the applicable August 10, 2015 General Plan Low Density Single Family Residential (SFR-LD) Land Use Designation for the Property, nor of the Single Family Residential District-65 (R-65) zoning for the Property the City adopted on July 23, 2018, by Ordinance no. 668, codified in LMC 6-7121.

106. On or after August 25, 2020, the City filed a Notice of Determination with the Contra Costa County Clerk.

LEGAL BACKGROUND

The California Environmental Quality Act ("CEQA")

107. "The 'foremost principle' under CEQA is that the Legislature intended the act 'to be interpreted in such a manner so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 390 (*Laurel Heights I*) [citation omitted].) With certain exceptions, CEQA requires an agency to analyze the potential environmental impacts of proposed projects in an EIR. (Public Resources Code ("PRC") § 21100.) The EIR is "the heart of CEQA" and the "primary means" of ensuring that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (*Laurel Heights I*, 47 Cal.3d at 392.) Adherence to the EIR process ensures that "the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Id*.)

108. CEQA has two purposes. First, CEQA is designed to truthfully inform the public about the potential environmental effects of a project. (CEQA Guidelines § 15002(a)(1).) "Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal. 3d 553, 564.) Second, CEQA requires agencies to reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and mitigation measures. If the project will have significant effects, the agency may approve the project only if it makes express findings that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects are "acceptable due to overriding concerns." (PRC § 21081.)

109. When performing an initial review of the adequacy of an EIR, the courts apply a hybrid standard, reviewing the adequacy of the EIR as an informational document de novo, while reviewing factual conclusions for substantial evidence. *Sierra Club v. County of Fresno* (2018) 6 Cal. 5th 502, 512.

110. Despite the fact that the EIR here at issue was initially certified in 2013, Real Parties withdrew the Project proposal immediately thereafter, and the Project was never approved by the City – until August 24, 2020. Under CEQA, an EIR may not be challenged until after the EIR is certified and the project is approved. *Coalition for Clean Air v. Visalia* (2012) 209 Cal.App.4th 408. Therefore, this is the first time that the 2013 EIR could be challenged, and the legal standard for initial review of an EIR applies.

111. Under CEQA, the standard of review is abuse of discretion. (PRC §§ 21168.5, 21005.) As the California Supreme Court has recently clarified, "[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence." (*Sierra Club v. County of Fresno* (2018) 6 Cal. 5th 502, 512 [quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 435 (*Vineyard Area Citizens*).].) However, judicial review differs depending on whether the issue is procedural or factual: "While we determine de novo whether the agency has employed the correct procedures, . . . we accord greater deference to the agency's substantive factual conclusions." (*Id*.)

112. Under the procedural versus factual dichotomy, clear-cut procedural issues—such as whether "the agency provide[d] sufficient notice and opportunity to comment on a draft EIR" or whether "the agency omit[ted] the required discussion of alternatives"—are reviewed de novo and "courts will invalidate an EIR that fails to meet them." (*Sierra Club*, at 512.) In contrast, when reviewing factual determinations—such as the decision to use a particular methodology and reject another—substantial evidence review is appropriate. (*Id*. at 514.)

113. In addition to resolving clear-cut procedural and factual issues, courts are also faced with determining "whether an EIR's discussion of environmental impacts is adequate, that is, whether the discussion sufficiently performs the function of facilitating 'informed agency decisionmaking and

informed public participation.'" (*Sierra Club*, 6 Cal.5th at 513 [quoting *California Native Plant Soc'y v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 988].) The California Supreme Court has noted that "the adequacy of an EIR's discussion of environmental impacts is an issue distinct from the extent to which an agency is correct in its determination whether the impacts are significant." (*Id*. at 514.) As such, "adequacy of discussion claims are not typically amenable to substantial evidence review." (*Id*. at 515.)

114. Rather than defer to an agency's determination when evaluating the adequacy of an EIR as an informational document, the courts instead must focus on CEQA's intent to inform citizens of an agency's decision-making process. To that end, "[t]he ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (*Sierra Club*, 6 Cal.5th at 516 [quoting *Laurel Heights I*, 47 Cal.3d at 405].) Thus, when determining the adequacy of an EIR, the court must engage in de novo review to determine "whether the EIR serves its purpose as an informational document." (*Id*. at 516.)

115. The City contends that the lenient "substantial evidence" standard of CEQA section 21166 and CEQA Guidelines section 15162 applies to its determination of whether a SEIR is required or whether the 2020 Addendum is sufficient. However, those sections do not apply at all because the 2013 EIR was never subject to challenge until now.

116. In *Benton v. Bd. of Supervisors*, 226 Cal. App. 3d 1467, 1479–80 (1991), the court explained, "In a case in which an initial EIR has been certified, section 21166 comes into play precisely because in-depth review of the project has already occurred, **the time for challenging the sufficiency of the original CEQA document has long since expired** and the question before the agency is whether circumstances have changed enough to justify repeating a substantial portion of the process." (Emphasis added).

117. Although the City certified the 2013 EIR, the City never granted final approvals for the 2011 Project because the developer withdrew the 2011 Project and submitted the Deer Hill Project. The minutes of the August 12, 2013 city council hearing make clear that the council certified the EIR, but did not approve the project. Since the 2011 Project never received final approval, any CEQA challenge

to the 2013 EIR would not have been ripe. In the case of *Coal. for Clean Air v. City of Visalia*, 209 Cal. App. 4th 408, 423-26 (2012), the court held that a notice of determination may not be filed until the CEQA document is approved and the project receives final approval. Any challenge cannot be brought until after project approval. Since the 2011 Project never received final approval, the 2013 EIR could not have been challenged – until now. Since "the time for challenging the sufficiency of the original CEQA document has [NOT] long since expired " CEQA section 21166 and CEQA Guidelines section 15162 do not apply at all. Rather, the 2013 EIR may be challenged now for the first time pursuant to the standards of review for challenging an EIR. Any other rule would allow a city to certify an EIR, wait 180 days, then approve the underlying project, and argue that the EIR must be challenged under section 21166 rather than using the court's independent judgment.

118. Even under the substantial evidence standard of CEQA section 21166 and CEQA Guidelines section 15162, a subsequent EIR is required.

119. Section 15164(a) of the CEQA Guidelines states that "the lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions [to the previous EIR] are necessary, but none of the conditions described in section 15162 calling for preparation of a subsequent EIR have occurred." CEQA Guidelines section 15162 provides that a subsequent or supplemental environmental impact report is required if any one of the following occurs: (1) substantial changes are proposed in the project that will require major revisions of the EIR, (2) there are substantial changes to the project's circumstances that will require major revisions to the EIR, or (3) new information becomes available. CEQA Guidelines § 15162; Pub. Res. Code § 21166.

120. Where an original environmental document does retain some informational value, then the agency must prepare a subsequent or supplemental EIR if the changes are "[s]ubstantial" and require "major revisions" of the previous EIR. (*Friends of Coll. of San Mateo Garden*, 1 Cal.5th at 943. "[W]hen there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations turn[] on the value of the new information to the still pending decisionmaking process." (*Id*. at 951–52.) The agency must "decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered

significant environmental effects." (*Id*., at 952.)

General Plan Consistency

121. "The Legislature has mandated that every county and city must adopt a 'comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning.'" *Citizens of Goleta Valley v. Bd. of Sups*. (1990) 52 Cal.3d 553, 570 (quoting Gov. Code §65300). The Supreme Court has described the general plan as "the constitution for all future developments within the city or county." Id. (internal quotation marks omitted).

122. The "propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." *Id. DeVita v. Cty. of Napa*, 9 Cal. 4th 763, 803 (1995). The "propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." *Citizens of Goleta Valley v. Bd. of Sups*. (1990) 52 C.3d 553, 570. Local government entities "cannot issue land use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans…Issuance of a permit inconsistent with zoning ordinances or the general plan may be set aside and invalidated as ultra vires." *Land Waste Management v. Contra Costa Board of Supervisors* (1990) 222 Cal.App.3d 950, 957-958.

123. A determination that a project is consistent with a general plan is subject to an abuse of discretion standard of review, and should be overturned if findings are not supported by substantial evidence. *Families Unafraid to Uphold Rural El Dorado v. Board of Supervisors of El Dorado County* ("*FUTURE*") (1998) 62 Cal.App.4th 1334; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 357.

124. While a city may weigh and balance non-mandatory policies where its general plan expressly gives it this kind of discretion, an agency is not free to ignore policies that are clear and mandatory. *FUTURE*, 62 Cal.App.4th at 1338.

California's Housing Accountability Act

125. Enacted in 1982, the Housing Accountability Act ("HAA") was designed to promote infill development by speeding up housing approvals to address the critical statewide problem of lack

of housing, including emergency shelters. (*See* Gov't Code § 65589.5(a)(1).)

126. The HAA expressly requires compliance with CEQA. (Gov't Code §§ 65589.5(e), (o)(6).)

127. If a project has significant unmitigated effects on public health and safety, the local agency may decline to approve it. (Gov't Code § 65589.5(d)(2).)

128. The HAA carves out a narrow exception to the General Plan consistency requirement. Under the HAA, an agency may approve a project that is inconsistent with the current General Plan or zoning, if it complied with the General Plan and zoning that existed at the time the project application was "deemed complete." (Gov't Code § 65589.5(d)(5).)

129. If a project is inconsistent with the General Plan and Zoning as it existed at the time the application was "deemed complete," the local agency may decline to approve it. (Gov't Code § 65589.5(d)(5).)

130. A current General Plan and Zoning will apply if "[t]he housing development project is revised following submittal of a preliminary application pursuant to Section 65941.1 such that the number of residential units or square footage of construction changes by 20 percent or more." (Gov't Code § 65589.5(o)(2)(E).) A prior General Plan and Zoning cannot be applied if construction does not commence within two and a half years of the project receiving final approval. (Gov't Code § 65589.5(o)(2)(d).)

FIRST CAUSE OF ACTION

Violation of CEQA
(Public Resources Code, § 21000 et seq.)
(Code of Civil Procedure § 1085 or in the alternative §1094.5)

131. Petitioner hereby realleges and incorporates by reference the preceding paragraphs, in their entirety, as if fully set forth herein.

132. Respondents prejudicially abused their discretion and failed to proceed in a manner required by law by failing to prepare a revised EIR for the Project because the 2013 EIR fails as an informational document because it failed to analyze numerous significant impacts of the Project, including but not limited to the following:

A. The presence of numerous special status species that will be adversely affected by

the Project;

B. Wildfire risks and related evacuation risks caused by the Project;

C. Indoor air quality impacts;

D. Impacts to scenic vistas including scenic resources with a State scenic highway;

E. Impacts to visual character;

F. Significant air quality emissions from nitrogen oxides (NOx);

G. Cumulative air quality impacts;

H. Significant airborne cancer risks;

I. Elimination of blue wildrye native grasslands;

J. Destruction of 101 of 117 healthy mature trees that are protected under the City's Tree Protection Ordinance, including a 58-inch valley oak;

K. Significant greenhouse gas emissions;

L. Land use and planning inconsistencies (Policies LU-2, LU-2.1, LU-2.2, LU-2.3, LU-13, LU-20.1);

M. Inconsistencies with Hillside Development Permit Requirements set forth in the Municipal Code;

N. Significant noise impacts;

O. Significant traffic impacts, including impacts on Pleasant Hill Road at Deer Hill Road;

P. Conflict with Gateway Constraint Policy due to widening of southbound Pleasant Hill Road.

133. In the alternative, Respondents prejudicially abused their discretion and failed to proceed in a manner required by law by failing to prepare a subsequent or supplemental EIR for the Project because there is substantial evidence in the record of 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 2013 EIR was certified as complete showing significant impacts and/or changed circumstances including but not limited to the following:

A. Biological resources including many special status species on the Project site that

will be adversely affected by the Project, none of which were analyzed in the 2013 EIR.

B. Protected trees that will be destroyed by the Project in greater numbers than were analyzed in the 2013 EIR.

C. Significant impacts due to the newly proposed widening of Pleasant Hill Road which was not discussed in the 2013 EIR.

D. Significant traffic impacts that were not analyzed in the 2013 EIR that will occur if Pleasant Hill Road is not widened.

E. Significant indoor air quality impacts on residents of the Project that was not discussed in the 2013 EIR.

F. Significant health risk impacts related to air pollution generated by the Project to nearby sensitive receptors that was not discussed in the 2013 EIR.

G. Significant impacts related to wildfire risks that were not discussed in the 2013 EIR.

H. Substantial increase in the severity of previously identified traffic impacts.

I. Significant impacts to wildrye areas.

134. Respondent abused their discretion and failed to proceed in a manner required by law by making findings to support a statement of overriding considerations under CEQA based on erroneous legal advice that the City was required by the Housing Accountability Act to issue a statement of overriding considerations for the Project.

135. Respondents abused their discretion and failed to proceed in a manner required by law by approving the Project in a manner that does not comply with the requirements of CEQA and Petitioner is entitled to the issuance of a writ of mandate setting aside all approvals that were issued in reliance on the Addendum.

SECOND CAUSE OF ACTION

Violation of General Plan
(Code of Civil Procedure § 1085 or in the alternative §1094.5)

136. Petitioners hereby reallege and incorporate by reference the preceding paragraphs, in their entirety, as if fully set forth herein.

137. The Project is inconsistent and fails to comply with applicable General Plan and zoning requirements. Approval of the Project would have required amendment of the applicable August 10, 2015 General Plan Low Density Single Family Residential (SFR-LD) Land Use Designation for the Property and the Single Family Residential District-65 (R-65) zoning for the Property the City adopted on July 23, 2018 after a brief moratorium, by Ordinance no. 668, codified in LMC 6-7121. The requisite amendment of the General Plan Land Use Designation is a legislative act subject to referendum pursuant to Gov. Code §65301.5. Accordingly, City's approval of the Project, in addition to violating the applicable General Plan Land Use Designation, further improperly interfered with the referendum process, in addition to the interference previously determined in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657.

138. Petitioners objected to City's failure to address the general plan and zoning amendments necessary to process the application for the Project on multiple occasions including, but not limited to, correspondence submitted dated May 14, 2018, August 11, 2019, May 13, 2020, June 10, 2020, August 20, 2020, and August 24, 2020.

139. The City Council violated California law and abused its discretion by approving the Project despite the inconsistency with the applicable General Plan Low Density Single Family Residential (SFR-LD) Land Use Designation for the Property and the Single Family Residential District-65 (R-65) zoning for the Property. In addition, to the extent that the City applied the substantially complete determination on the 2011 Project to the application for the Project filed June 15, 2018, City committed error. The substantially complete determination of 2011 expired under the Permit Streamlining Act., Gov. Code §65950(a), by February 2014, and was for the earlier application abandoned by Real Parties in Interest. A new 30-day substantially complete determination was applicable to the Project after July, 2018 pursuant to Gov. Code §65943(a), and was subject to the August 10, 2015 General Plan Low Density Single Family Residential (SFR-LD) Land Use Designation for the Property and the Single Family Residential District-65 (R-65) zoning for the Property the City adopted on July 23, 2018 after a brief moratorium, by Ordinance no. 668, codified in LMC 6-7121.

140. The Housing Accountability Act ("HAA") does not allow the City to apply the General Plan and zoning requirements that existed in 2011 because after the 2011 Project was submitted for

approval, Real Parties revised the Project "such that the number of residential units or square footage of construction changes by 20 percent or more." (Gov't Code § 65589.5(o)(2)(E).)

141. The HAA also does not allow the City to apply the General Plan and zoning requirements that existed in 2011 because Real Parties did not commence construction within two and a half years of the project receiving final approval. (Gov't Code § 65589.5(o)(2)(d).)

142. The so-called "Process Agreement" did not extend these deadlines because there is no such thing as "Process Agreement" under California law, the City cannot invent a contract that violates state law. Also, the Process Agreement purported to violate the Permit Streamlining Act.

143. Even if the City were able to approve the Project based on the 2011 General Plan and zoning, the Project also fails to comply with the General Plan and zoning requirements that existed in 2011.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that the Court:

1. Issue a peremptory writ of mandate directing Respondents to vacate and set aside their approval of the Project, including but not limited to the resolutions approving and adopting the Addendum to the 2013 EIR, and findings in support of the CEQA approval, including the statement of overriding considerations, unless and until Respondents have prepared, circulated, and considered a legally adequate CEQA document prior to any subsequent approval action;

2. Issue a peremptory writ of mandate direction Respondent to vacate and set aside their approval of the Project because it fails to comply with the applicable General Plan and zoning requirements;

3. Issue a peremptory writ of mandate directing Respondents and Real Parties in Interest to suspend all activity in furtherance of the Project unless and until Respondents take all necessary steps to bring their actions into compliance with CEQA and the General Plan;

4. Issue a stay, staying the effect of Respondents' approvals of the Project;

5. Award costs of suit;

6. Award attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and any other applicable provisions of law; and

7. Grant such other and further relief as the Court deems just and proper.

Dated: September 23, 2020

LOZEAU DRURY LLP

By: _____

Richard Drury
Paige Fennie
Attorneys for Petitioner

VERIFICATION

I, Laurel Stanley, am the Chief Financial Officer and Treasurer for Petitioner in this action, Save Lafayette, a non-profit corporation; the foregoing complaint is true of my knowledge, except as to the matters stated in it on my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Sept. 22, 2020

Laurel Stanley, CFO and Treasurer
Save Lafayette

Exhibit A

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September 15, 2020

Lafayette City Council
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Greg Wolff
Planning Director
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Re: Notice of Intent to File Suit Under the California Environmental Quality Act Regarding the Terraces of Lafayette Project

Dear Mayor Anderson, Honorable Councilmembers, Honorable Commissioners, Ms. Robbins, and Mr. Wolff:

I am writing on behalf of Save Lafayette regarding the City's approval of the Terraces of Lafayette Project ("Project") and accompanying CEQA addendum.

Please take notice, pursuant to Public Resources Code ("PRC") §21167.5, that Save Lafayette intends to file a Verified Petition for Writ of Mandate ("Petition"), under the provisions of the California Environmental Quality Act ("CEQA"), PRC §21000 *et seq.*, against Respondents and Defendants City of Lafayette, City Council of the City of Lafayette, and Planning Commission of the City of Lafayette (collectively the "City") in the Superior Court for the County of Contra Costa, challenging the City's August 25, 2020 decision approving the Project, including adopting a resolution upholding the Planning Commission's approval of the Project and accompanying Addendum to the Terraces of Lafayette Project 2013 Final Environmental Impact Report ("EIR").

The Petition being filed will request that the Court grant the following relief:

1. Issue a peremptory writ of mandate directing Respondents to set aside the approval of the Project, the CEQA Addendum prepared for the Project, and the Land User Permit, Hillside Development Permit, Ridgeline Exception, Grading Permit, Design Review Permit, and Tree Permit unless and until Respondents have prepared, circulated, and considered a legally adequate Subsequent EIR prior to any subsequent approval action;

2. Issue a peremptory writ of mandate directing Respondents and Real Party in Interest to suspend all activity in furtherance of the Project unless and until Respondents take all necessary steps to bring their actions into compliance with CEQA;

3. Award costs of suit;

4. Award attorneys' fees pursuant to Code of Civil Procedure §1021.5 and any other applicable provisions of law; and

5. Grant such other and further relief as the Court deems just and proper.

Sincerely,

Paige Fennie
Lozeau | Drury LLP

PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1939 Harrison Street, Suite 150, Oakland, CA 94612. On September 15, 2020, I served a copy of the following documents:

- **NOTICE OF INTENT TO FILE CEQA SUIT**

☒ By emailing the document(s) listed above to the email addresses set forth below.

☒ By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pittsburg, California addressed as set forth below.

Lafayette City Council
c/o Mayor Mike Anderson
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549
manderson@lovelafayette.org

Joanne Robbins, CMC
City Clerk
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549
jrobbins@lovelafayette.org

Lafayette Planning Commission
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549
planningcommission@lovelafayette.org

Greg Wolff
Planning Director
City of Lafayette
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549
gwolff@lovelafayette.org

I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed September 15, 2020 at Pittsburg, California.

Toyer Grear

Toyer Grear

Exhibit B

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Attorneys for Petitioner
SAVE LAFAYETTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

SAVE LAFAYETTE, a non-profit corporation, Petitioner, v. CITY OF LAFAYETTE, a municipality; LAFAYETTE CITY COUNCIL, a municipal body; and LAFAYETTE PLANNING COMMISSION, a municipal body, Respondents, O'BRIEN LAND COMPANY, LLC, a California limited liability company; and ANNA MARIA DETTMER as trustee for the AMD FAMILY TRUST, Real Parties in Interest.	CASE NO.: PETITIONER'S NOTICE OF INTENT TO PREPARE ADMINISTRATIVE RECORD (Code Civ. Proc., §§ 1085, 1094.5; Pub. Resources Code, §§ 21000 et seq. (CEQA))

Pursuant to Public Resources Code § 21167.6(b)(2), Petitioner SAVE LAFAYETTE ("Petitioner") hereby notifies all parties that Petitioner elects to prepare the administrative record relating to the above-captioned action challenging the August 25, 2020 decision of Respondent City of Lafayette to approve the Terraces of Lafayette Project ("Project") based on an addendum to the Terraces of Lafayette Project 2013 Final Environmental Impact Report. Respondents and Real Parties in Interest are directed not to prepare the administrative record for this action and not to expend any resources to prepare the administrative record.

Dated: September 23, 2020

LOZEAU DRURY LLP

By: _____

Richard Drury
Paige Fennie
Attorneys for Petitioner
SAVE LAFAYETTE