

CASE NO. A153549

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

SAVE THE HILL, *et al.*, Petitioners and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants and Respondents,

POTRERO PARTNERS, LLC *et al.*, Real Parties in Interest.

On Appeal from the Superior Court for County of San Francisco,
Honorable Cynthia Ming-mei Lee, Case No. CPF-16515238

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TABLE OF CONTENTS

Table of Authorities	3-6
I. Introduction and Summary	7
II. Factual Background	8
Project Description and Locale	8
Administrative Review Process	11
III. Statement of the Case	15
IV. Scope and Standard of Review	16
A. Appellate Review	16
B. Mandamus	16
V. Violations of CEQA	20
A. Procedural Violations.....	20
B. Alternatives Analysis.....	24
<i>Metal Shed Reuse Alternative</i>	27
C. Cumulative Loss of Production Distribution and Repair (PDR) Uses	38
D. Community Plan Exemption.....	40
E. Residential Growth	41
F. Failure to Respond to Comments.....	51
G. Traffic and Transportation Impacts	52
<i>Traffic Mitigation</i>	56
H. Open Space and Recreation	56
I. Inconsistency with Area Plans and Policies	58
J. Transit Priority Area	63
K. Aesthetics and Views Impacts	66
VI. Conclusion	70

TABLE OF AUTHORITIES

Cases	Page
<i>Architectural Heritage Association v. County of Monterey</i> (2004) 122 Cal.App.4th 1095	68
<i>Arvio Enterprises v. South Valley Planning Commission</i> (2000) 101 Cal.App.4 th 1333	67
<i>Association of Irrigated Residents v. County of Madera</i> (2004) 107 Cal.App.4 th 1383	17
<i>Berkeley Keep Jets over the Bay Committee v. Board of Port Commissioners of the City of Oakland</i> (2001) 91 Cal.App.4 th 1344	45
<i>Burger v. County of Mendocino</i> (1975) 45 Cal.App.3d 322	26, 30
<i>California Oak Foundation v. City of Santa Clarita</i> (2005) 133 CA 4 th 1219	43
<i>Citizens Association for Sensible Development of Bishop Area v. County of Inyo</i> (1985) 172 Cal.App.3d 151	67
<i>Citizens of Goleta Valley v. Board of Supervisors (Goleta I)</i> (1988) 197 Cal.App.3d 1167	26, 30, 31
<i>Citizens to Preserve the Ojai v. County of Ventura</i> (1985) 176 Cal.App.3d 421	44-45
<i>City of Carmel-by-the-Sea v. Board of Supervisors</i> (1986) 183 Cal.App.3d 229	67
<i>City of Marina v. Board of Trustees of the California State University</i> (2006) 39 Cal.4 th 341	18, 23, 25
<i>Cleary v. County of Stanislaus</i> (1981) 118 Cal.App.3d 348	51
<i>County of San Diego v. Grossmont-Cuyamaca Community College District</i> (2006) 141 Cal.App.4 th 86	25, 26, 30
<i>County Sanitation District No. 2 v. County of Kern</i> (2005) 127 Cal.App.4 th	68
<i>East Sacramento Partnership v. City of Sacramento</i> (2016) 5 Cal.App.5th 281	19

<i>Flanders Foundation v. City of Carmel-by-the-Sea</i> (2012) 202 Cal.App.4th 603	51
<i>Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency</i> (2000) 82 Cal.App.4th 511	19
<i>Friends of Sierra Madre v. City of Sierra Madre</i> (2001) 25 Cal.4th 165	23
<i>Friends of the College of San Mateo Gardens v. San Mateo County Community College District</i> (2016) (“Gardens I”) 1 Cal.5th 937	18, 19
<i>Friends of the Eel River v. Sonoma County Water Agency</i> (2003) 108 Cal.App.4th 859	51
<i>Kings County Farm Bureau v. City of Hanford</i> (1990) 221 Cal.App.3d 692	18, 26, 35
<i>Laurel Heights Improvement Assn. v. Regents of University of California</i> (1988) 47 Cal.3d 376	35
<i>Madera Oversight Coalition v. County of Madera</i> (2011) 199 Cal.App.4th 48	17
<i>Mountain Lion Foundation v. Fish & Game Commission</i> (1997) 16 Cal.4th 105	25
<i>Oro Fino Gold Mining Corporation v. County of El Dorado</i> (1990) 225 Cal.App.3d 872	67
<i>People v. County of Kern</i> (1976) 62 Cal.App.3d 761	51
<i>Preservation Action Council v. City of San Jose</i> (2006) 141 Cal.App.4th 1336	25, 35
<i>Protect the Historic Amador Waterways v. Amador Water Agency</i> (2004) 116 Cal.App.4th 1099	19
<i>Quail Botanical Gardens Foundation, Inc. v. City of Encinitas</i> (1994) 29 Cal.App.4th 1597	67
<i>San Bernardino Valley Audubon Society v County of San Bernardino</i> (1984) 155 Cal.App.3d 738	32
<i>San Joaquin Raptor Rescue Ctr. v. County of Merced</i> (2007) 149 CA 4th 645	43
<i>Save Round Valley v. County of Inyo</i> (2007) 157 Cal.App.4th 1437	17

<i>Sierra Club v. County of Sonoma</i> (1992) 6 Cal.App.4th 1307	18
<i>Sierra Club v. State Board of Forestry</i> (1994) 7 Cal.4 th 1215	17
<i>Stanislaus Audubon Society v. County of Stanislaus</i> (1996) 48 Cal.App.4th 182.....	68
<i>The Pocket Protectors v. City of Sacramento</i> (2004) 124 Cal.App.4th 903.....	68
<i>Uphold Our Heritage v. Town of Woodside</i> (2007) 147 Cal.App.4 th 587	26
<i>Vineyard Area Citizens v. City of Rancho Cordova</i> (2007) 40 Cal.4 th 412	17, 25, 43
<i>Western States Petroleum Association v. Superior Court</i> (WSPA) (1995) 9 Cal.4 th 559	42

STATE STATUTES

Public Resources Code §§

21002	24, 25
21002.1(b).....	25
21061.1.....	24
21080(e)(1)	16
21081.....	25
21081(a)(1)	24
21081(a)(2)	24
21081(a)(3)	24
21082.2(c).....	16
21083(b)(2).....	44
21094(c).....	19
21100.....	19
21100(a).....	20
21100.1.....	19
21151(a).....	20, 67
21168.....	16

Code of Civil Procedure §

1094.5.....	16
-------------	----

STATE REGULATIONS

CEQA Guidelines §§

15021(a)..... 25
15064..... 67
15088(b)..... 51
15091(a)(1) 25
15091(a)(3) 24
15125(a)..... 45
15126.6(a)..... 36
15151..... 45
15183..... 40
15355..... 44
15364..... 24

LOCAL STATUES

San Francisco Administrative Code §§

31.16..... 14, 20, 21, 23
31.16(b)..... 21
31.16(c)..... 21

I. Introduction and Summary

Two public interest groups based in Potrero Hill, Save the Hill and Grow Potrero Responsibly (“Citizens”), challenge the environmental review conducted for the 901 16th Street and 1200 17th Street mixed use residential project (“Project”) in order to enforce mandatory environmental laws protecting Potrero Hill and the Showplace Square areas of San Francisco. Positioned at the gateway of the Potrero Hill community, the Project proposed by Potrero Partners covers 3.5 acres and has the capacity to alter the very nature of the iconic Potrero Hill environs. It is one of the largest projects to ever be proposed in the history of Potrero Hill.

The City and County of San Francisco (“City”) improperly relied upon the 2008 Eastern Neighborhoods Plan Environmental Impact Report (“Plan EIR”) for the application of a Community Plan Exemption and the adoption of the Project’s Environmental Impact Report; the Plan EIR underestimated the level of development of residential units that had been implemented and proposed throughout the Potrero Hill and Showplace Square Area, thereby impacting the adequate analysis of environmental impacts.

The Project EIR failed to adequately analyze impacts in the areas of: traffic and circulation, transit and transportation, aesthetics and views, recreation and open space, land use, consistency with area plans and policies, and cumulatively considerable impacts;

failed to adequately consider the adoption of feasible mitigation measures and alternatives; and the Final EIR failed to adequately respond to substantive comments made on the Draft EIR.

The Project does not qualify for the claimed exception under Public Resources Code section 21099, which relieves certain mixed use transit oriented projects from examining aesthetic and views impacts, and aesthetic impacts were inadequately analyzed.

Citizens are not against the development of Potrero Hill; they are acting in the public interest to ensure their communities do not shoulder the burden of a project with undisclosed impacts due to the improper reliance on a Plan EIR, Community Plan Exemption, and an inadequate Project EIR.

Citizens respectfully request reversal in the public interest to require environmental review in compliance with CEQA.

II. Factual Background

Project Description and Locale

The Project site consists of four adjacent lots in the lower Potrero Hill neighborhood. (AR:226, 823-825, 827-830, 832-843.¹) The approximately 3.5-acre site is bounded by 16th Street to the north, Mississippi Street to the east, 17th Street to the south, and residential and industrial buildings to the west. (*Ibid.*) The site currently

¹ The administrative record of proceedings is referenced as AR[VOLUME]:[PAGE/S].

contains four existing buildings: two metal-clad industrial warehouse buildings (102,500 square feet), a brick office building (1,240 square feet), and a modular office building (5,750 square feet). (*Ibid.*) The 1926 brick building was originally constructed by the Pacific Rolling Mill Co. to house the office functions of the company's steel fabricating operation; the two metal-clad industrial buildings were built by Pacific Rolling Mill between 1908 and 1926. (AR:1714-1725.) The four existing buildings constitute approximately 109,500 gross square feet. (AR:35-37, 226-227.)

The Project is located in an Urban Mixed Use (UMU) Zone along a transitioning industrial corridor connecting the Mission neighborhood to Mission Bay within the Showplace Square/Potrero Hill Plan Area. (AR:37-38, 864-865.) Adjacent properties to the north, west, east, and south are all zoned UMU. (AR:37-38.) Properties further northwest are zoned PDR-1-D (Production, Distribution, Repair -1- Design) while properties further south are primarily zoned RH-2 (Residential-House, Two Family). (*Ibid.*)

The Project proposes to merge four lots into two lots, totaling approximately 3.5 acres, demolish a surface parking lot and approximately 109,500 square feet of existing warehouse (PDR) use and would include two four- to six-story mixed use buildings. (AR:226-227.) The Project entails the preparation of a Project level EIR and request for a Large Project Authorization. The two

buildings consist of a North Building (“16th Street Building”), a 6-story, 68-foot tall, 402,943 gross square foot, with 260 dwelling units, 20,318 square feet of retail, and 263 off-street parking spaces; and a South Building (“17th Street Building”), a 4-story, 48-foot tall, 213,009 gross square foot mixed use building with 135 dwelling units, 4,650 square feet of retail and 125 off-street parking spaces. (AR:226, 823-825, 827-830, 832-843.) Combined, the two new buildings would construct a total of 395 dwelling units, 24,468 gross square feet of retail space and 388 off-street parking spaces. (*Ibid.*) Planned roof-top elements would increase the height of the 16th Street Building to between 78 feet and 82 feet and increasing the height of the 17th Street Building to between 51 feet and 52 feet. (AR:829.) The total building area for the entire project would be 616,452 square feet. (AR:804.)

The Project would retain an existing two-story, brick historic building. (AR:227.) Collectively, the Potrero Hill industrial complex contains the last remaining structures of the Pacific Rolling Mill, which began operating in the Central Waterfront in 1868 before reorganizing and relocating to Potrero Hill in the early 1900s. (AR:6337-6339, 1714-1725.) The buildings are also the last remaining extant structures of the merged companies, Judson-Pacific Company (1928), and Judson Pacific-Murphy Company (1945) in San Francisco. (*Ibid.*)

Administrative Review Process

The Eastern Neighborhoods Area Plan EIR (“Plan EIR”) upon which the Project’s Community Plan Exemption and the Project’s EIR, tiers, was adopted in 2008. (AR:228-229, 2886-2889 [Motion 17659 certifying the Plan EIR], 2890-2923 [Motion 17661 adopting Findings and a Statement of Overriding Consideration for the Plan EIR], 17700-17985, [7/12/16 and 7/13/16 Eastern Neighborhoods Plan Monitoring Reports].)

The Project’s Draft EIR, and Community Plan Exemption were released for public review in August 2015. (AR:229, 770-1031, 1032-1109.) The application of the Community Plan Exemption purportedly relieved the City from reviewing most of the Project’s potentially significant impacts. (*Ibid.*) The Draft Project EIR found that the Project would result in direct significant unavoidable impacts to traffic and circulation and cumulatively significant impacts contributing to the loss of PDR uses and worsening of area traffic and circulation but claimed there were no feasible mitigation measures or alternatives that would lessen or avoid these impacts. (AR:784-802.)

The Draft EIR considered a No Project Alternative, Reduced Density Alternative, and Metal Shed Reuse Alternative and found the Reduced Density Alternative to be the environmentally superior alternative. (AR:802-809.) Expert and architectural historian,

Katherine Petrin, along with several others, recommended the adoption of the Metal Shed Reuse Alternative. (AR:1237-1238, 1408, 1436-1146, 1714-1725, 4961, 6337-6339.)

Citizens and numerous concerned area residents commented on the adequacy of the Draft Project EIR during the established comment period, including objections to: the improper reliance on the Plan EIR and the Project EIR's failure to adequately review and analyze: traffic and circulation, transit and transportation, aesthetics and views, heights, shadows, loss of PDR uses, recreation and open space, land use, cultural and historic resources, consistency with area plans and policies, and cumulative impacts; as well as the consideration of feasible mitigation measures and alternatives.

(AR:499-660 [Draft EIR Comment letters]; 810-812 [Draft EIR areas of known controversy]; 510, 516-517, 521, 525, 528-537, 585-594, 604-611, 618-619, 632-645, 646-647, 658-659; **Metal Shed Reuse Alternative:** 509, 510, 511, 516, 518, 523, 526, 534-535, 535-536, 545, 553-554, 557-559, 561, 562, 563-564, 570-571, 573-574, 576-579, 585, 593-594, 603, 611, 625-626, 628-629, 635-636, 650, 654-657; **Loss of PDR Uses:** 504, 507, 531, 543, 583-584, 600-601, 651, 653-655; **Traffic:** 509, 511, 516, 520, 528-529, 539, 541, 543-544, 546-552, 553, 555-556, 560, 563, 572-573, 579 and 581-583, 588-589, 596, 599, 607-608, 612, 630-631, 636-637, 649; **Cumulative Impacts:** 529, 560, 565-567, 572-573, 627-628, 630-631, 636-638, 649, 652; **Mitigation:** 510, 589, 630-631,

637-638, 660; Transit: 511, 516, 520, 529, 555, 560, 568, 574, 638; **Plan EIR:** 513, 533-534, 558, 592-593, 596, 606-607, 628, 643-644; **Aesthetics and Views Impacts:** 525, 624, 641-642; Open Space: 526, 532, 592, 609-610, 616-617, 642-643; **Project Height:** 531, 535, 553, 639; and **Inconsistency with area plans:** 531-532, 591, 604-606, 631, 639-642.)

On October 1, 2015, the Planning Commission held a hearing on the Draft EIR. (AR:18079-18703, 662-719 [Transcript].) On April 28, 2016, the City published the Final Project EIR. (AR:272-769.) Citizens stated the Final Project EIR failed to adequately respond to comments in the areas of, *inter alia*, scale, height and density, aesthetic and views, recreation and open space, and consistency with area plans and policies and raised objections regarding the adequacy of the Project EIR. (AR:5058-5065.)

On May 12, 2016, the Planning Commission held a public hearing, certified the Project EIR, made CEQA findings rejecting alternatives as infeasible, adopted a Statement of Overriding Considerations and Mitigation Monitoring Program, and approved the Project *via* Motions 19643-19645. (AR:2924-2933 [Agenda], 2934-3328 [Staff Report], 3329-3568 [Transcript], 3569-3589 [Minutes], 6-8 [Motion 19643, Certification of EIR], 9-34, 223-248, 249-271 [Motion 19644, CEQA findings, Statement of Overriding Considerations and Mitigation Monitoring Plan], 35-216 [Motion 19645, Large Project Authorization], 1585-1624 [May 2015 Nexus Study].)

On June 10, 2016, Citizens appealed the application of the Community Plan Exemption and the EIR; the appeal was accepted by the Board of Supervisors as complete and was calendared for hearing. (AR:1110-1391 [Notice of Appeal letter].) Thereafter, on July 15, 2016, Citizens submitted an extensive appeal packet to support their objections to the Project and its environmental review with attached memorandums that included comprehensive details on specified environmental issue areas. (AR:1392-2682 [Appeal letter].) The appeal included objections to: reliance on the Plan EIR; application of the Community Plan exemption, inadequate and incomplete analysis of Project level impacts related to traffic and circulation, aesthetics and views, inconsistencies with area plans and policies, loss of PDR uses, open space and recreation, shadows, historic, and cumulative, as well as the failure to adopt feasible alternatives. (*Ibid.*)

On July 18, 2016, eight days before the appeal hearing before the Board of Supervisors, the Planning Department asserted Citizens could not file an appeal to the Planning Commission's CEQA determinations without also appealing the Large Project Authorization (LPA). (AR:2770-2820.) Regarding Citizens' right to appeal the Planning Commission's CEQA decisions, Citizens countered that the San Francisco Administrative Code section 31.16 provided the bases for the Board of Supervisor's rejection of the

Planning Commission's adoption of the CEQA determination and findings *via* a CEQA appeal; their action to uphold the appeal would necessarily void the Planning Commission's approval of the Project and was not premised on the appeal of the LPA. (AR:2874-2875.)

On July 26, 2016, the Board of Supervisors held a public hearing to consider the appeal but was directed not to, and did not, consider the feasibility of alternatives. (AR:3641-3642.) After several hours of testimony from Citizens and numerous area residents and deliberation by the Board, the Board denied the appeal and upheld the Planning Commission's decisions that adopted the Project and its environmental review. (AR:2876-2885 [staff report], 3770-3869 [minutes], 3590-3769 [transcript], 217-22 [Motion M16-0097 affirming Planning Commission's certification of the EIR].)

On July 29, 2016 the Notice of Determination was filed. (AR:1-5.)

III. Statement of the Case

The underlying mandamus action was filed on August 26, 2016. (JA1:21-42².) Judgment denying the Petition was entered on November 17, 2017. (JA6:1032-1083.) The Notice of Appeal was filed on January 9, 2018. (JA6:1096-1100.) To Citizens' knowledge, the status quo has been retained on the site.

² The Joint Appendix is referenced as JA[VOLUME]:[PAGE/S].

IV. Standard and Scope of Review

A. Appellate Review

Appellate review of the underlying petition is de novo. In mandamus actions, “the trial and appellate courts occupy in essence identical positions with regard to the administrative record, exercising the appellate function of determining whether the record is free from legal error.” (*Bowman v. Petaluma* (1986) 185 Cal.App.3d 1065, 1071, citing *Honey Springs Homeowners Association v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1135, n.10.)

B. Mandamus

In deciding whether to issue a writ, a court determines whether the City committed a prejudicial abuse of its discretion. Such abuse is proven if the City did not proceed in the manner required by law, if its decision was not adequately supported by findings, or if its findings were not supported by substantial evidence in light of the whole record. (Code of Civil Procedure § 1094.5; Pub. Res. Code § 21168.) Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (Pub. Res. Code §§ 21080 (e)(1), 21082.2 (c).)

Abuse of discretion in certifying an EIR is assessed in two separate prongs; both present issues of law based on the certified administrative record. First, the sufficiency of the EIR content is reviewed as to whether it was prepared “in the manner required by

law” within statutory and regulatory requirements. Second, sufficiency of an EIR’s conclusions is then reviewed for substantial evidence. (*Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427, 435; *Association of Irrigated Residents v. County of Madera* (2004) 107 Cal.App.4th 1383, 1391 [“A Court’s task is to determine ‘whether the administrative record demonstrates any legal error ... and whether it contains substantial evidence” supporting the agency’s findings]; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215; *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 76-77 [abuse of discretion is found if an EIR did not contain information required by law and that the omission precluded informed decision-making by the agency or informed participation by the public]; *Save Round Valley v. County of Inyo* (2007) 157 Cal.App.4th 1437.)

Whether the contents and analysis of the EIR is considered adequate is an issue of law as confirmed by the recent California Supreme Court case in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal. 5th 918, 935-936. A court independently reviews the adequacy of the contents, analysis, and procedural requirements of the EIR. “Whether an EIR has omitted essential information is a procedural question subject to de novo review.” (*Ibid.*) Some examples include: the failure to lawfully evaluate cumulative effects and to apply the correct definition of cumulative effects, and error

regarding the legal feasibility of mitigation measures. (*EPIC v. Johnson* (1985) 170 Cal.App.3d 604, 624-625; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1216; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 722; *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341 at 350, 355.

Moreover, “the existence of substantial evidence supporting the agency’s ultimate decision ... is not relevant when one is assessing a violation of [CEQA’s] information disclosure provisions.” (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82.)

Regarding the scope of subsequent environmental review, the Supreme Court found that when a lead agency prepares a program EIR, as with the 2008 Eastern Neighborhood Plan EIR, if a ‘second-tier’ project is not within the scope of the earlier program, CEQA review will be under “a more exacting [i.e., fair argument] standard to determine whether the later project might cause significant environmental effects that were not fully examined in the initial program EIR.” (*Friends of the San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal. 5th 937, 960 (“*Gardens I*”), citing *Sierra Club v. County of Sonoma, supra*, Cal.App.4th at 1321;

Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency (2000) 82 Cal.App.4th 511, 528; Public Resources Code § 21094(c).) The Project proposed here is admittedly not within the scope of the 2008 Plan EIR and the Project EIR is a second-tier, project- level EIR. Public Resources Code sections 21100 and 21100.1 require that a project EIR include analysis of all potentially significant environmental effects, mitigation measures, and alternatives, regardless of the project's characterization as new or supplemental project. (*Gardens I, supra*, 1 Cal.5th 952, n.3 [both initial and subsequent EIRs "are subject to the same general procedural and substantive requirements."].) The scope of topics to be studied is subject to the fair argument standard. (*Gardens, supra*, 1 Cal.5th 952, n.3, citing *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ["the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project"]; accord *East Sacramento Partnership v. City of Sacramento* (2016) 5 Cal.App.5th 281, 301-302.)

Here, the size and intensity of use were not previously studied and the EN Plan EIR's assessment of residential growth has been exceeded, measured in residential units, as divulged in the City's own draft July 2011-2015 Monitoring report and as illustrated by the Project Final EIR's assessment of the current number of residential

units constructed or in the pipeline. (AR:17131, 334.)

V. Violations of CEQA

A. Procedural Violations

The Board of Supervisors failed to fully consider Citizens' CEQA appeal. Planning staff asserted Citizens could not file an appeal to the Planning Commission's CEQA determinations without also appealing the Large Project Authorization (LPA) and Potrero Partners assert Citizens did not exhaust administrative remedies on this basis. (AR:2771.) Citizens countered that the San Francisco Administrative Code section 31.16 provides the bases for the Board of Supervisor's rejection of the Planning Commission's adoption of the CEQA determination and findings *via* a CEQA appeal; their action to uphold the appeal would necessarily void the Planning Commission's approval of the Project and was not premised on the appeal of the Large Project Authorization, therefore it was not necessary to challenge the LPA and Citizens exhausted remedies. (AR:2874-2875.) Citizens stated:

It is well settled that discretionary project approvals subject to CEQA, as here, must first be premised on adequate environmental review under Public Resources Code Sections 21100(a) and 21151(a). If the Board rejects the environmental determination or findings made by the Commission, the Large Project Approval will be deemed void. ... "The Board shall reverse the Planning Commission's certification of the EIR if the Board finds that the EIR does not comply with CEQA, including that it is *not adequate, accurate and objective, is not*

sufficient as an informational document, that its conclusions are incorrect or it does not reflect the independent judgment and analysis of the City, or that the Planning Commission certification findings are incorrect.” “Any actions approving the project in reliance on the reversed CEQA decision, shall be deemed void.” (Emphasis added.) The relevant sections are quoted in full below.

Section 31.16 subdivision (b), relevant to “Appeal Procedures”

states:

(10) If the Board reverses the CEQA decision, the prior CEQA decision and any actions approving the project in reliance on the reversed CEQA decision, shall be deemed void.

Section 31.16 subdivision (c), relevant to “Appeal of Environmental Impact Reports” states:

(5) The Board shall reverse the Planning Commission's certification of the EIR if the Board finds that the EIR does not comply with CEQA, including that it is not adequate, accurate and objective, is not sufficient as an informational document, that its conclusions are incorrect or it does not reflect the independent judgment and analysis of the City, or that the Planning Commission certification findings are incorrect. If the Board reverses the Planning Commission's certification of the final EIR, it shall remand the final EIR to the Planning Commission for further action consistent with the Board's findings. (AR:2874-2875.)

At the July 26, 2016 Appeal hearing, Planner Chris Thomas advised the Board of Supervisors that the feasibility of the alternatives was not to be considered as part of the appeal.

(AR:3641-3642.) Deputy City Attorney, Marlena Byrne stated: “Now those alternatives were rejected as infeasible through the approvals

process, and that's when the Planning Commission chose to approve the project. Which [sic] that approval is not before the Board today."

(AR:3664-3665.) Supervisor Aaron Peskin disagreed, stating:

I personally disagree that the CEQA findings are a part of the approval and not within the realm of Board of Supervisors to work on ... I believe that the EIR has a problem, which is to the extent that staff in the EIR includes an alternative and says it's feasible, but as part of the project approvals with information that came later, it is determined that it is infeasible because of this economic analysis that was not a part of the EIR. That to me is an argument that that alternative was not adequately studied in the EIR that is properly before this Board. I believe findings are actually properly before this Board ... didn't need to be appealed to the Board of Appeals as part of the LPA.

(AR:3690-3691.)

Just before the vote was taken, Supervisor Malia Cohen asked Potrero Partners to contribute funding for the development of Jackson Park; Potrero Partners promptly replied by offering \$800,000. (AR:3723-3724.) Supervisor Aaron Peskin strongly objected to the "financial transaction" between Potrero Partners and the Board member and stated that all of the Board members should be recused due to its impropriety. (AR:3734-3745.)

We are dealing with a hearing on the adequacy or lack thereof of an environmental review document and the impacts that decision makers have to consider and that's not a subject of a financial transaction or increased donation."

(AR:3745.)

Shortly before the vote was taken, Supervisor Cohen was recused from voting. (AR:3747.) Citizens pointed to these facts, not to assert a conflict of interest by Ms. Cohen, but to show that the supervisors failed to adequately consider reasonable alternatives to the Project prior to considering the benefits of the Project, as required by CEQA.

“CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project’s benefits, unless the measures necessary to mitigate those effects are truly infeasible.” (*City of Marina, supra*, 39 Cal.4th 341, 368, citing *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 185.)

The Board failed to consider the feasibility of alternatives. The Board abused its discretion when it failed to exercise an affirmative duty under San Francisco Administrative Code section 31.16 pursuant to the review of CEQA appeals. As noted, aside from a question about the economic feasibility of the Metal Shed Reuse Alternative, the Planning Commission did not deliberate on the adoption of feasible alternatives; the Board’s affirmation of the Planning Commission’s decision is therefore not supported by substantial evidence.

B. Alternatives Analysis

If a project will result in significant environmental impacts that will not be avoided or substantially lessened by mitigation measures, the agency must consider the environmentally superior alternatives identified in the EIR and find that they are “infeasible” before approving the project. (Pub. Res. Code § 21081(a)(3), *see also* CEQA Guidelines 14 Cal. Code Regs. § 15091(a)(3).) Feasible means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, technological, and legal factors. (Pub. Res. Code § 21061.1; Guidelines § 15364.) The requirement for an infeasibility finding flows from the public policy that states:

It is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ... the Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

(Pub. Res. Code § 21002.) Reflecting this policy, Public Resources Code sections 21081(a)(1) – (3) provide that if one or more significant impacts will not be avoided or substantially lessened by adopting mitigation measures, alternatives described in the EIR that can avoid or reduce the impact must be found infeasible if they are not

adopted.

Under this scheme, a public agency must avoid or reduce a project's significant environmental effects when it is feasible to do so. (Pub. Res. Code §§ 21002, 21002.1(b); 14 Cal. Code Regs §§ 15021(a) and 15091(a)(1).) As explained by the California Supreme Court in *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 124, "Under CEQA, a public agency must ... consider measures that might mitigate a project's adverse environmental impact and adopt them if feasible. (Pub. Res. Code §§ 21002, 21081.)" The Court reiterated "CEQA's substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures." (*Id.* at 134.) CEQA's substantive mandate was again underscored by the California Supreme Court in *Vineyard Area Citizens, supra*, 40 Cal.4th 412; *City of Marina, supra*, 39 Cal.4th 341, by the Court of Appeal in *County of San Diego v. Grossmont-Cuyamaca Community College District* (2006) 141 Cal.App.4th 86 and *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336.

Increased costs of an alternative do not equate to economic infeasibility: "[t]he fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to

render it impractical to proceed with the project.” (*Citizens of Goleta Valley v. Board of Supervisors (Goleta I)* (1988) 197 Cal.App.3d 1167, 1181 [the record included no analysis of the comparative costs, profits, or economic benefits of scaled down project alternative and was insufficient to support finding of economic infeasibility]; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587 [project applicant’s preference against an alternative does not render it infeasible]; *County of San Diego, supra*, 141 Cal.App.4th 86, 108 [community college’s proportional share of cost of off-campus traffic mitigation measures could not be found economically infeasible in absence of cost estimates]; *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322 [an infeasibility finding based on economic factors cannot be made without estimate of income or expenditures to support conclusion that reduction of motel project or relocation of some units would make project unprofitable]; *see also Kings County Farm Bureau, supra*, 221 Cal.App.3d 692, 736.)

Here, the Project adds 395 residential units into an area already experiencing protracted traffic congestion that is severely underserved by area transit. The Project results in admitted direct and cumulative impacts to traffic; is 90% residential and entails removal of an existing 109,500 square feet of PDR uses, while contributing to cumulatively considerable impacts due to the loss of PDR uses. Considering these facts, it was imperative that

alternatives to the Project be fairly considered, and were not.

Metal Shed Reuse Alternative

The Metal Shed Reuse Alternative is described as:

... [The] warehouse buildings on the site (1200/1100 17th Street, and 1210 17th Street/975 16th Street) would be retained and reused. Along with a new building with underground parking in the northeast corner of the site, this alternative would contain a mix of residential units, commercial space, and artist workspace and exhibition space including 177 residential units, 20,200 square feet of commercial space, 55,323 square feet of artist workspace and exhibition space, 36,291 square feet of open space, 123 off- street parking spaces within a below-grade garage, and associated improvements. The total building area would be 369,907gsf and building heights would be up to 5 stories (58 feet) along 16th Street and 4 stories (48 feet) along 17th Street. (AR:992-993.)

The Draft Project EIR determined the Reduced Density Alternative to be the environmentally superior alternative but the Final EIR revised the analysis to select the Metal Shed Reuse Alternative instead. (AR:290.) “The Metal Shed Reuse alternative evaluated in the Draft EIR was chosen as a reasonable alternative that would retain the metal sheds and some PDR space while meeting Planning Code requirements and most of the project objectives and present a comparison of impacts for such an alternative against those of the proposed project.” (AR:412.)

The Metal Shed Alternative was derived from a community-based alternative. (AR:281, 416, 421, *see also* 1244, 2552-2270, 3598.)

Rod Minott of Save the Hill stated:

The metal shed reuse alternative was [inspired] by an adaptive reuse proposal that Save the Hill submitted to planning in late 2014. Save the Hills Plan was the result of extensive community outreach over a period of several years, a process that resulted in a consensus to reuse the existing buildings on the site including the metal clad [buildings] and rehabilitate them for new modern uses. (AR:3598.)

Citizens and numerous residents offered extensive comments on the advantages of the alternative, recommended its adoption, and stated that the Metal Shed Reuse Alternative would substantially reduce impacts to traffic and circulation and provide much needed PDR uses. (AR:413-425, 426-427, 509, 510, 511, 516, 518, 523, 526, 534-535, 535-536, 545, 553-554, 557-559, 561, 562, 563-564, 570-571, 573-574, 576-578, 579, 585, 593-594, 603, 611, 625-626, 628-629, 635-636, 650, 654, 656-657, 1110-1391, 3366-3368, 3370-3373.)

The Project EIR confirmed that the Metal Shed Reuse alternative was potentially feasible but Potrero Partners stated it was economically infeasible based upon a financial study conducted for Potrero Partners by Seifel Consulting, not considered or evaluated in the Project EIR. (AR:426-428.)

In a short interchange at the May Planning Commission hearing after the public comment period was closed, Commissioner Dennis Richards asked planning staff member, Wade Wietgreffe whether the Metal Shed Reuse Alternative was economically feasible. (AR:3422-3423.) Mr. Wietgreffe stated it was economically

infeasible based upon staff's internal analysis. (*Ibid.*) The referenced internal staff memo prepared by planning staff member Jacob Bintliff was not included in the Planning Commission packet prior to the hearing; Citizens obtained the memo after the hearing *via* a San Francisco Sunshine Act request after the Planning Commission voted to approve the project and reject the Metal Shed Reuse Alternative. (AR:2934-3328.)

The Jacob Bintliff memo incorrectly stated that the economic analysis in the Seifel report met planning's standard methods for evaluating feasibility using land acquisition costs and that the alternative was not feasible. (AR:2726-2727.) The report did not use land acquisition costs, it used current land value, therefore the Planning Department failed to apply its own standards when assessing economic feasibility. (AR:1196-1197.) Potrero Partners' analysis consequently resulted in a considerable inflation of the costs of the Project and equally undervalued the profits of the Metal Shed Reuse Alternative. (AR:1455-1456, 1196-1197, 2732, 2740-2743, 3599-3600.)

Utilizing land acquisition cost data, Citizens show that the Metal Shed Reuse Alternative meets the targeted profit margin cited by Potrero Partners. (AR:1455-1456.) Even if the alternative had not matched Potrero Partners' target profit goals, under the standards articulated in *Goleta I, supra*, 197 Cal.App.3d 1167, the alternative

would have still been considered feasible.

The Bintliff memo also incorrectly stated that the Seifel report's assumptions were applied consistently to each development scenario. (AR:1196, 2726.) In actuality, the report failed to fully compare the Preferred Project to the alternatives under all scenarios, it included no pro forma for the Preferred Project under the Condo Scenario; only the Rental Scenario was analyzed for the Preferred Project. (AR:2743.) The report failed to provide the Project's actual cost and profit information. (AR:2728-2743.) An agency cannot find an alternative economically infeasible without this information, as confirmed in *Goleta I, supra*, 197 Cal.App.3d 1167; *County of San Diego, supra*, 141 Cal.App.4th 86, 108; and *Burger, supra*, 45 Cal.App.3d 322.

Potrero Partners argued that the public need not have had access to the Bintliff memo, however, the Planning Commission itself did not review the memo; the Commission based its finding of economic infeasibility solely upon a single staff member's assertions about the Seifel report, that were proved incorrect. Had the public had access to the information, these facts could have been raised before the Commission made its decision. Citizens later objected to the Bintliff memo and the adequacy of the Seifel report in their appeal, but as explained, the Board of Supervisors did not consider Citizens' argument relative to the feasibility of alternatives.

Potrero Partners argued expert testimony was required to rebut the Seifel report. This is incorrect; the only expertise one had to apply was to be able to: read the Bintliff memo that stated feasibility was based on land acquisition costs; and read the report to see that it used current land value instead and that it did not fully review each development scenario, as asserted by staff.

Potrero Partners argued Citizens did not have the expertise to review the profit analysis. As noted, it did not require expertise to show the discrepancies between the Binliff memo and the Seifel report. Since the analysis did not fully reveal the actual costs or profits of the development under all scenarios and did not perform the analysis under land costs, any conjecture by the City that the alternative was economically infeasible is not supported by substantial evidence.

Potrero Partners responded to Citizens' appeal letter during the administrative review but failed to offer any specific response to Citizens' objections to the Seifel report. (AR:2687-2688; 1395-1396, 1455-1462.) Moreover, Potrero Partners failed to rebut the provision in *Citizens of Goleta Valley v. Board of Supervisors (Goleta I)* (1988) 197 Cal.App.3d 1167, 1181, that states when reviewing assertions about additional costs or lost profits, the rule is whether these costs or lost profits render the Project "impractical to proceed." The Bintliff memo made no such assertions; neither did the Seifel report, Potrero

Partners, or the City. (AR:1196-1197, 2728-2743; *see also San Bernardino Valley Audubon Society v County of San Bernardino* (1984) 155 Cal.App.3d 738, 750.)

Other errors in the study included the use of outdated information to establish the value of rental square footage in PDR uses, which was utilized in estimating the Metal Shed Reuse Alternative's profit margin, and failed to include operating costs. (AR:1456; 1625-1629.)

The Seifel Report assumed a \$2.50 per square foot value, whereas the then current square foot rates were estimated at nearly twice that, at \$4.00/square foot. (*Ibid*; AR:2735.) The use of the outdated figure devalued the alternative's projected profit margins. (AR:1456.) Potrero Partners argued Citizens' evidence, derived from the public nonprofit, SF Made, was inadequate to rebut the PDR rental rate used in the analysis and opined that the data was not credible. SF Made actively assists manufacturers in finding urban industrial space and is familiar with the then current square footage rental rate. (AR:15089-15093.) In any case, the argument is untimely, neither the City nor Potrero Partners questioned this evidence during the administrative review of the Project.

Citizens and others also rebutted the EIR's assertion that the Metal Shed Reuse Alternative would render higher traffic counts than the Project. (AR:516, 410-411, 1396, 1457-1462.) The Planning

Department unnecessarily chose the most intensive commercial use (restaurant) for nearly half (10,000 square feet) of the non-PDR commercial space in the Metal Shed Reuse Alternative, which largely accounted for the higher traffic counts attributed to the alternative. (AR:429, 1396, 1457, 1471-1472, 1508, 1513-1515, 2325.)

Reviewing the figures, one can appreciate that the use of a high-density restaurant, even larger than the Project's, with a 'composite rate' (used to assess a particular use's potential to generate traffic) of 600 – as opposed to the rates for manufacturing (7.9), retail (150), and general office (18) – accounts for most of the traffic attributed to the Metal Shed Reuse alternative. (*Ibid*; AR:4993-4996.) An email exchange from staff member Wade Wietgreffe to traffic consultant, Joshua Pilachowski, DKS Associates, revealed the Planning Department's decision *not* to reduce the size of the restaurant component of the alternative after being presented with the trip generation figures for a reduced sized restaurant option. (AR:4993-4996.)

Planning also elected to use 'office' composite rates (18) for the PDR components rather than 'manufacturing' rates (7.9) from the Transportation Impact Analysis (TIA) Guidelines, even though the Plan EIR specifically stated that 'PDR' use was less impactful than 'office' use under the same TIA Guidelines. (AR:412, 1457-1462.) The Final Project EIR noted that the analysis was rerun using

a different method and found that evening (“PM”) peak hour trips were reduced by 44 trips. (AR:1585-1624 [May 2015, TSF “Nexus” study].) Performing a complete analysis, utilizing the full set of ‘motorized’ TSF Nexus rates for PDR, non-PDR, commercial, and residential uses shows that the Metal Shed Reuse Alternative would have the lowest impact on traffic. (AR:1460-1462 [Total Trips: Project: 3681, Reduced Density: 3226, Metal Shed Reuse: 2612.]

The Project EIR’s calculations were thus unfairly skewed to make the Metal Shed Reuse Alternative appear more impactful and less profitable. Without these unnecessary impediments, the alternative would have shown to be feasible and substantially reduce impacts to the Project.

In summary, the Metal Shed Alternative is a feasible alternative that attained most of the Project objectives, would lessen traffic impacts, aesthetic impacts, retain historic resources, increase PDR uses, result in more public open space, and would attain most project objectives, and should have been adopted. (AR:413-425, 509, 510, 511, 516, 518, 523, 526, 534-535, 535-536, 545, 553-554, 557-559, 561, 562, 563-564, 570-571, 573-574, 576-578, 579, 585, 593-594, 603, 611, 625-626, 628-629, 635-636, 650, 654, 656-657.) Citizens provided the contextual importance for the formulation of the Metal Shed Reuse Alternative, addressing the need to retain PDR uses and public open space in Potrero Hill, which is suffering the particular

loss of PDR uses and has severely limited public open space.

Potrero Partners argued Citizens did not consider some of the Planning Commission's feasibility findings. In countering this argument, Citizens cited the following holdings in *Kings County, supra, Laurel Heights*, and *Preservation Action Council, supra*. "The lead agency must *independently* participate, review, analyze and discuss the alternatives in good faith." (*Kings County, supra*, 221 Cal.App.3d 692, 736; *see also* AR:611, 635-636, 426.) The EIR or some other document in the administrative record should "explain in meaningful detail ... the basis for" the alleged infeasibility of the alternative. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405.) A developer's preference to build its own project is not substantial evidence of infeasibility. (*Preservation Action Council, supra*, 141 Cal. App. 4th 1336.) Deputy City attorney Marlena Byrne stated she had not even reviewed Citizens' letter regarding the feasibility of the Metal Shed alternative. (AR:3419, 5058-5065.)

The Planning Commission's deliberation at the May 12, 2016 hearing contained almost no discussion about the feasibility of alternatives and as noted, the Board of Supervisors failed to consider the alternatives to the Project altogether. (AR:3419, 3422-3423.) Except for one brief discussion about the Metal Shed Reuse alternative's economic feasibility, the Commission did not consider

or fully discuss why the alternative would be considered infeasible. (*Ibid.*) The City failed to meaningfully deliberate on the feasibility of alternatives.

One of the Project's objectives and the reason stated for approving the Project is to "build a substantial number of residential dwelling units on the site to contribute to the City's General Plan Housing Element goals and ABAG's Regional Housing Needs Allocation for the City and County of San Francisco." (AR:15, 822.) Feasibility 1, states the Metal Shed Reuse Alternative did not propose as many housing units as the Project. (AR:29.) The fact that the alternative does not result in as many units as the Project, does not equate to infeasibility; alternatives need only meet most project objectives to be considered feasible, otherwise only the proposed project would be considered feasible. (CEQA Guidelines § 15126.6(a).)

Under Feasibility 2, the City claimed the Metal Shed Reuse Alternative would not reduce significant traffic impacts to insignificant levels but, as acknowledged, neither does the Project, therefore this is not a reason for finding the alternative infeasible. (AR:29.) Furthermore, Citizens showed how the City manipulated the configuration of the Alternative to result in unnecessarily higher traffic impacts under the Level of Service (LOS) traffic congestion metric. Moreover, the Final Project EIR chose the Alternative as the

environmentally superior alternative relative to its reduction in Vehicle Miles Traveled (VMT), that corresponds to a reduction in greenhouse gas (GHG) impacts, consistent with the current law regarding the analysis of traffic and transportation impacts.

(AR:290.)

Under Feasibility 3, the City asserts it is unnecessary to adopt an alternative that adds PDR uses because the Plan EIR acknowledged cumulative PDR loss as a significant impact. (AR:30.) This is not a reason for finding the Project infeasible. The Project EIR acknowledged that the Project would contribute to the cumulative loss of PDR uses, thereby magnifying the intensity of the loss identified in the Plan EIR, instead of relieving it. That an alternative would help mitigate this loss, is not a reason for finding the alternative infeasible, it is a reason the alternative should have been fully considered.

Under Feasibility 4, the City asserts the Metal Shed Reuse alternative would not meet to the same degree or be as consistent with the strategies to reduce greenhouse gasses (GHG) impacts as the Project. (AR:30.) As noted, this is inconsistent with the City's finding that the Metal Shed Reuse Alternative was deemed the environmentally superior alternative due to its lower VMT impacts, a primary consideration in lowering GHG gasses, consistent with the State's and City's policies for the reduction of GHG emissions.

(AR:290.) An alternative need not reduce every impact to insignificance to be considered feasible.

When a project increases traffic congestion it generally results in higher GHG impacts. As noted, Citizens objected to the manipulation of the configuration of the alternative to result in higher traffic counts and a correspondingly higher GHG emission. The alternative could have easily been configured to reduce these impacts.

Feasibility 5 relates to the subjective assessment of the Project's urban design features as compared to the Metal Shed Reuse alternative. (AR:30.) That the Project proposes design features different from the alternative, is not a reason to find the alternative infeasible, otherwise only the Project would be considered feasible. And as stated, this was not discussed in any detail by the Commissioners in relation to the alternative's feasibility.

C. Cumulative Loss of Production Distribution and Repair (PDR) Uses

The EIR acknowledged that the Project's removal of 109,500 square of PDR uses would result in a cumulative loss of PDR. Since preservation of PDR uses is a key policy goal of the City's, it is important to understand the background of how PDR loss became so pervasive in the Eastern Neighborhoods and why the consideration of an alternative that substantially reduces the loss of

PDR uses, like the Metal Shed Reuse Alternative, is so important. (AR:1432-1434, 504, 507, 531, 543, 583-584, 600-601, 651, 653-655, 3396.)

Potrero Hill and Showplace Square were on track to lose approximately 320,000 square feet of PDR, roughly 40% of the total loss was already occurring throughout the Eastern Neighborhoods. (AR:3669.) The Project will permanently displace PDR uses and replace it with development that is over 90% residential use and will not provide any PDR uses. (AR:1432.) The Plan EIR anticipated PDR loss, but in keeping with the key goal to preserve PDR, it also assumed that there would be protections for PDR within the Urban Mixed Use (UMU) zoning. But the requirement to retain PDR uses within UMU zoning areas was stripped away from the Eastern Neighborhood Plan after the Plan EIR was completed. (AR:1224-1226.) Much of the PDR loss in the Eastern Neighborhoods has occurred under UMU zoning. (AR:1432-1434, 1647.) UMU zoning lacks the requirements for actual mixed uses and as a result there has been a stark overemphasis on residential development. (*Ibid.*)

The Plan EIR stated the new UMU zoning “would encourage transitional development patterns ... buffering potentially incompatible land uses. Non-PDR development would be required to also provide PDR space, at specified ratio(s).” (AR:8850-885.)

“Requirements to construct new PDR space in mixed-use districts ...

would discourage the type of incompatible residential development that has been the pattern throughout much of the Eastern Neighborhoods, reducing potential land use conflicts.” (AR:8350-8351.) Commissioner Moore stated, “The monotonous use of over-residential in this part of Potrero Hill is of concern to me. UMU implies urban mixed use, and we are packing significant high numbers of housing into one area ... we are replacing 100,000 square feet of PDR primarily by housing. The issue we have not addressed ... is what is the mixed use?” (AR:715-716, *see also* 3369.)

D. Community Plan Exemption

CEQA Guidelines Section 15183 provides an exemption from environmental review for projects that are consistent with the development density established by the zoning, community plan or general plan policies for which an EIR was certified, except as might be necessary to examine whether there are project-specific effects which are peculiar to the project or its site. (AR:331.)

The CPE checklist purported to assess the Project’s significant impacts and concluded that most environmental impacts were adequately reviewed in the Plan EIR. (AR:1040-1109, 331-336.)

Citizens assert they were not. Residential development has outpaced the projected growth analyzed in the Plan EIR such that the Community Plan Exemption is not applicable; cumulative impacts have not been fully analyzed and are understated and the Plan EIR

did not analyze a project of this height or density at this location. (See *discussion, post*, at pgs. 41-50 re. residential growth; at pgs. 59-62 re. height.)

E. Residential Growth

Residential development has outpaced projected residential growth analyzed in the Plan EIR such that the Community Plan Exemption is not applicable and the Project EIR's analyses and conclusions are inadequate and incomplete due to its reliance on the Plan EIR. (AR:1398-1400, 1421-1424, 1432-34, 1630-1637, 1638-1676, *see also* 513, 533-534, 558, 592-593, 596, 606-607, 628, 643-644, 324-329, 330-336.)

Given the unanticipated level of residential development in the Showplace Square/Potrero Hill Area, the assumption that cumulative impacts were adequately addressed in the Plan EIR is not reliable. (*Ibid.*) In fact, at the time of the appeal, the City already had more residential units constructed, entitled or in the pipeline for the Showplace Square/Potrero Area than were anticipated to be built in the area by the year 2025. (AR:1421.) As a result, the Project EIR's analysis and determinations are materially flawed.

Potrero Partners claim that the Project's reliance on the Plan's assessments is valid based primarily on two documents – not available to the public and outside of the public review process – that purport to show current residential growth was actually less

than the figures utilized in the EN Plan EIR and the Project EIR. (City's and Potrero Partners' Request for Judicial Notice, Exb. B, JA3-5:429-555; Supplemental AR (SAR) 18704-18729.)

One document proposed in Potrero Partners' request for judicial notice constitutes extra record evidence, disallowed in CEQA cases; it postdates the Project approval and was not before the public or the City at the time the Project was approved. (City's and Potrero Partners', Request for Judicial Notice Exb. B, JA3-5:429-555; Citizens' Opposition to Request for Judicial Notice, JA5:592-597.)

The second document referenced by Potrero Partners was belatedly included in the record as part of the supplemental record; it contains nonpublic information derived from an internal City memo that reanalyzes the number of residential units that had been approved or were in the pipeline. (SAR:18704-18729.) This document was attached to an internal City planning department July 26, 2016 email on the same day Citizens' appeal was heard. (AR:6408-6412.)

The document proposed for judicial notice contains excerpts from the final 2011-2015 Monitoring Report published in September 2016. The report was amended and finalized after the Project approval and therefore constitutes extra record evidence, disallowed in CEQA and other mandamus cases. (*Western States Petroleum Association v. Superior Court (WSPA)* (1995) 9 Cal.4th 559, at 570-576;

Citizens' Opposition to Request for Judicial Notice, JA5:592-597.)

Pursuant to Public Resources Code section 21167.6, subd. (e), which governs the scope of evidence in the Court's determination of an agency's abuse of discretion, the only relevant evidence is that which was before the agency at the time of its decision.

Regarding the use of the internal memo contained in the supplemental record, this document was never disclosed to the public, was not included with the information in the Project EIR, and is inconsistent with the information provided to the public in the Project EIR. Information relied upon must be in the EIR and not buried in an appendix or other document. (*San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 CA 4th 645, 659; *Vineyard Area Citizens, supra*, 40 Cal.4th 412.) In *California Oak Foundation v. City of Santa Clarita* (2005) 133 CA 4th 1219, the court questioned the fact that critical information was located in an appendix and not in the Draft EIR, noting that information buried in an appendix cannot substitute for reasoned analysis. That the Planning Department later came up with a new interpretation of the quantity of residential units that had been constructed or were in the pipeline at the Board of Supervisor's hearing is unavailing. The Planning Department's last minute change of numbers and rationale is inconsistent with the number of units disclosed in the Project's Final EIR and the information in the July 2016 draft 2011-2015 Monitoring Report, and

was outside of the public review process. Even if the public had been presented with this document, it did not contain sufficient information or a reasoned analysis to determine the basis for the calculations used, therefore, there would have been no way to evaluate its veracity.

Regarding the cumulative impacts analysis, pursuant to Guidelines section 15355, 'cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts when: (a) the individual effects may be changes resulting from a single project or a number of separate projects or (b) the cumulative impact from several projects is the change in the environment, which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time. Pursuant to Public Resources Code section 21083 subdivision (b)(2) "'... cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

In *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, the court ruled that an understated cumulative

impacts analysis “impedes meaningful public discussion and skews the decision maker’s perspective concerning the environmental consequences of a project, the necessity for mitigation measures, and the appropriateness of project approval.” An EIR need not be perfect, but must represent an adequate, complete, and good faith effort at full disclosure of environmental impacts. (Guidelines § 15151; *Berkeley Keep Jets over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344 [by using outdated information, the EIR was not a reasoned and good faith effort to inform decision makers and the public about the impacts of the project].)

The physical conditions existing when the Notice of Preparation is published “will normally constitute the physical baseline conditions” for assessing environmental impacts. (Guidelines § 15125(a).) The Notice of Preparation for the Plan EIR was issued in March 2005. (AR:326.) The Plan EIR indicated that a 2004 Land Use Database was accurate for the purposes of CEQA and for comparison of the differences between proposed rezoning options and their environmental consequences. (AR:9159-9163.)

In an email dated October 30, 2015, planning staff member, Sarah Jones, asserted that the City’s planning department did not have to include Area projects before 2008, despite the earlier NOP date for the Plan EIR. (AR:4963.) Later, at the Planning Commission,

she conceded that the baseline for assessing growth was the date of the NOP and that projects that went forward under the old zoning did count towards the Plan. (AR:3417-3418.) The Project's Final EIR asserts that development prior to 2008 doesn't count towards projected growth, but even by this measure the residential units (totaling 3,315 units) are still over the projections of 3,180 units in the Plan EIR. (AR:332-333.)

Using the 2008 baseline used in the Draft Project EIR, as of February 23, 2016, **3,315** residential units have been completed or are planned to complete environmental review within the Area, over the **3,180** residential units adopted for the Plan EIR. (AR:334, 1214, 1421-1424, 1398, 3726-3727.) This total does not include 643 units constructed between 2005 and 2008, which would otherwise be consistent with the date of the Plan EIR's Notice of Preparation. (AR:12239-12240.) Additional analysis conducted for the draft 2010-2015 Eastern Neighborhoods Monitoring Report reveals that the Showplace/Potrero Hill Area actually had **4,526** residential units under construction, entitled, or under review, as of December 31, 2015. (AR:1398, 1421-1424, 1636.) Notably, the Monitoring Report indicates that total residential development across the Mission, East SOMA, Central Waterfront, and Showplace/Potrero Areas (**10,340** units) has exceeded the Preferred Project levels in the Plan EIR by

over **500** units and, with the inclusion of Western SOMA, by over **2,000** units. (AR:1398, 1636, 1421-1424.)

Using a 2005 baseline, the total number of residential units constructed and in the pipeline in the Showplace Square/Potrero Hill Area was **3,841** units, well over the level of **3,180** that was approved under the Plan EIR. (AR:326, 1398, 9130, AR:1218, 1421-1424.) By any baseline utilized by the City that variably uses the 2000, 2004, or 2005, or 2008 baselines, residential units have been surpassed. (AR:8480, 8635, 9130, 9159, 332-333.)

As Potrero Partners note, the Eastern Neighborhoods Plan calls for monitoring reports to be prepared to “track all development activity occurring within Plan Area ... as well as the pipeline projecting future development.” (AR:2804) Analysis for the draft 2011-2015 Monitoring Report, Table 4, using the 2008 baseline, clearly shows that **4,526** units were under review, entitled or under construction in the Showplace/Potrero Area at the end of 2015. (AR:17131.) The City’s attempts to rework the analysis by referencing extra record evidence after the Project was approved does not comply with CEQA’s requirement that the evidence relied upon in the EIR must be in the EIR, not in some other document, and certainly not a document that postdates the Project’s approval.

Potrero Partners’ assertion that Citizens claim the City used the wrong baseline is incorrect. Any confusion over the appropriate

baseline is the result of the City's inconsistent and confusing use of methodologies within the Plan EIR and the Project Final EIR and how they have been presented differently by the Planning Department at various times. The Planning Commission's deliberation on this issue is almost incomprehensible. (AR:3414-3419.) Compounding the problem, City planning staff changed the analyses of residential growth figures and the projects it believed should be included in the analyses right up until the vote was taken at the Board of Supervisors' hearing on Citizens' appeal, as well as after the Project was approved, as seen by Potrero Partner's Request for Judicial Notice for inclusion of a post Project approval amending the projects contributing to residential growth considered in the Monitoring Report. (AR:3730-3734.)

The City claims that although the residential land use category is approaching projected levels, non-residential uses have not been exceeded. (AR:334.) But methodology used throughout the Plan EIR considered impacts based on specific land uses and not as an overall value because the primary goal of the Eastern Neighborhoods Plan was to provide balance between uses:

At their core, the Eastern Neighborhoods Plans try to accomplish two key policy goals: 1) They attempt to ensure a stable future for Production, Distribution and Repair (PDR) businesses in the city, mainly by reserving a certain amount of land for this purpose; 2) They strive to provide a significant amount of new housing affordable to low, moderate and

middle income families and individuals, along with “complete neighborhoods” that provide appropriate amenities for these new residents. (AR:9383.)

This is reiterated in the Draft Project EIR: “A major issue in the Eastern Neighborhoods Plan rezoning process was the degree to which existing industrially-zoned land would be rezoned to primarily residential and mixed-use districts, thus reducing the availability of land traditionally used for PDR employment and businesses.” (AR:817.) The analysis of cumulative impacts in the Project EIR should maintain consistency with the methodology used in the underlying Plan EIR, as well as with the goals of the Plan. Many of the assumptions regarding cumulative impacts in the underlying Plan EIR were based on projected levels of residential development that included a balance between residential and commercial development. (AR:323.)

It has been acknowledged that the Eastern Neighborhoods Plan has failed to meet the benefits established under the Plan, and listed as overriding benefits of the Plan EIR, needed to enable, what amounts to, a near doubling of population. (AR:2922, 1424.) The 2008 Plan sought to balance growth over an extended period, but instead, growth has been compressed into several short years with almost no support for that growth. (AR:1424.) By relying on inaccurate assumptions regarding cumulative growth and together

with the gap in adequate infrastructure provisions and benefits, the Project EIR did not adequately analyze the then current level of development in Potrero Hill.

For example, despite the Eastern Neighborhood Transit Implementation Planning Study and the subsequent Transit Effectiveness Plan, the area has never received the transit improvements it needs and the area remains severely underserved. (AR:511, 516, 520, 529, 520, 555, 560, 568, 574, 638.) Furthermore, the Showplace Square Potrero Plan included a mandate to provide four acres of new open space to accommodate expected growth. (AR:9437.) To date, less than one acre of public open space has been provided, at Daggett Park. (AR:1399-1400, 1406, 1424, 1450, 1668, 609-610, 616-617, 642-643.) A Nexus Study was prepared in 2007 to determine the cost of the impacts identified in the Plan EIR with the idea that developers would pay impact fees to fund infrastructure improvements. (AR:1399.) Due to concerns that development would lag during the 2008 recession, impact fees were set at only one third of the actual amount needed and adequate alternative funding sources have never been identified. Additional funding reliant on State and federal grants and General Fund monies has not materialized. (AR:336, 5270.)

The reliance on the 2008 Plan EIR for the evaluation of the Project's impacts was improper, resulting in a Project level EIR that

failed to act as a full disclosure document and a failure to proceed in the manner required by law.

F. Failure to Respond Adequately to Comments

An EIR must respond adequately to comments. (Guideline §15088(b).) In *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 355-360, the court found that failure to adequately respond to any significant public comment is an abuse of discretion. Responses that do not explain the rejection of a commentors' proposed mitigations and alternatives or are evasive, conclusory, or mere excuses are not legally sufficient. A general response to a specific question is usually insufficient. (*People v. County of Kern* (1976) 62 Cal.App.3d 761; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859.) A response must consider potentially feasible mitigation. (*Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, [certification of a project EIR was set aside when it failed to adequately respond to comments regarding potentially feasible mitigation].)

The Project EIR failed to adequately respond to comments regarding cumulative impacts, inconsistency with area plans, proposed mitigation measures, and recreation and open space, discussed within each issue section, *post*.

G. Traffic / Transportation Impacts

Citizens and numerous concerned residents commented extensively on this issue, stating that the review and analysis of cumulative traffic and transportation impacts is inadequate and incomplete, and as the record testimony shows, traffic congestion in the immediate area of the project is already a fact of life, with multiple intersections operating at F levels. (AR:1405-1406, 1411-1420, 1488; 324-330, 330-336, 353, 365, 372, 373, 375, 376, 509, 511, 516, 520, 528-529, 520, 529, 539, 541, 543-544, 546-547, 548-552, 553, 555-556, 560, 563, 565-566, 567, 572-573, 579 and 581-582, 583, 588-589, 596, 599, 607-608, 612, 630-631, 636-637, 649.) The analysis of cumulative traffic impacts was therefore of widespread and crucial concern.

The Project EIR states the Project would result in significant direct impacts to traffic and circulation. "Under Existing Plus Project conditions, three study intersections – 17th Street and Mississippi Street, Mariposa Street and Pennsylvania Street, and Mariposa Street and Mississippi Street – would operate at an unacceptable level (Level of Service F) during the PM peak hour" and result in cumulatively significant impacts at "four of the study intersections – 7th Street/16th Street/Mississippi Street, 17th Street and Mississippi Street, Mariposa Street and Pennsylvania Street, and Mariposa Street and Mississippi Street – each of which would operate at LOS E (the

first listed only) or LOS F under the 2025 Cumulative Conditions.”

(AR:784.) The Project would generate 12,361 person trips, which would include an estimated 7,055 auto person trips (4,233 vehicle trips), 2,124 transit trips, 2,510 walk trips, and 671 “Other” person trips (which includes trips by bicycle, motorcycle and taxi).

(AR:909.) The Draft EIR noted that the proposed changes to CEQA review that entail the analysis of traffic impact using Vehicle Miles Traveled (VMT) instead of vehicle delay had not yet been required for the review of direct traffic impacts. (AR:288.) The Final Project EIR conducted VMT analyses but stated that since the Draft Project EIR analyzed direct impacts of traffic congestion by the applicable method, the analysis contained both metrics. (*Ibid.*)

The Plan EIR’s evaluation of 2025 cumulative traffic impacts, upon which the Project EIR relied, was based on assumptions about the level of development that has now been far outpaced. The Project Draft EIR states that the cumulative analysis “primarily relies on the cumulative growth projections assumptions found in the Eastern Neighborhoods P[lan]EIR.” (AR:376-377.) The Final Transportation Impact Study (TIS) similarly states that 2025 cumulative conditions were developed from “the existing and cumulative intersection turning movement volumes” for the Plan EIR. (AR:15307.) But, as Citizens’ members explained, only a few of the intersections studied in the Project’s Transportation Impact

Study (TIS) were included in the Plan EIR 2025 cumulative analysis. (AR:8674-8675, 15321.) The analysis prepared by DKS Assoc. makes clear that cumulative traffic analysis was comprised of taking traffic counts on one afternoon for the 5 out of the 14 impacted intersections analyzed in the EIR and increasing them proportionally, based on projections from the Plan EIR, by 3.2% a year, as confirmed by City Planner, Wade Weitgreffe at the July Board of Supervisor's hearing. (AR:3679-3680, 1548 [DKS Assoc. 2015 TIS – 2025 Cumulative Conditions Methodology], 727 [DKS Assoc. Memo - Analysis of Traffic Volumes Based on Updated Counts].)

Commentors noted that since the Project's Cumulative 2025 impacts analysis was simply derived from an extrapolation of the Plan EIR's Cumulative 2025 analysis, it failed to include several past, present, and foreseeable future projects in the analysis. (AR:369, 372, 572-573, 630-631, 636-638, 649, 652, 1464.)

Projects that should have been included in the analysis include those located at: 1150 16th Street, 1301 16th Street, 1001 17th/140 Pennsylvania, 1717 17th Street, 88 Arkansas Street, 801 Brannan Street, 975 Bryant Street, 580 De Haro Street, 540-522 De Haro Street, 1601 Mariposa Street, 131 Missouri Street, 249 Pennsylvania Avenue, 98 Pennsylvania Avenue, 790 Pennsylvania and 22nd Street, and 645 Texas Street. (AR:372.)

During the scoping for the Project EIR, Ms. Alison Heath of Grow Potrero Responsibly, emphasized that it is critical that large projects anticipated for the area, such as, 1601 Mariposa, 88 Arkansas, 1301 16th Street, EQR Potrero, Warriors' Stadium, further development in the Central Waterfront, and Pier 70 be considered in cumulative studies. (AR:4646, 17991-17999.) Commentors stated traffic due to the Giants' baseball games and the new Warriors basketball stadium should be taken into consideration in the cumulative traffic analysis. (AR:326-327, 367, 371, 373, 649, 652, 4619.)

The Final Project EIR failed to adequately respond to comments that the analysis should have included specific projects in the cumulative analysis. (AR:376-377.) The Final EIR explained that it had based its approach on the projections for growth in the Plan EIR and the City had determined that reliance on Eastern Neighborhoods 2025 traffic volume growth projections remained appropriate, and is therefore nonresponsive. (*Ibid.*)

The Warriors plan to locate their arena in the area was already well publicized by 2015 and the Draft Project EIR recognized the foreseeability of the new arena. (AR:828, 77.) The Final Project EIR's response that the Warriors arena was not considered because the 2015 Notice of Preparation was issued before the Warriors project at the Mission Bay site was foreseeable, is therefore nonresponsive.

(AR:377.)

The Project's cumulative impact analysis was primarily based on the Plan EIR's growth projections that underestimated the construction of residential units and the Project EIR failed to include relevant closely related projects that would have accurately represented cumulative growth.

Traffic Mitigation

The Planning Commission failed to consider the adoption of feasible mitigation measures to reduce traffic and circulation impacts such as the implementation of traffic and signal calming measures. (AR:345, 354, 510, 529, 630-631, 589, 631, 637-638, 660.)

The Final Project EIR failed to adequately respond to comments that traffic calming measures would help relieve congestion, claiming that the measure need not be considered because the Project does not conflict with the City's plans for the surrounding sidewalks and roadways and does not pose a significant impact related to traffic hazards. (AR:345-346.)

H. Open Space / Recreation

As noted, the Community Plan Exemption relied on the Plan EIR to analyze the physical impacts associated with growth, including impacts to Recreation and Open Space. (AR:334-335.) Because of unanticipated growth in the Showplace/Potrero Area, cumulative impacts on Recreation were not anticipated in the Plan

EIR and the Project's residential units put increased demand on the area's limited open space and recreational facilities. (AR:1228-1260, 4947-4960.)

The Plan EIR did not identify adequate funding sources to meet the needs of the Eastern Neighborhoods for either maintenance of existing parks and recreation facilities or for the acquisition of new open space. (AR:1399, 1411.) The Showplace Square/Potrero Hill Plan specifically called for four acres of new space for the Area: "Analysis reveals that a total of about 4.0 acres of new space should be provided in this area to accommodate expected growth." (AR:1424.) But, so far, less than one acre of new space has been provided, Daggett Park. (Ibid; AR:1450-1454.) Resident Sean Angles stated:

Recreation impacts are not fully addressed. The addition of new residential households would result in an increased demand on Jackson Playground. The Draft EIR relies on outdated projections and doesn't account for cumulative impacts. It points to onsite public and private open space to fulfill recreation needs for residents. (Angles, Sean, E-mail, October 05, 2015) (AR:325.)

Because the proposed project is over 50 feet tall, and adds net shadow to a portion of Daggett Park, impacts and appropriate mitigations should be considered. The Community Plan Checklist mentions only the importance of open space that would be shadowed but does not fully consider the impact of morning

shadows or the significant cumulative impacts of shadowing from the Daggett project in combination with the 901-16th/1200-17th Street project. (AR:609, 1451.)

The Community Plan Exemption (CPE) Checklist states that the project is within the development levels projected under the Eastern Neighborhoods Plan and that there would be no unanticipated impacts to Recreation. (AR:1037, 1088.) The Final EIR reiterates this assertion without adequately responding to concerns that excessive residential growth has not been analyzed and the Project places additional unanalyzed demands on recreation and open space resources. (AR:335.)

I. Inconsistency with Area Plans and Policies

The Project EIR disregarded established City policies, including the Showplace Square/Potrero Area Plan, General Plan, and the Eastern Neighborhoods Plan and failed to adequately respond to comments regarding these inconsistencies. (AR:1228-1260, 1400, 5058-5065, 531-532, 535, 553, 591, 604-606, 631, 639-64, 314-323, 326, 437-445, 466-469, 1228-1253, 4947-4960, 1254-1260, 1426-1431, 316-323, 437-443, 466-469.) Alison Heath, Grow Potrero Responsibly, stated:

the project is inconsistent with multiple objectives of several applicable plans and will have a substantial impact on the existing character of the vicinity and land use particularly in the context of cumulative development at levels that were not

anticipated in the Eastern Neighborhoods P[lan]EIR. (Heath, Alison, E-mail, October 05, 2015) (AR:326.)

The Project is inconsistent with key City objectives and policies:

- Objective 1.1: Encourage transition of portions of Showplace/Potrero to a more mixed use and neighborhood serving character, while protecting the core of design-related PDR uses. (AR:863.) As noted, the Project fulfills neither function.
- Objective 1.7 Retain the role of Showplace Square as an important location for Production, Distribution, and Repair (PDR) activities, focusing in particular on design related activities. (AR:863.) As noted, the loss of PDR uses in the area is of critical concern and the Project results further substantive loss of PDR uses.
- Objective 3 of the San Francisco General Plan's Urban Design Element requires: "Moderation of major new development to complement the city pattern, the resources to be conserved, and the neighborhood environment." (AR4947-4960, 1254-1260; Objective 3 of the SF General Plan.)
- Objective 3.1 / Policies 3.1.1 & 3.1.2 state that heights should be adopted that respect, "the residential character of Potrero Hill", "Respect the natural topography of Potrero Hill", and that "Lowering heights from the north to the south side of 16th Street would help accentuate Potrero Hill." (AR:9414-9415 [SS/PH Area Plan, Objective 3.1, Policy 3.1.1 & 3.1.2], 1228-1253, 4947-4960.)
- Policy 3.1.6 of the Showplace Square/Potrero Hill Area Plan states, "new buildings should epitomize the best in contemporary architecture, but should do so with a full awareness of, and respect for, the height, mass, articulation and materials of the best of the older buildings that surrounds them." (AR:1228-1253.)
- Policy 2 of the City's General Plan states "existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our

neighborhoods.” (AR:1228-1253; Policy 2 of the SF General Plan.)

- Objective 4.9: Facilitate movement of automobiles by managing congestion and other negative impacts of vehicle traffic. (AR:863.) As noted, the Project negatively impacts congestion and significantly adds to vehicle traffic.
- All of the analyses completed for the Plan EIR anticipated a height on the Project parcel of 68 feet – not 72 to 83 feet, as proposed by the Project. (AR:1426-1431, 4947-4960, 1677-1709.) As shown in height maps, the Plan EIR actually anticipated and analyzed lower heights at the site of 40 feet to 45 feet. (AR:1677-1709, 9102-9353, 8327-9042.)
- In accordance with the Showplace Square/Potrero Hill Area Plan policy that calls for lowered heights on the south side of 16th Street, the underlying Plan EIR addresses heights rising 65 feet to 68 feet – but only on the north side of 16th Street – not the south side of 16th where the Project is proposed. (AR:9414-9415 [SS/PH Area Plan, Objective 3.1, Policy 3.1.2], 1677-1709, 9102-9353 [Plan Final EIR/Comments & Responses on Draft Plan EIR], 8327-9042 [Plan Rezoning and Area Plans Draft EIR].)
- Policy 3.1.5 Showplace Square/Potrero Hill Area Plan. “Respect public view corridors.” (AR:9415 [SS/PH Area Plans], 4947-4960, 1232.)
- Priority Policy 8 of City General Plan: that our parks and open space and their access to sunlight and vistas be protected from development. (AR:132, 1426-1431; Priority Policy 8 of the General Plan.)
- Objective 1.2 Showplace Square / Potrero Hill Area Plan, which promotes development in keeping with neighborhood character. (AR:9391 [SS/PH Area Plan, Objective 1.2], 1428-1429, 1228-1239, 4947-4960.)
- Objective 6.1, Showplace Square / Potrero Hill Area Plan calls for the City “to support the economic well-being of a variety of businesses” which includes Production, Distribution and Repair (PDR) uses. (AR:9448 [SS/PH Area Plan, Objective 6.1], 1228-1239.)

- Policy 3.1.9, Showplace Square / Potrero Hill Area Plan seeks to “promote the preservation of other buildings and features that provide continuity with past development.” (AR:9416 [SS/PH Area Plan], 1231, 4947-4960.)

Regarding height and density, the assertions by City Planning that the density and height for the Project were adequately evaluated in the Plan EIR are inaccurate and misleading. In July of 2014, City Planner, Wade Wietgreffe inaccurately cited information in the Plan EIR, claiming 68-foot heights along 16th Street were identified in the Plan EIR. (AR:1426.) In actuality, the Plan EIR addressed heights rising to 65-68 feet on the north side of 16th but not the south side of 16th Street, consistent with the Showplace Square/Potrero Hill Area Plan policy calling for lowered heights on the south side of 16th Street. (AR:1426-1431, 316-323, 1677-1709.) The Plan EIR emphasized that the added height would remain on the *north* side of 16th Street (Showplace Square) and *not the south side of 16th* (Potrero Hill). (*Ibid.*)

No changes in height limits are proposed on Potrero Hill. The Preferred Project would establish height limits of 65-68 feet within the core of Showplace Square between US-101 and I-280, north of 16th and south of Bryant Streets.

In Showplace Square/Potrero Hill plan area, height limits would be similar to those analyzed for Options B, with minor height increases (to 45 feet as opposed to 40 feet in the DEIR) proposed to areas north of Mariposa Street, between De Haro Street and Seventh/Pennsylvania Streets. Height limits in the established residential areas of Potrero Hill would remain

unchanged at 40 feet. The Preferred Project establishes heights of 65-68 feet within the core of Showplace Square between U.S. 101 and I-280, north of 16th and south of Bryant Streets. (AR:1677-1709, *see also* 9118-9127.)

The Project's sponsor lobbied to overturn the proposed 40- to 45-foot height at the Project site stating: "[s]ixteenth Street should be designated a 'transit corridor' with a height limit of 65 feet near Mission Bay and Interstate 280. Seventh Street should have a height limit of 55 feet." (*Ibid.*)

The Final Project EIR asserts that height restrictions have been adequately evaluated since the height limitations expressed in the Plan EIR have been amended. (AR:474.) Citizens assert the City relied on the impact assessments made in the Plan EIR for the application of the Community Plan exemption. The Project's impacts should be evaluated on that basis.

Commissioners Moore and Hillis stated there were concerns about the monolithic aspect of the Project on the 16th street side and Commissioner Richards expressed concern about the "canyon" effect. (AR:3443-3444, 3462-3463, 3469.) Commissioner Moore noted that it may be possible to work with Potrero Partners to alter the Project but changes were not proposed to rectify this by the time the Project was approved by the Planning Commission.

The Final Project EIR broadly claimed that inconsistency with area plans do not constitute environmental impacts. (AR:322-323.)

This is false and also unresponsive; the reason EIRs are required to analyze a project's consistency with area plans is that inconsistency may result in impacts to, among other things, aesthetics and views, land use, traffic and circulation, and cumulatively considerable impacts.

The Project's inconsistencies with scale and height and the restrictions against obscuring public views and altering the natural topography of Potrero Hill result in unexamined impacts to land use, aesthetics and views, and cumulative impacts. (AR:1228-1253, 4947-4960, 1254-1260.)

J. Transit Priority Area

The Project EIR claims that the Project's location within a transit priority area and "within close proximity to numerous transit routes" relieves the Project from having to consider aesthetic impacts. (AR:353, 870.) The volume of comments on this issue shows that Potrero Hill is poorly served by area transit and the Project is not in close proximity to transit routes. Only 24% of area residents rely on public transit service for their commute and the area lags far behind the city as a whole. (AR:1663.) There have been no substantive improvements since the Plan EIR's assessment, while residential growth has greatly increased and continues to do so.

The mere location of the Project within an identified transit priority area does not suffice; the Project does not meet the

requirements of Public Resources Code section 21099 that embodied the legislative enactment of SB 743 which relieves a project from having to consider aesthetic impacts.

SB 743 provides that the Project must fulfill the following requirements in addition to being located in a transit priority area. The Project must be located within one-half mile of a major transit stop or high-quality transit corridor included in a regional transportation plan. A major transit stop is as defined in Section 21064.3, except that, for purposes of this section, it also includes major transit stops that are included in the applicable regional transportation plan. For purposes of this section, a high-quality transit corridor means a corridor with fixed route bus service with service intervals no longer than 15 minutes during peak commute hours.

The Project EIR does not identify what the major transit stops are within one-half mile of the Project nor whether the Project is serviced by a high-quality transit corridor such that it meets the requirement to provide service at peak commute hours at 15 minute intervals.

Citizens stated the area is underserved by transit, that transit is difficult to reach on foot, and delays at nearby stops are longer than 15 minutes. (AR:1411.) The Plan EIR acknowledged that in the Potrero Hill/Showplace area, transit was subject to “relatively long

headways between buses and indirect lines limits the usability of service” and that “steep topography of Potrero Hill and the discontinuous street network in some parts of the subarea can also be limiting in terms of accessibility, as the closest stop may not be easily reached by a direct route.” (AR:1411, 8660.)

The only transit that is currently within a 5-minute walk from 901-16th Street is the temporary 55-16th route (which will eventually be replaced with the re-routed 22) and all other routes are nearly a half-mile or more away. (AR:1411.) The 10-Townsend (currently operating at or above capacity) and 19-Polk (which is expected to stop service to this area) are .4 miles away. Caltrain is .7 miles away and involves a walk over a steep hill (not the half mile claimed in the Draft EIR) and the T-Third is .5 miles away, a 9-minute walk. (*Ibid.*) The 2.2-mile Transit to downtown (Montgomery and Market) takes an average of 30 minutes, excluding headways of 9-10 minutes or more; walking the route would take 43 minutes. (*Ibid.*) While the 22 Fillmore will eventually become a Bus Rapid Transit (BRT) route and there are streetscape improvements slated for 16th Street, there was no other targeted funding to directly improve transit in the area or fill the need for better transit to serve a growing population. (*Ibid.*)

Potrero Partners’ claim that the Project qualifies as a transit oriented infill project is not supported.

K. Aesthetics / Public View Corridors and Scenic Vistas

The Project is not eligible for relief from the requirement to review aesthetic impacts; the Project's mere location within a transit priority area is insufficient to qualify for the exemption. (*See discussion, ante*, at pgs. 63-65.) The Project EIR acknowledged that "views from surrounding public vantage points would be altered" but claimed the Project need not consider aesthetic or views impacts because it met the definition of a mixed-use residential project within a transit priority area as defined by Public Resources Code section 21099(a). (AR:469, 783, 819, 872, 847.)

While the Project was identified as being within a transit priority area, as noted, the area is admittedly severely underserved by transit and proposed upgrades to transit are tenuous. The Project is composed of 90% residential use and it removes 109,500 square feet of PDR uses, resulting in the cumulatively significant loss of PDR. The Project is not the type of mixed use that is envisioned in the Plan EIR. (*See discussion, ante*, at pgs. 38-40.) The Project should not be exempted from review of aesthetics and views impacts. (AR:1392-1409, 1426-1431.)

CEQA Guidelines state a visual resources impact is considered significant if implementation of the proposed project would "have a substantial adverse effect on a scenic vista," or "substantially damage scenic resources," or "substantially degrade

the existing visual character or quality of the site and its surroundings.” (Pub. Res. Code § 21151(a), Guidelines § 15064.) First-hand lay perceptions regarding non-technical impacts meet legislative definitions of substantial evidence and testimony of area residents that are not qualified environmental experts qualifies as substantial evidence when based on relevant personal observations. (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246 n.8; *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 882; *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 173; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604-1605; *Arviv Enterprises v. South Valley Planning Commission* (2000) 101 Cal.App.4th 1333.) Here, aesthetic impacts were supported by residents’ first hand observations, expert testimony by architectural designer Kepa Askenasy, Studio Askenasy and Ergin Guney, technology consultant, and testimony by Planning Commissioners.

Potrero Hill, like San Francisco as a whole, is known for its dramatic City views and sweeping vistas. The height, bulk, and mass of the proposed Project would effectively wall off a large portion of lower Potrero Hill from public views of downtown enjoyed by neighborhood visitors for generations, as shown in the Architectural renderings by expert Kepa Askenasy, Studio

Askenasy, which included depictions of the skyline utilizing three six-foot diameter red balloons that were inflated above the Showplace Square/ Potrero Neighborhood to simulate the visual impacts of building heights. One balloon is shown at 55 feet and the other at 85 feet. (AR:17987-17990, 314-316, 469, 525, 624, 1228-1253, 1254-1260, 1426-1431, 4947-960.)

Commissioner Moore's and Hillis' testimony regarding the Project's aesthetic impacts is particularly compelling because opinions based on the expertise of planning commissioners with expertise in land use and planning qualify as substantial evidence supporting a fair argument. (AR:3443-3444, 3462-3463, 3469; *Stanislaus Audubon Society v. County of Stanislaus* (1996) 48 Cal.App.4th 182; *The Pocket Protectors, supra*, 124 Cal.App.4th 903, 934; *Architectural Heritage Association v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1115; *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544.)

The EIR provided a curtailed analysis of aesthetics and views impacts but failed to provide accurate and adequate 3-D modeling visual simulations on the impacts of the project (including stair, elevator, mechanical penthouses) to public scenic views of downtown. (AR:641-642, 847-857.) The visual simulations offered by the Project sponsor for the EIR do not accurately reflect the impact on scenic public vistas of a 72- to 83-foot high building in lower

Potrero Hill. (AR:1430.) The visual simulations were effectively limited to a single North-South Street (Texas Street) and failed to include other North-South streets as well including Mississippi, Pennsylvania Streets, and Missouri Streets. (AR:1430.) Moreover, the Texas Street visuals are misleading because they are framed from a single vantage point in the middle of the roadway looking directly north and do not capture varied and wider angles, for example, from the north west. (AR:1430, 1694-1695.) The significant impacts of added height due to roof top mechanical penthouses and massing are not presented.

The Project conflicts with long-standing City and state policies regarding protection of public scenic vistas that were not considered and the underlying Plan EIR did not analyze a project of this height at this location. (*See discussion, ante*, at pgs. 59-62.)

The Project would also contribute to the cumulative loss of public view corridors. (AR:1430, 1693, 1709.) Review of photo simulations of building development in Potrero Hill over the past several years shows the significant and destructive impact on Potrero Hill's cherished public view corridors. (*Ibid.*) The continuing loss of public view corridors due to Mission Bay and 1010 16th Street Daggett/Equity Residential developments has been incremental but dramatic. (*Ibid.*) The Project would contribute significantly to this continuing erosion of Potrero Hill's public scenic view corridors.

The significant impacts relative to aesthetics, public views and cumulatively significant views impacts have not been adequately evaluated.

Citizens have presented a fair argument of potentially significant impacts to aesthetic and public views that must be reviewed in the EIR.

VI. Conclusion

For the reasons cited herein, Citizens respectfully request reversal in the public interest to require environmental review in compliance with CEQA.

Dated: May 18, 2018



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Certificate of Word Count

I certify that this brief contains 13895 words, not counting the caption page and tables, according to the word count function of the word processing program used to produce this brief.

Dated: May 18, 2018



Rachel Mansfield-Howlett

CASE NO. A153549

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

PROOF OF SERVICE

I am a citizen of the United States, over the age of eighteen years and I am not a party to the within entitled action;

On MAY 18, 2018, I served one true copy of the following documents:

APPELLANTS' OPENING BRIEF

X by emailing a true copy thereof enclosed to the addresses and persons listed below.

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I declare under penalty of perjury, that the foregoing is true and correct. Executed on MAY 18, 2018 at Santa Rosa California.



Rachel Mansfield-Howlett