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October 25, 2018

VIA HAND DELIVERY

Niroop K. Srivatsa
Planning & Building Director
City of Lafayette
3675 Mount Diablo Blvd., #210
Lafayette, CA 94549
Email: NSrivatsa@ci.lafayette.ca.us

**Re: California Environmental Quality Act Compliance
Terraces of Lafayette (L03-11)
3233 Deer Hill Road, Lafayette**

Dear Niroop:

As you know, this firm, along with Allan Moore, of Wendel, Rosen, Black & Dean LLP, represents O'Brien Land Company, LLC and Anna Maria Dettmer in connection with the above-referenced 315-unit apartment project that was "deemed complete," pursuant to the Permit Streamlining Act (Cal. Govt. Code § 65920 *et seq.*) ("**PSA**"), in 2011 ("**Project**"). We write to address the requirements of the California Environmental Quality Act (Cal. Code. Pub. Res. § 21000 *et seq.* and 14 Cal. Code Regs. § 15000 *et seq.*) (collectively, "**CEQA**") as the City processes the Project's final discretionary approval, a use permit.

The Project was fully analyzed in "The Terraces of Lafayette Environmental Impact Report," dated May 8, 2012 ("**EIR**"), which was certified by the Planning Commission on March 4, 2013 and, following the applicant's appeal challenging the factual basis of the conclusions regarding significant effects in the EIR, certified by the City Council on August 13, 2013. As explained in more detail below, CEQA prohibits the City from requiring a subsequent or supplemental EIR unless specific conditions are present and supported by substantial evidence. If none of those conditions are met, however, CEQA requires the City to prepare an addendum to the EIR that explains its decision not to prepare a subsequent or supplemental EIR. *See, e.g., Save Our Heritage Organisation v. City of San Diego*, __ Cal.App.5th __ (October 24, 2018) (holding that the addendum process fills a gap in CEQA for projects with a previously certified EIR requiring revisions that do not warrant the preparation of a subsequent or supplemental EIR and that absence of public review reflects the nature of an addendum as a document describing project revisions too insubstantial in their effect to require subsequent environmental review).

While CEQA mandates avoidance of repetitive environmental review, the memorandum from contract planner Jean Eisberg to you dated July 2, 2018, and provided by email to us on July 10, 2018 (See [Attachment 1](#)), improperly presumes a supplemental EIR is required. According to Ms. Eisberg, “[s]upplemental review is required, based on [the] CEQA Guidelines, since the following conditions are true:

- an EIR was previously certified
- the project is unchanged
- time has passed
- follow-up discretionary action is necessary
- circumstances have changed (e.g., updated data and local conditions)[.]”

Although we agree with Ms. Eisberg that the EIR was indeed previously certified, the Project is unchanged, time has passed, and additional discretionary action in the form of a use permit is required, these facts do not warrant or allow further CEQA review. Moreover, there is no evidence that “circumstances have changed,” despite Ms. Eisberg’s generic citation to unspecified “updated data and local conditions.” Ms. Eisberg has not cited any evidence, and there is no evidence, much less substantial evidence, of “changed circumstances” or “new information” to warrant additional environmental review as the City processes the Project’s use permit.

Under Public Resources Code section 21166, once an EIR has been approved for a project, the lead agency responsible for approving the project may not require preparation of a subsequent or supplemental EIR unless one of three specific conditions are met:

1. Substantial changes are proposed in the project that will require major revisions of the EIR;
2. Substantial changes occur with respect to the circumstances under which the project is being undertaken that will require major revisions in the EIR;
or
3. New information that was not known and could not have been known at the time the EIR was certified as complete becomes available.

The same rule is provided and extended in CEQA Guidelines section 15162. Under section 15162, a lead agency shall not require a subsequent or supplemental EIR when an EIR or negative declaration has previously been adopted for a project unless there is substantial evidence in light of the whole record of any of the following:

1. Substantial changes are proposed in the project that will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
2. Substantial changes occur with respect to the circumstances under which the project is undertaken that will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
3. New information of substantial importance that was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:
 - A. The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - B. Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - C. Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
 - D. Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

14 Cal. Code Regs § 15162(a).

Sections 21166 and 15162 prohibit agencies from requiring subsequent or supplemental EIR's unless the specified conditions are satisfied. *Bowman v. City of Petaluma*, 185 Cal.App.3d 1065, 1073-74 (1986). "[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired [citation omitted], and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process." *Bowman, supra*, 185 Cal.App.3d at 1073.

Section 21166 is thus intended to provide a balance against the burdens created by the environmental review process and to give a measure of finality and certainty to the results achieved. *Melom v. City of Madera*, 183 Cal.App.4th 41, 54 (2010)

(modifying an approved retail center project to include a “supercenter” does not automatically trigger a supplemental EIR).

This purpose appears not only from the statute’s prohibitory language (“no subsequent or supplemental environmental impact report . . . unless . . .”) but also from legislative context and history. Chapter 6 of the CEQA statute, in which section 21166 appears, is entitled “Limitations.” Similar procedural limits and protections appear elsewhere in that chapter and throughout the CEQA. *E.g.*, §§ 21167 (time limits for court actions); 21167.2 (conclusiveness of EIR on responsible agencies if not challenged within time limits); 21167.6 (expedited preparation of record for court action, limits on extensions of time, time preference on appeal); 21168 (limited scope of judicial review); 21168.5 (same); 21168.3 (calendar preference); 21168.9 (requirement that court specify action necessary for compliance); 21003 (various steps to avoid delay, etc.). These provisions effectuate the Legislature’s stated concern for balancing environmental considerations against the social and economic burdens of compliance. *See, e.g.*, §§ 21000-21003 (policy statements); 21081(c) (social or economic considerations making mitigation not feasible); and 21085 (limitation on reduction in housing units as mitigation measure); § 15021.

CEQA thus strongly presumes against requiring any additional environmental review once an EIR has been certified or a Negative Declaration adopted for a project. The California Supreme Court has explained that “[t]hese limitations are designed to balance CEQA’s central purpose of promoting consideration of the environmental consequences of public decisions with the interests in finality and efficiency.” *Friends of the College of San Mateo Gardens v. San Mateo Cmty. College Dist.*, 1 Cal.5th 937, 949 (2016) (rejecting the argument that even substantial changes to an approved project triggers an inquiry into whether such changes constitute a “new” project requiring new CEQA review).

CEQA’s presumption against additional environmental review is so strong that once the statute of limitations for challenging the prior EIR or Negative Declaration has passed neither the legal adequacy nor age of the prior CEQA document is relevant if none of the statutory or regulatory triggers for additional environmental review are met. *See Moss v. County of Humboldt*, 162 Cal.App.4th 1041, 1049 (2008) (“after a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review”); *Citizens for a Megaplex-Free Alameda v. Preservation Society of Alameda*, 149 Cal.App.4th 91, 110 (2007) (“[a]fter the statute of limitations has expired, the City’s decision to adopt the MND is protected by concerns for finality and presumptive correctness”); *Snarled Traffic Obstructs Progress v. City and County of San Francisco*, 74 Cal.App.4th 793, 797 (1999) (“STOP”) (“once a negative declaration is issued or an EIR is completed, that decision is protected by concerns for finality and presumptive correctness”).

Numerous cases have upheld the use of addenda even where (unlike the unchanged Project here) substantial changes were made to previously approved

projects, and even where many years had passed since the adoption of the original CEQA document. For example:

- In *Citizens Against Airport Pollution v. City of San Jose*, 227 Cal.App.4th 788 (2014) (“CAAP”), the court upheld an addendum to an EIR for a master plan for San Jose International Airport that extended the plan’s horizon by 17 years, changed the size and location of planned cargo facilities, converted planned cargo facilities to planned general aviation facilities, and modified taxiways to accommodate large corporate jets.
- In *Mani Brothers Real Estate Group v. City of Los Angeles*, 153 Cal.App.4th 1385 (2007), the court upheld an addendum for a revised hotel and office project in downtown Los Angeles that added residential uses and increased the total project size from approximately 2.7 million square feet to approximately 3.2 million square feet, an increase of approximately 18.5%.
- In *Santa Teresa Citizen Action Group v. City of San Jose*, 114 Cal.App.4th 689 (2003), the court upheld an addendum for a revised project to reroute a water pipeline where both the original and revised project would have potentially significant impacts to groundwater quality requiring mitigation.
- In *STOP, supra*, 74 Cal.App.4th at 802, the court upheld the City’s decision not to require additional environmental review where a project to construct a parking garage with ground-floor retail was approved with a Negative Declaration but never built and nine years later a revised project was proposed that would, among other things, eliminate the ground floor retail.
- In *River Valley Preservation Project v. Metropolitan Transit Development Bd.*, 37 Cal.App.4th 154 (1995), the court upheld an addendum for modifications of a light rail line within the flood plain of the San Diego River that doubled the height and increased the slope of the berm on which the line would run, increasing the amount of required fill and decreasing the total area available for spreading flood flows.
- In *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467 (1991), the court upheld an addendum for a revised project that moved the location of a proposed winery by approximately one mile to a larger site closer to existing residences.
- In *Fund for Environmental Defense v. County of Orange*, 204 Cal.App.3d 1538 (1988), the court upheld an addendum in connection with the approval of a revised project for a medical and research

laboratory complex in which the revisions (1) substantially reconfigured the project site plan, (2) expanded the project's square footage from 308,000 to 331,000 square feet, (3) increased the number of two-story buildings, and (4) required increased grading.

Under CEQA Guidelines section 15164, if a lead agency determines that none of the triggers for additional environmental review have been met but some minor changes or additions to the prior CEQA document are still necessary, it must prepare an addendum to the prior document. CEQA Guidelines § 15164(a). The addendum should contain a brief explanation of the decision not to prepare a subsequent or supplemental CEQA document supported by substantial evidence in the record. CEQA Guidelines § 15164(c). An addendum therefore simultaneously (1) embodies the process used to determine whether any of the conditions that would allow a subsequent or supplemental CEQA document have been met and (2) is the result of that process.

Given the lack of evidence, much less substantial evidence, to support any of the legal bases for requiring a further EIR for the Project, we reject the City's July 2 memorandum and its unsubstantiated suggested revisions to the EIR. We thus urge the City to consider an addendum that confirms that some changes or additions to the EIR are necessary but none of the conditions described in CEQA Guidelines section 15162 calling for preparation of a subsequent or supplemental EIR have occurred.

As the cases cited herein demonstrate, addenda are a widely accepted CEQA compliance tool. Courts have upheld the use of addenda to expand the physical dimensions of a project and revise previously adopted mitigation measures (e.g., *CAAP*, *Mani Brothers*, and *River Valley*), to move a project from its original location (e.g., *Santa Teresa* and *Benton*), and substantially reconfigure a site plan (e.g., *Fund for Environmental Defense*). Thus, in light of the fact that (1) the Project has been fully addressed in a certified EIR and has not changed and (2) there is no evidence, much less substantial evidence, that there are any "changed circumstances" or that there is "new information," a supplemental EIR may not be required and the use of an addendum for the Project is entirely appropriate.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP
BWW/kli

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October 25, 2018
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cc: Mala Subramanian, City Attorney
Robert Hodil, Coblenz Patch Duffy & Bass LLP
Clients
Allan C. Moore, Esq.
Arthur F. Coon, Esq.

Attachment 1



City of Lafayette Memorandum

Date: July 2, 2018
To: Niroop Srivatsa
From: Jean Eisberg, Contract Planner
Subject: Deer Hill Terraces – CEQA Update

The Terraces of Lafayette EIR was prepared in 2012 and certified by the Lafayette City Council on August 12, 2013. This memo analyzes the Draft EIR to identify how the passage of time in the intervening 5-6 years has affected the impact analysis and suggest which sections need to be updated at this time. The analysis below assumes that there are no changes to the proposed project.

Supplemental review is required, based on CEQA Guidelines, since the following conditions are true:

- an EIR was previously certified
- the project is unchanged
- time has passed
- follow-up discretionary action is necessary
- circumstances have changed (e.g., updated data and local conditions)

Notably, recirculation of the Draft EIR is likely not necessary. Rather the Supplemental EIR could come in the form of revised chapters on key topics and/or a checklist.

The table on the following pages shows the substantive items from the table of contents for the 2012 Draft EIR in the first column and a suggestion for the level of revision required based a review of each section and background knowledge about changes in the local and regional context (e.g. updates to the BAAQMD Clear Air Plan, new projects in the City). The color coding is intended to provide a visual indication of the overall level of effort that may be required:

- **green** indicates no substantive changes (e.g., no revisions required or minor revisions to make subsections consistent);
- **yellow** indicates minor changes (e.g., data changes, new thresholds); and
- **red** indicates that more substantive or major revisions may be required (e.g., new technical studies required).

Table 1: 2012 Draft EIR Chapters, by Level Anticipated Level of Revision

| Chapter | Level of Revision Expected |
|---|--|
| 03. Chapter 1 Introduction | Minor update - if CEQA document type changes |
| 04. Chapter 2 Report Summary | Major update - revise based on changes to topical sections |
| 05. Chapter 3 Project Description | No substantive changes |
| 06. Chapter 4 Environmental Evaluation | Major update – update recent/pending list of development projects in Lafayette that represent cumulative analysis |
| 07. Chapter 4-1 Aesthetics Visual Resources | No substantive changes, unless recent projects in the vicinity would affect the existing/proposed visual simulations |
| 08. Chapter 4-2 Air Quality | Major update - new Clean Air Plan, update data tables, updated BAAQMD thresholds (if appropriate), update cumulative analysis based on new development project list (see chapter 4) |
| 09. Chapter 4-3 Biological Resources | Minor update - unlikely that there have been substantial changes, but consultants should update the wetlands, biological and tree assessments, or provide a memo indicating that there have been no changes. |
| 10. Chapter 4-4 Cultural Resources | No substantive changes |
| 11. Chapter 4-5 Geology Soils Seismicity | No substantive changes - but, Building Department will require more recent geotech study prior to building permit submittal |
| 12. Chapter 4-6 GHG Emissions | Minor update - update BAAQMD screening thresholds and mitigations, if necessary |
| 13. Chapter 4-7 Hazards Hazardous Materials | No substantive changes |
| 14. Chapter 4-8 Hydrology Water Quality | No substantive changes |
| 15. Chapter 4-9 Land Use Planning | No substantive changes, unless recent projects, area plans, or policy measures that need to be addressed |
| 16. Chapter 4-10 Noise | Major update - new noise measurements; update noise analysis based on revised traffic analysis |
| 17. Chapter 4-11 Population Housing | Minor update - update RHNA, population, and housing data |
| 18. Chapter 4-12 Public Services | Minor update - update public services data, fees, etc. |
| 19. Chapter 4-13 Transportation Traffic | Major update - update traffic study (new traffic counts, verify intersections, cumulative project analysis, etc.) |
| 20. Chapter 4-14 Utilities Service Systems | Minor update - update utilities data |
| 21. Chapter 5 Alternatives | Minor update - revise based on changes in topical sections; no changes to alternative scenarios |
| 22. Chapter 6 CEQA-Required Assessment | No substantive changes |
| 26. Appendix A. NOP. IS | Minor update - Reissue NOP; no need to prepare Initial Study |
| 27. Appendix B. NOP. Scoping | Minor update - Reissue NOP and hold new Scoping Meeting |
| 33. Appendix F. Biological Resources Data | Minor update - unlikely that there have been substantial changes, but consultants should update the wetlands, biological and tree assessments, or provide a memo indicating that there have been no changes. |

| | Chapter | Level of Revision Expected |
|--|---|---|
| | 34. Appendix G. Preliminary Stormwater Control Plan | No substantive changes |
| | 35. Appendix H. Air Quality GHG HRA | Major update - Rerun AQ/GHG report with latest CalEEMod Version; update BAAQMD thresholds (if appropriate); update Health Risk Assessment |
| | 36. Appendix I. Noise Data | Major update - new noise measurements; update noise analysis based on revised traffic analysis |
| | 39. Appendix J. Traffic Data | Major update - update traffic study (new traffic counts, verify intersections, cumulative project analysis, etc.) |
| | 40. Appendix K. Phase I Phase II ESA | No substantive changes |
| | 42. Appendix M. Geology Soils Data | No substantive changes - but, Building Department will require more recent geotech study prior to building permit submittal |
| | 43. Appendix N. Cultural Resources Data | No substantive changes |
| | 44. Appendix O. Lighting Study | No substantive changes |