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BY ELECTRONIC MAIL AND OVERNIGHT MAIL

October 25, 2011

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RE: Mitigated Negative Declaration for Harmony Development & Trade Zone Blvd. Rezone. McCandless and Montague Expressway (APN's: 86-41-020, 201, and 022)

Dear Ms. Brown:

I am writing on behalf of Carpenters Local Union Number 405 and its many members living in and around the City of Milpitas, and lifelong Milpitas resident Mike May ("Commenters") concerning the Mitigated Negative Declaration ("MND") for Harmony Development & Trade Zone Blvd. Rezone. McCandless and Montague Expressway (APN's: 86-41-020, 201, and 022) ("Project"). This letter supplements our earlier letter dated September 27, 2011, and is supported by the expert comments of Professional Traffic Engineer Tom Brohard, PE, and Certified Hydrogeologist Matthew Hagemann, PG, C. Hg, whose comments are attached hereto and incorporated by reference.

In particular, we ask the City of Milpitas ("City") to prepare an environmental impact report ("EIR") for the Project because there is a fair argument that the Project may have significant unmitigated impacts, including:

1. Air pollution;
2. Toxic Air contaminants;
3. Traffic;
4. Greenhouse Gases;
5. Public services and schools

An EIR is required to analyze these and other impacts and to propose feasible mitigation measures to reduce the impacts to the extent feasible.

Also, only days ago, the City staff reversed course, and appears now to be proposing that rather than approving an MND, the City should instead exempt the Project entirely from CEQA review. As discussed below, this eleventh hour change of environmental review misleads the public, and is legally untenable. Due to this last minute change, we will discuss the standards under both the CEQA exemption and the MND. Since the City already published and circulated a mitigated negative declaration, it has admitted that the Project has impacts that require mitigation measures to be reduced to below significance. It may not now change the form of review to a CEQA exemption, since a project may not be exempted from CEQA review if it requires any mitigation measures. *Salmon Pro. & Watershed Network v. County of Marin* (2004) 125 Cal.App4th 1098, 1102.

PROJECT DESCRIPTION

The Project includes the development of 276 single family attached homes and condominiums on approximately 12.3 acres. The Development site is wholly located on the northwest of the McCandless and Montague Expressway Intersection (APN's: 86-41-020, 201, and 022). The proposed Development is within the McCandless/Centre Pointe sub-district of the Transit Area Specific Plan ("TASP") and is located at the intersection of Montague Expressway and McCandless Drive. The property is surrounded on four sides by developed parcels and/or creeks. East of the site includes numerous vacant industrial and office buildings (which is the new location of the park within the Specific Plan). To the north of the project are the East Penitencia Creek and other existing industrial buildings on residentially zoned properties. To the South of the project is Montague Expressway, a six lane east/west arterial and the boundary of Milpitas to the City of San Jose. To the west of the property is the Lower Penitencia Creek, a rail line and the existing paragon residential community.

STANDING

Local 405's members and Mr. May live, work and recreate in the immediate vicinity of the Project site. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group or environmental group. Hundreds of Local 405 members live and work in areas that will be affected by traffic, air pollution, and toxic chemical pollution generated by the Project. As construction workers, some of these members may be exposed to toxic chemicals in the soil and groundwater at the Project site during excavation and soil moving required for Project construction. Mike May lives in the City and will be directly affected by the Project's environmental impacts. All of the Commenters are interested in participating in a full and open CEQA process to

ensure that all of the Project's impacts are mitigated to the full extent feasible. Finally, as the Court of Appeal stated, "in any event, unions have standing to litigate environmental claims." (*Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1198, citing, *International Longshoremen's & Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal. App. 3d 265)

LEGAL STANDARD.

A. MITIGATED NEGATIVE DECLARATION

As the California Supreme Court very recently held, "If no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Environment v. South Coast Air Quality Management Dist. (ConocoPhillips)* (2010) 48 Cal. 4th 310, 319-320 ("*CBE v. SCAQMD*"), citing, *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d at pp. 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal. App. 3d 491, 504–505) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.)

An EIR is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." Pub. Res. Code § 21080(d) (emphasis added); see also *Pocket Protectors*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (CEQA Guidelines § 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. Pub. Res. Code §§ 21100, 21064. Since "[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process," by allowing the agency "to dispense with the duty [to prepare an EIR]," negative declarations are allowed only in cases where "the proposed project will not affect the environment at all." *Citizens of Lake Murray v. San Diego*, 129 Cal.App.3d 436, 440 (1989). CEQA contains a "***preference for resolving doubts in favor of environmental review***." *Pocket Protectors*, 124 Cal.App.4th at 927 (emphasis in original).

A negative declaration is improper, and an EIR is required, whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur. Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. CEQA Guidelines § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon v.*

Stanislaus (1995) 33 Cal.App.4th 144, 150-151 (1995); *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1602. The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

As a matter of law, "substantial evidence includes . . . expert opinion." Pub.Res.Code § 21080(e)(1); CEQA Guidelines § 15064(f)(5). CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors*, 124 Cal.App. 4th at 935. "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." Pub. Res. Code § 21068; see also Guidelines 15382. An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 83. In the recent *Pocket Protectors* case, the court explained how expert opinion is considered. The Court limited agencies and courts to weighing the admissibility of the evidence. *Id*. In the context of reviewing a Negative Declaration, "neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance." *Id*. Where a disagreement arises regarding the validity of a negative declaration, the courts require an EIR. As the *Pocket Protectors* court explained, "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." *Id*.

B. CEQA EXEMPTION.

In the staff report for the October 26, 2011, City staff for the first time informs that public that it proposes to abandon the MND that had already been circulated for public review and comment, and instead exempt the Project entirely from all CEQA review pursuant to CEQA Guidelines section 15168 (c)(2), which applies to projects previously fully analyzed in a specific plan EIR. Here, the City relies on the Transit Area Specific Plan EIR ("TASP EIR").

Section 15168(c) creates a "partial exemption" only for impacts that were already analyzed in a prior CEQA document. Thus, the partial exemption generally requires some form of streamlined supplemental EIR to analyze project-specific impacts. The City is not proposing to conduct any such streamlined analysis. The 15168(c) CEQA exemption may not be used if "a later activity would have effect that were not examined in the program EIR," if "new effects would occur," or if "new mitigation measures would be required." (14 CCR 15168(c)(1), (2). As discussed below, the Project has several impacts that were not examined in the TASP EIR and new mitigation measures will be required. Indeed, the fact that the City already

prepared a Mitigated Negative Declaration proves that new mitigation measures are required, since an MND admits that a project has significant impacts that require mitigation measures. As such, the CEQA exemption is legally improper.

A project that requires mitigation measures cannot be exempted from CEQA – at the very least a mitigated negative declaration is required. *Salmon Pro. & Watershed Network v. County of Marin* (2004) 125 Cal.App4th 1098, 1102. Since the City has proposed numerous mitigation measures to reduce the impacts of the Project, a CEQA exemption is legally precluded.

To achieve its objectives of environmental protection, CEQA has a three-tiered structure. 14 CCR §15002(k); *Comm. to Save Hollywoodland v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1185-86. First, if a project falls into an exempt category, no further agency evaluation is required. *Id*. Second, if there is a possibility the project will have a significant effect on the environment, the agency must perform a threshold initial study. Id.; 14 CCR §15063(a). If the study indicates that there is no substantial evidence that the project may cause a significant effect on the environment the agency may issue a negative declaration. Id., 14 CCR §§ 15063(b)(2), 15070. Finally, if the project will have a significant effect on the environment, an environmental impact report ("EIR") is required. *Id*.

Here, the City prepared and circulated an MND, thereby finding that the Project has significant impacts requiring mitigation. However, it now has reversed course, and is proposing a CEQA exemption. However, a Project requiring mitigation measures may not be exempted from CEQA review. Therefore, the City is taking internally inconsistent positions that are legally untenable.

CEQA exemptions are narrowly construed and "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language." *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125; *McQueen v Board*, 2 Cal.App.3d at 1148. Erroneous reliance by the City on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA. *Azusa Land Recl. v. Main San Gabriel*, 52 Cal.App.4th at 1192. "[I]f the court perceives there was substantial evidence that the project might have an adverse impact, but the agency failed to secure preparation of an EIR, the agency's action must be set aside because the agency abused its discretion by failing to follow the law." *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist*. (1992) 9 Cal.App.4th 644, 656).

CEQA contains several exceptions to categorical exemptions. If an exception applies, the exemption cannot be used, and the agency must instead prepare an initial study and CEQA document. *McQueen*, 202 Cal.App.3d at 1149; *Hollywoodland*, 161 Cal.App.4th at 1187. Chief among these is that a project may not be exempted from CEQA review if there is a fair argument that the project may have adverse environmental impacts due to unusual circumstances. 14 CCR §15300.2(c), or where

there is a reasonable possibility that the activity will have a significant effect on the environment (1) when "the cumulative impact of successive projects of the same type in the same place, over time is significant." 14 CCR § 15300.2(b). The test for whether a project presents unusual circumstances is whether "the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects." *Azusa*, 52 Cal. App. 4th at 1207. Unusual circumstances include risks posed by toxic chemicals. *McQueen*, 202 Cal. App. 3d at 1148-49.

DISCUSSION

A. AN EIR IS REQUIRED BECAUSE THE PROJECT WILL HAVE SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS.

1. The Project will have Significant Air Quality Impacts.

Environmental expert Matthew Hagemann, PG, C. Hg., concludes that the Project will have significant air pollution impacts that were not analyzed or mitigated in the TASP EIR. Mr. Hagemann states:

> The MND does not consider the potential of the Project to exceed thresholds for air quality and greenhouse gasses from emissions during construction. To determine the potential significance of construction emissions, the Bay Area Air Quality Management District (BAAQMD) has established tables for various projects types which would, if above a certain size, likely result in exceedences of thresholds and would need to be mitigated. No estimates of Project emissions of criteria air pollutants and greenhouse gasses were made in the MND for the Project and no estimates were made in the TASP.
>
> We have compared the Project size to "Screening Level Sizes" established by the BAAQMD and have determined that the Project will likely exceed emissions thresholds for criteria pollutants and greenhouse gasses. The Project will involve the construction of 276 single family attached homes and condominiums. According to the table below, a project size of 276 units exceeds screening sizes for construction criteria pollutants (ROG) for the "Single-family."[1] Additionally, the Project size of 276 units exceeds the screening size for operational greenhouse gasses by more than two times.

[1] http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx, p. 3-2

Table 3-1 Criteria Air Pollutants and Precursors and GHG Screening Level Sizes			
Land Use Type	Operational Criteria Pollutant Screening Size	Operational GHG Screening Size	Construction Criteria Pollutant Screening Size
Single-family	325 du (NOX)	56 du	114 du (ROG)
Apartment, low-rise	451 du (ROG)	78 du	240 du (ROG)
Apartment, mid-rise	494 du (ROG)	87 du	240 du (ROG)
Apartment, high-rise	510 du (ROG)	91 du	249 du (ROG)
Condo/townhouse, general	451 du (ROG)	78 du	240 du (ROG)
Condo/townhouse, high-rise	511 du (ROG)	92 du	252 du (ROG)

Because screening sizes are exceeded, the Project will likely generate construction-related ROG and operational greenhouse gasses that would exceed CEQA thresholds of significance. Where the proposed project exceeds screening thresholds, the BAAQMD recommends that project emissions be quantified. If emissions result in exceedences of thresholds, the BAAQMD states that the "lead agencies are responsible for implementing all feasible mitigation measures to reduce the project's air quality impacts".[2]

No analysis of this type was conducted in the MND and no project-level analyses were made in the TASP. Therefore, a DEIR should be prepared to conduct an analysis consistent with the BAAQMD guidance and identify any mitigation that is necessary to reduce exceedences of criteria pollutants and greenhouse gasses to levels below thresholds including routine feasible measures that are considered in CEQA projects as listed below.

Since Mr. Hagemann's analysis constitutes a "fair argument" that the Project will have adverse impacts on air quality, a negative declaration is not allowed. Since the Project will have significant air quality impacts not analyzed in the TASP EIR, the CEQA exemption is not allowed. An EIR is therefore required to analyze the impact and to propose feasible mitigation.

Furthermore, the TASP EIR admitted that the specific plan project would have significant unmitigated air quality impacts. The TASP EIR says:

REGIONAL AIR QUALITY

Implementation of the proposed Plan would further contribute to the exceedance of regional air pollutant emissions for State and federal ambient air quality standards. As the Bay Area is currently designated "non-attainment" for State and national ozone standards and for the State PM10 and PM2.5 standards,

[2] http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx, p. 4-3

> development of projects per the provisions of the Plan could further contribute to non-attainment of air quality standards. Additionally, build-out of the proposed Plan could place sensitive land uses near local intersections or roadways associated with air pollutant emissions that exceed State or federal ambient air quality standards. Similarly, existing sensitive land uses near local roadways that experience increased levels of traffic resulting from build-out of the proposed Plan could be exposed to air pollutant emissions that exceed State and/or federal ambient air quality standards. While General Plan policies and Transit Plan polices would reduce air quality impacts, regional air quality standards could still be exceeded, ***and thus this impact is still considered significant and unavoidable.*** [bold added for emphasis]

(TASP DEIR, Page 5-2)

The MND ignores the EIR's finding of "Significant & Unavoidable". The MND states in the "Conclusion" Section:

> The development under the entire Transit Area Specific Plan could increase population and vehicle miles traveled in the area at a rate greater than that assumed in the regional air quality planning and therefore conflict with the implementation of the Bay Area Ozone Strategy, [sic] the proposed project would not result in significant long-term regional or local air quality impacts. Short-term air quality impacts associated with construction would be reduced to less than significant levels wit [sic] the implementation of standard construction measures and mitigation measures. [**Less Than Significant Impact with Mitigation**] [page 15, emphasis in original]

The MND is thus directly contradictory with the TASP EIR. Since the TASP EIR admitted that the specific plan would have significant unmitigated air quality impacts, the negative declaration cannot now conveniently reach a contradictory conclusion. As the Court of Appeal stated in the case *Stanislaus Audobon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, in rejecting a county's argument that a revised initial study prepared by the county which contradicted the findings of the first initial study had not "relegated the first initial study to oblivion." Id. at 154. The court stated, "We analogize such an untenable position to the unringing of a bell. The first initial study is part of the record. The fact that a revised initial study was later prepared does not make the first initial study any less a record entry nor does it diminish its significance, particularly when the revised study does not conclude that the project would not be growth inducing but instead simply proceeds on the assumption that evaluation of future housing can be deferred until such housing is proposed." (Id. at 154) The City cannot conclude that a project may have significant impacts and then, when such admission is no longer convenient, simply change its conclusion to better suit its needs. The conclusions from the original Initial Study themselves create a "fair argument" that the Project may have significant impacts, despite other evidence to the contrary, including

the revised Initial Study. See, Id.; *Gentry v. Murietta* (1995) 36 Cal.app.4th 1359 (petitioner may rely on statements made in initial study to establish fair argument, even in the face of contradictory evidence).

The courts have held that where a specific plan EIR has admitted significant unmitigated environmental impacts, then later phases of the project require supplemental environmental impact reports to determine if any feasible mitigation measures can be imposed to reduce the impact. In the case of *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125, the court of appeal held that when a "first tier" EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later phases of the project to ensure that those unmitigated impacts are "mitigated or avoided." (*Id*. citing CEQA Guidelines §15152(f)) The court reasoned that the unmitigated impacts were not "adequately addressed" in the first tier EIR since they were not "mitigated or avoided." (*Id*.) Thus, significant effects disclosed in first tier EIRs will trigger second tier EIRs unless such effects have been "adequately addressed," in a way that ensures the effects will be "mitigated or avoided." (*Id*.) Such a second tier EIR is required, even if the impact still cannot be fully mitigated and a statement of overriding considerations will be required. The court explained, "The requirement of a statement of overriding considerations is central to CEQA's role as a public accountability statute; it requires public officials, in approving environmental detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support." (*Id*. at 124-125)

Since the TASP EIR admitted significant, unmitigated impacts on air quality, traffic (DEIR E-7) and other issues, a second tier EIR is required to determine if mitigation measures can now be imposed to reduce or eliminate those impacts. If the impacts still remain significant and unavoidable, a statement of overriding considerations will be required.

2. The Project will have Significant Impacts Related to Toxic Air Contaminants.

In our letter of September 27, 2011, we urged the City to conduct an analysis of toxic air contaminants (TACs), as required by the TASP EIR. We pointed out that the TASP EIR stated:

> ***In addition, all new development under the proposed Plan would be subject to further CEQA review to evaluate project-level impacts of odors and toxics specific to their site, time and project description and to avoid potential conflicts in land uses***. Analysis of potential impacts conducted would include both the following situations:
>
> 1) sources of odorous/toxic emissions locating near existing sensitive receptors, and

2) receptors locating near existing odor/toxics sources.

In traffic-related studies, additional health risk attributable to proximity to major roadways was seen within 1,000 feet and was strongest within 300 feet. California freeway studies show about 70 percent drop off in particulate pollution levels at 500 feet. A new policy will be added in Section 5.4 of the Plan, and cited in the section describing Impact 3.6-6 in the Draft EIR, which requires future project level TAC analysis and possible upgraded ventilation systems. With full compliance with BAAQMD's construction BMPs, the new policy which requires future project level TAC analysis and possible upgraded ventilation systems, and Policy 5.23, which requires new residential developers to inform future residents of TAC related health effects and the potential for exposure, this impact would be less than significant.

• New Policy: ***For new residential development that is proposed within 500 feet of active rail lines where vehicles emit diesel exhaust, or roadways where total daily traffic volumes from all roadways within 500 feet of such location exceed 100,000 vehicles per day, will, as part of its CEQA review, include an analysis of toxic air contaminants (which includes primarily diesel particulate matter (DPM)).*** If the results show that the carcinogenic human health risk exceeds the 10 people in a million standard for carcinogenic human health impacts established by the

[DEIR, page 2-22 (emphasis added)]

The Project is directly adjacent to the Union Pacific railway, and the Montague Expressway – both major sources of diesel air pollution. Both are far closer than 500 feet. Thus, under the TASP EIR, the City was required to analyze the impact and impose feasible mitigation measures.

The developer has retained environmental consultant Environ to conduct a TAC analysis for the Project. As predicted, the analysis concludes that the Project will indeed have significant adverse impacts related to toxic air contaminants – more than double the CEQA significance threshold. The City has attached to the MND an analysis dated October 19, 2011 by the environmental consulting firm Environ. The Environ analysis concludes that future residents of the Project will be exposed to cancer risks of up to 23 per million from nearby roadways, rail lines, and rail yard. The analysis states:

(ENVIRON) conducted an evaluation of excess lifetime cancer risks associated with nearby roadways and single railway line for the proposed Harmony development (referred to as "project" or "site") in Milpitas, California. From this analysis, ***we determined that the combined impacts from these sources results in an exceedance of the applicable risk threshold (i.e., cancer risk of 10 in a million)*** without mitigation. However, with the implementation of

> mitigation measures including vegetative barriers on project perimeters and building filtration system requirements for certain portions of the project site, the impacts can be mitigated to levels below the risk threshold.
>
> To evaluate the combined health risks from roadways and the railways, the cancer risk from each source at each evaluated receptor location was combined. For the railway risks, to be conservative for all receptors, this analysis used the risk from the receptor height with the maximum impact to characterize the risk at each receptor location. The combined cancer risks at each receptor were then evaluated against the 10 in a million cancer risk outlined in Policy 5.25 of the 2008 City of Milpitas Transit Area Specific Plan. ***The maximum onsite cancer risk was found to be approximately 23.3 in a million.***

(Environ Analysis p. 1, 5)

The Environ analysis recommends the imposition of numerous "mitigation measures" to reduce the cancer risks, such as vegetative barriers and air filtration devices.

As discussed by environmental expert Matthew Hagemann, PG, C. Hg., there are several deficiencies in this approach. First, there is no calculation or substantial evidence to support Environ's conclusion that the mitigation measures will reduce the cancer risk to below the 10 per million significance threshold. While the measures may reduce the risk, there is no calculation showing whether the new cancer risk level will be below 10 per million. Thus, there is a fair argument that even with mitigation, the cancer risk will remain significant. Mr. Hagemann also discusses that the mitigation measures proposed are inadequate to significantly reduce cancer risks, and additional measures should be required. For example, air filtration systems require ongoing routine maintenance to remain effective, but the Environ report contains no such maintenance requirement. Since the mitigation measures are not sufficient to reduce the cancer risk to below significant, a negative declaration is not allowed.

Furthermore, since mitigation measures will be required, a CEQA exemption is not allowed. If a project requires mitigation measures, then a CEQA exemption is not allowed. *SPAWN v. Marin, supra*.

3. The Project will Create Individually and Cumulatively Potentially Significant Impacts on Traffic.

Traffic Engineer Tom Brohard, PE, concludes that the Project will have significant unmitigated traffic impacts, including contributing to Level of Service F ("LOS F") in the area, which is the worst possible rating. Mr. Brohard also concludes that the Project is inconsistent with the traffic analysis in the TASP EIR in several respects. Mr. Brohard states:

From my review of the TASP EIR, a number of significant traffic impacts in the immediate vicinity will occur. The Development Project and the Rezoning Application are located within the TASP on McCandless Drive in the vicinity of Montague Expressway/Trade Zone Boulevard. As such, there is at least a "fair argument" that the Development Project and the Rezoning Application will contribute traffic to adjacent intersections and street segments that are forecast to operate at Level of Service (LOS) F under Background Conditions and Cumulative Conditions as disclosed in the TASP EIR.

Further environmental review including detailed traffic analyses of the Development Project and Rezoning Application are required to determine if any mitigation is feasible. If the significantly impacted intersections and street segments cannot be mitigated, then the City must adopt a statement of overriding consideration for both the Development Project, the Harmony Residential Project at 1765 McCandless Drive, and for the Rezoning Application.

…

Based on the information regarding the Harmony Residential Project at 1765 McCandless Drive, the Rezoning Application, and my review of the TASP EIR, there is at least a "fair argument" that the requested approvals will contribute traffic to adjacent intersections on Montague Expressway and street segments on both Montage Expressway and Trade Zone Boulevard that are forecast to be significantly impacted in the TASP EIR. Additional study is required to determine if any mitigation is feasible while considering the following concerns and issues:

1) Vehicle Trips with the Harmony Residential Project – The TASP EIR utilized trip generation rates published in April 2002 by the San Diego Association of Governments, SANDAG, in their Not So Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region. As indicated in Table 3.3-7 on Page 3.3-41 of the TASP EIR, each multi-family residential dwelling unit is forecast to generate 8 daily trips including 0.64 AM peak hour trips and 0.80 PM peak hour trips. Applying these trip rates to the proposed Harmony Residential Project indicates the 276 dwelling units will generate 2,208 daily trips including 177 AM peak hour trips and 221 PM peak hour trips.

2) Incorrect Assumptions for Trip Generation for Proposed Rezoning – While Table 3 on Page 10 of the Agenda Report provides acreage and estimated densities for the Rezoning Application, inconsistencies between this table and other information within the Initial Study and the Agenda Report were identified as follows:

    a) Multi-Family Residential High Density (R3) Dwelling Units – From Page 12 of the Milpitas City Council Minutes of their February 15, 2011 meeting (Attachment E to the Agenda Report), the minimum density in the R3 zone

is 21 units per acre. The proposed rezoning includes about four acres in the southern section of the 12.3 acre Harmony Project as well as the parcel at the southeast corner of Montague Expressway and Trade Zone Boulevard. Rezoning these remaining 9.13 acres to R3 in the top lines of Table 3 would result in a minimum of 192 dwelling units, not 175 dwelling units, for the parcel to be rezoned at the southeast corner of Montague Expressway and Trade Zone Boulevard.

b) Parks, Open Space, and Elementary School – Figure 6 on Page 8 of the Environmental Checklist for the MND identifies the rezoning of property on the east side of McCandless Drive to "School Site and City Park". Page 43 of the Environmental Checklist for the MND states "The number of new students generated by buildout of the proposed Plan will require at least one new elementary school and expansions of existing facilities." For the 10.87 acre site, Figure 3-6 in Attachment D identifies the northern 4.77 acres as "School Site and City Park" and the southern 6.10 acres as "Sports fields and passive recreation or school playgrounds." The "Estimated Density" of this rezoned parcel in Table 3 should include an elementary school rather than "None."

c) Resulting Trip Generation for Harmony Project and Rezoning – Page 47 of the Environmental Checklist provides calculations of daily and peak hour trips for the proposed rezoning. This table does not include trips to and from the Harmony Project or trips associated with the elementary school. The minimum number of dwelling units at the southeast corner of Montague Expressway and Trade Zone Boulevard also appear to be incorrectly calculated as identified above. Trip rates used on Page 47 do not correspond to those used in the TASP EIR published in by the San Diego Association of Governments, SANDAG, in April 2002 in their Not So Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region. Corrected trip generation calculations for the Harmony Project and the Rezoning Application using SANDAG trip rates are as follows:

Component	Size	Daily Trips	AM Peak Hour	PM Peak Hour
Harmony	276 du	2,208	177	221
Elementary School	10.87 ac.	979	314	89
SE Montague/Trade Ctr.	192 du	1,536	123	154
Minimum Number of Trips		4,723	614	464

In the table above, the number of dwelling units is based on the minimum density of 21 dwelling units per acre in the R3 zone. The actual number of dwelling units and the corresponding number of trips will likely be higher.

3) Most Trips Will Use Montague Expressway or Trade Zone Boulevard – Vehicular access to and from the Harmony Residential Project will occur along McCandless Drive north of Montague Expressway. Most traffic to or from the Harmony Residential Project and the other two parcels in the Rezoning Application will pass through the intersection of McCandless Drive/Trade Zone Boulevard at Montague Expressway and then use Montague Expressway or Trade Zone Boulevard.

4) Montague Expressway Intersections Significantly Impacted By TASP – In its analysis, the TASP EIR determined Background Conditions by adding traffic volumes associated with planned but not completed or fully occupied projects to existing traffic volumes. The analysis also included planned and fully funded improvement projects. Traffic to and from the TASP was then added to Background Conditions and compared to identify significant traffic impacts.[3] Table 3.3-10 beginning on Page 3.3-55 of the TASP EIR forecast 15 of the 52 intersections in the study area would be significantly impacted by the TASP.

Most trips generated by the Harmony Residential Project and the Rezoning Application will use the McCandless Drive/Montague Expressway/Trade Zone Boulevard intersection. The Harmony Residential Project and the Rezoning Application will add trips to this location and at other intersections that are forecast to be significantly impacted by TASP trips in Table 3.3-10 beginning on Page 3.3-55 of the TASP EIR.

The intersection of McCandless Drive/Montague Expressway/Trade Zone Boulevard (Intersection #39) will be significantly impacted by TASP project trips under Background Conditions during both peak hours. In the AM peak hour at this intersection, the average vehicle delay was forecast to increase from 93.0 seconds at LOS F to 176.3 seconds at LOS F with the addition of TASP trips. In the PM peak hour at this intersection, the average vehicle delay was forecast to increase from 133.9 seconds at LOS F to 304.7 seconds at LOS F with the addition of TASP trips.

Just to the west at Montague Expressway and South Main Street/Oakland Road (Intersection #38), significant traffic impacts were forecast in the TASP EIR under Background Conditions in both peak hours. In the AM peak hour at this intersection, the average vehicle delay was forecast to increase from 68.5

[3] The EIR's traffic analysis is legally incorrect. The court of appeal recently held in the CEQA baseline must be traffic conditions as they actually exist at the time CEQA review commences, not hypothetical traffic conditions that may exist at some time in the future. *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council*, 190 Cal. App. 4th 1351, 1389 (Cal. App. 6th Dist. 2010) The project's impacts must be compared to the real conditions on the ground. The City has committed the same error as in *Sunnyvale West* by using a hypothetical future condition as the CEQA baseline.

seconds at LOS E to 144.2 seconds at LOS F with the addition of TASP trips. In the PM peak hour at this intersection, the average vehicle delay was forecast to increase from 83.9 seconds at LOS F to 170.2 seconds at LOS F with the addition of TASP trips.

Just to the east at Montague Expressway and Great Mall Parkway/Capitol Avenue (Intersection #26), significant traffic impacts were forecast in the TASP EIR in both peak hours. In the AM peak hour at this intersection, the average vehicle delay was forecast to increase from 98.9 seconds at LOS F to 129.8 seconds at LOS F with the addition of TASP trips. In the PM peak hour at this intersection, the average vehicle delay was forecast to increase from 121.4 seconds at LOS F to 165.7 seconds at LOS F with the addition of TASP trips.

5) Street Segments Significantly Impacted By TASP Trips – For Year 2030 cumulative conditions with buildout of the City's General Plan and the TASP, Table 3.3-12 beginning on Page 3.3-62 of the TASP EIR indicates that 31 roadway segments in the AM peak hour and 49 roadway segments in the PM peak hour will be significantly impacted by traffic to and from the TASP.

Most trips to and from the Harmony Residential Project and the Rezoning Application will use the McCandless Drive/Montague Expressway/Trade Zone Boulevard intersection. The Development Project and the Rezoning Application will add trips to roadway segments on Montague Expressway and Trade Zone Boulevard that have been forecast to be significantly impacted by TASP trips in Table 3.3-12 beginning on Page 3.3-62 of the TASP EIR.

Between Great Mall Parkway/Capitol Avenue and McCandless Drive, the westbound Montague Expressway roadway segment was forecast to operate at LOS F in the AM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions. Between McCandless Drive and South Main Street/Oakland Road, the westbound Montague Expressway roadway segment was forecast to operate at LOS F in the AM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions. South of Montague Expressway, both northbound and southbound Trade Zone Boulevard was forecast to operate at LOS F in the AM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions.

Between South Main Street/Oakland Road and McCandless Drive, the eastbound Montague Expressway roadway segment was forecast to operate at LOS F in the PM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions. Between McCandless Drive and Great Mall Parkway/Capitol Avenue, the eastbound Montague Expressway roadway segment was forecast to operate at LOS F in the PM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions.

South of Montague Expressway, both northbound and southbound Trade Zone Boulevard was forecast to operate at LOS F in the PM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions.

6) TASP Impacts Considered Significant and Unavoidable – On Page 3.3-77 of the TASP EIR, Table 3.3-14 indicates that the traffic impacts at McCandless Drive/Montague Expressway/Trade Zone Boulevard (Intersection #39) are deemed significant and unavoidable, and no mitigation measures are feasible (further discussion is provided on Page 3.3-87). On Page 3.3-77 of the TASP EIR, Table 3.3-14 also indicates that the traffic impacts at Montague Expressway/South Main Street/Oakland Road (Intersection #38) are deemed significant and unavoidable, and no mitigation measures are feasible (further discussion is provided on Page 3.3-86). On Page 3.3-76 of the TASP EIR, Table 3.3-14 indicates that the traffic impacts at Montague Expressway and Great Mall Parkway/Capitol Avenue (Intersection #26) are significant and unavoidable. The table indicates an urban interchange at this location is proposed in regional planning documents and further discussion is provided on Page 3.3-84.

Page 3.3-89 of the TASP EIR indicates that no mitigation measures are considered feasible for any roadway segments except for the Great Mall Parkway/Tasman Drive corridor. Traffic analyses of the Development Project and Rezoning Application are required to determine if any mitigation of the significantly impacted intersections and roadway segments is feasible.

In summary, the Harmony Residential Project at 1765 McCandless Drive (Development Project) and Rezoning Application will contribute traffic to adjacent intersections on Montague Expressway and to roadway segments on Montague Expressway and Trade Zone Boulevard that have been forecast to be significantly impacted in the TASP EIR. The Development Project and Rezoning Application will therefore have a cumulatively significant adverse impact on traffic. Additional study is required to determine if any mitigation is feasible. If the significantly impacted intersections and roadway segments cannot be mitigated, then the City must adopt a statement of overriding consideration. If you have questions regarding these comments, please call me at your convenience.

Since a qualified expert concludes that the Project will create significant adverse traffic impacts, a mitigated negative declaration is not allowed. Since these impacts were not analyzed in the TASP EIR, a CEQA exemption is not allowed. An EIR is required to analyze the Project's traffic impacts and to propose all feasible mitigation measures.

4. The Project will Create Individually and Cumulatively Potentially Significant Impacts on School Facilities.

The MND admits that the Project will have significant impacts on schools that will need to be mitigated. The MND states:

> The number of new students generated by buildout of the proposed Plan will require at least one new elementary school and expansions of existing facilities. Since the provision of public school facilities is outside the control of the City, this is a ***significant and unavoidable impact***, although one that can be mitigated by action from the Milpitas Unified School District. (MND 43)

Since the MND itself admits that the Project will have a significant unmitigated adverse impact, an EIR is required.

Although the TASP EIR suggests that mitigation fees may be imposed, mitigation fees are not adequate mitigation unless the lead agency can show that the fees will fund a specific mitigation plan that will actually be implemented in its entirety. *Napa Citizens for Honest Gov. v. Bd. Of Supervisors* (2001) 91 CallApp.4th 342 (no evidence that impacts will be mitigated simply by paying a fee); *Anderson First Coal. v. City of Anderson* (2005) 130 Ca.App.4th 1173 (traffic mitigation fee is inadequate because it does not ensure that mitigation measure will actually be implemented); *Kings Co. Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692. But see, *Save Our Peninsula Comm v. Monterey Co.* (2001) 87 Cal.App.4th 99 (mitigation fee allowed when evidence in the record demonstrates that the fee will fund a specific mitigation plan that will actually be implemented in its entirety); *California Native Plant Society v. County of El Dorado et al.* (2009) 170 Cal. App. 4th 1026 (fee program must go through CEQA review for an agency to say that the payment of the fee alone is adequate CEQA mitigation); *Gray v. County of Madera* (2008). Here the City has identified no specific mitigation measure that will be implemented in its entirety as a result of the fee, and there is no reasonable assurance that the impact will be mitigated to less than significant. The City may therefore not find this impact less than significant.

Furthermore, the Court of Appeal has recently held that school fees alone are not sufficient to mitigate a project's impacts related to schools. An EIR is required to analyze other impacts related to required schools, such as traffic, construction, greenhouse gases, etc. *Chawanakee Unified School Dist. v. County of Madera*, 196 Cal. App. 4th 1016, 1019 (Cal. App. 5th Dist. 2011) As discussed by Traffic Engineer Tom Brohard, the MND fails entirely to analyze traffic impacts related to the school associated with the Project area.

CONCLUSION

For the foregoing reasons, the MND should be withdrawn, an environmental impact report should be prepared, and the draft EIR should be circulated for public review and comment in accordance with the requirements of the CEQA. The Project may not be exempted from CEQA review since the City is proposing numerous mitigation measures, the Project has numerous impacts not analyzed in the TASP EIR, and the Project has several inconsistencies with the TASP EIR. Thank you for considering our comments.

Sincerely,

Richard Drury

EXHIBIT A

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

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October 25, 2011

Richard Drury
Lozeau | Drury LLP
410 12th Street, Suite 250
Oakland, CA94607

Subject: Comments on the Harmony Residential Development, Milpitas, California

Dear Mr. Drury:

We have reviewed the Mitigated Negative Declaration (MND) for the Harmony Development and Trade Zone Blvd. Rezone Project ("Project") in Milpitas, California. The Project would demolish the existing buildings at 1765 McCandless Dr. and prepare the 12.3-acre site for construction of 276 single family attached homes and condominiums. We also reviewed the Transit Area Specific Plan (TASP) prepared for the development of a 437-acre area in southern Milpitas that encompasses the Project. The TASP provides a plan for construction of 7,109 dwelling units, 993,843 square feet of office space, 340 hotel rooms and 287,075 square feet.

We have determined that the MND failed to conform to Bay Area Air Quality Management District CEQA guidelines that indicate that the construction of the Project would result in significant emissions of criteria pollutants and greenhouse gasses. The MND also failed to adequately document the effectiveness of mitigation measures that were identified to reduce cancer risks from adjacent roadways and the railway. The MND does not consider the cumulative impacts of the 1765 McCandless Dr. Project in combination with the other six residential housing projects currently proposed within a 4,000 foot radius of the Project. We have concluded that a preparation of a draft environmental impact report (DEIR) is necessary to address these deficiencies and identify mitigation to reduce air quality impacts.

Project Size Exceeds Screening Thresholds for Construction and Operation

The MND does not consider the potential of the Project to exceed thresholds for air quality and greenhouse gasses from emissions during construction. To determine the potential significance of construction emissions, the Bay Area Air Quality Management District (BAAQMD) has established tables for various projects types which would, if above a certain size, likely result in exceedences of thresholds and would need to be mitigated. No estimates of Project emissions of criteria air pollutants and greenhouse gasses were made in the MND for the Project and no estimates were made in the TASP.

We have compared the Project size to "Screening Level Sizes" established by the BAAQMD and have determined that the Project will likely exceed emissions thresholds for criteria pollutants and greenhouse gasses. The Project will involve the construction of 276 single family attached homes and condominiums. According to the table below, a project size of 276 units exceeds screening sizes for construction criteria pollutants (ROG) for the "Single-family."[1] Additionally, the Project size of 276 units exceeds the screening size for operational greenhouse gasses by more than two times.

Table 3-1
Criteria Air Pollutants and Precursors and GHG Screening Level Sizes

Land Use Type	Operational Criteria Pollutant Screening Size	Operational GHG Screening Size	Construction Criteria Pollutant Screening Size
Single-family	325 du (NOX)	56 du	114 du (ROG)
Apartment, low-rise	451 du (ROG)	78 du	240 du (ROG)
Apartment, mid-rise	494 du (ROG)	87 du	240 du (ROG)
Apartment, high-rise	510 du (ROG)	91 du	249 du (ROG)
Condo/townhouse, general	451 du (ROG)	78 du	240 du (ROG)
Condo/townhouse, high-rise	511 du (ROG)	92 du	252 du (ROG)

Because screening sizes are exceeded, the Project will likely generate construction-related ROG and operational greenhouse gasses that would exceed CEQA thresholds of significance. Where the proposed project exceeds screening thresholds, the BAAQMD recommends that project emissions be quantified. If emissions result in exceedences of thresholds, the BAAQMD states that the "lead agencies are responsible for implementing all feasible mitigation measures to reduce the project's air quality impacts".[2]

[1] http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx, p. 3-2
[2] http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx, p. 4-3

No analysis of this type was conducted in the MND and no project-level analyses were made in the TASP. Therefore, a DEIR should be prepared to conduct an analysis consistent with the BAAQMD guidance and identify any mitigation that is necessary to reduce exceedences of criteria pollutants and greenhouse gasses to levels below thresholds including routine feasible measures that are considered in CEQA projects as listed below.

Operational Emissions Mitigation

- Install photovoltaic panels on the roof or on undeveloped land within the Project boundary;
- Use electric equipment for landscaping;
- Increase wall insulation beyond Title 24 requirements;
- Install Energy Star approved roofing and windows;
- Use energy-efficient and automated controls for air conditioning;
- Use lighting controls and energy-efficient interior lighting;
- Use energy-efficient low sodium parking lot and street lights;
- Use light-colored roof materials and paint to reflect heat;
- Substitute materials, *e.g.*, use water-based paint;
- Use concrete or other non-pollutant materials for parking lots instead of asphalt;
- Landscape with drought-resistant species, and use groundcovers rather than pavement to reduce heat reflection;
- Use ozone-destruction catalyst on air condition systems; and
- Reduce standard paving by 20%.

Construction Emissions Mitigation

- Require preparation of a traffic control plan;
- Demonstrate proper inspection and maintenance of construction equipment;
- Limit idling to 5 minutes;
- Provide on-site lunch, *e.g.*, a lunch wagon;
- Implement a carpool program for construction workers;

- Require all deliveries to the construction site to be made with trucks that meet clean engine standards or are otherwise equipped with post-combustion controls that reduce emissions compared to uncontrolled equivalents by 50% for NOx, 90% for ROG and CO, and 80% for PM10/PM2.5;
- Prohibit the use of conventional cut-back asphalt for paving and restrict the maximum VOC content of asphalt emulsion;
- Use low-ROG paints and other low-ROG construction materials;
- Employ a construction site manager to verify that engines are properly maintained and keep a maintenance log;
- Configure construction parking to minimize traffic interference;
- Consolidate truck deliveries when possible;
- Provide dedicated turn lanes for movement of construction trucks and equipment on and off site;
- Suspend use of all construction equipment operations during second stage smog alerts;
- Establish a staging zone for trucks that are waiting to load or unload material at the work zone in a location where diesel emissions from the trucks will have minimum impact on abutters and the general public;
- Locate construction equipment away from sensitive receptors such as fresh air intakes to buildings, air conditioners and operable windows;
- Require all diesel trucks used by construction contractor(s) at the site, or for on-road hauling of construction material, to be post-1996 models; and
- Diesel portable generators less than 50 hp shall not be allowed at the construction site.

Mitigation of Roadway and Railway Risks are not Adequately Documented

The MND included an October 19, 2011 analysis of cancer risks from roadways and the railway that is adjacent to the Project. The analysis concluded that:

> combined impacts from these sources results in an exceedence of the applicable risk threshold (i.e., cancer risk of 10 in a million) without mitigation. However, with the implementation of mitigation measures including vegetative barriers on project

> perimeters and building filtration system requirements for certain portions of the project site, the impacts can be mitigated to levels below the risk threshold. [3]

The conclusion made in the report confirms the independent analysis that we conducted for preparation of these comments using the Bay Area Air Quality Management District CEQA Guidelines, i.e. roadway and railway risks exceed thresholds and require mitigation. However, we believe that there is a fair argument that the mitigation identified in the report – vegetative buffers and air filtration – may not be effective in reducing risks to below the 10 in a million cancer risk threshold.

The report claims reductions in cancer risks from the mitigation measures without showing calculations to demonstrate those reductions. For example, the building filtration mitigation measure references a table (Table 4) that does not show cancer risk reduction. Instead the table shows information about the mechanical system and the efficiency of the proposed MERV-13 filter, ventilation assumptions, and estimates of time spent by residents outdoors.

The discussion of the effectiveness of the building filtration and vegetation mitigation measures concludes simply by stating:

> With the assumptions described above, all residences will be below the cancer risk standard of 10 in a million described in Policy 5.25 provided the following:
>
> - implementing vegetative barriers along the eastern, western, and southern perimeters of the site, and
> - installing MERV-13 or equivalent filters on both the air intake and recirculation for the residences shown in the "green zone" of Figure 2.[4]

Without supporting calculations, we cannot independently check the conclusions of cancer risk reductions. A DEIR needs to be prepared to include a more complete analysis of the reduction in cancer risks that would be achieved by implementation of the proposed mitigation.

Additionally, a DEIR needs to be prepared to identify a maintenance schedule for replacement of the MERV-13 filters and any pre-filters that would be necessary to ensure continued effectiveness. We note that at other installations, the filters are replaced on an annual basis and the pre-filters on a semi-annual basis.[5] A maintenance manual should be included in the CC&Rs for the Project and distributed to the building maintenance staff to ensure implementation. Without commitment to an appropriate maintenance schedule, we believe that there is a fair argument that filters will not reduce risks to below 10 in a million on a continued basis.

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[3] Cancer Risk Analysis for the Proposed Harmony Development in Milpitas, California, October 19, 2011, p. 1
[4] Cancer Risk Analysis for the Proposed Harmony Development in Milpitas, California, October 19, 2011, p. 8
[5] http://www.universityofcalifornia.edu/sustainability/documents/eq_credit51.pdf, p. 3

If the additional analysis, as recommended, does not show risks are reduced to below 10 in a million, additional mitigation may be necessary. We have noted that mitigation of indoor air quality in other Bay Area cities may additionally include consideration of:

- Redesign of the site layout to locate sensitive receptors as far as possible from any freeways, major roadways, or other sources of air pollution (e.g., loading docks, parking lots);
- Maintenance of positive pressure;
- Achieve a performance standard of at least one air exchange per hour of fresh outside filtered air and at least 4 air exchanges per hour of recirculation;
- Installation of a high efficiency filter and/or carbon filter to filter particulates and other chemical matter from entering the building. Either HEPA filters or ASHRAE 85% supply filters shall be used; and
- Installation of indoor air quality monitoring units in buildings.[6]

Cumulative Impacts were not Evaluated

Six large residential and mixed use projects have been proposed within a 4,000 ft. radius of the 1765 McCandless Dr. site:

- Milpitas Blvd. and Montague: 303 dwelling units (DUs);single family, town home and brownstone) on 12.1 acres;
- 1102 Abel Street: 366 DUs on a 5.2 acre parcel;
- 300, 324-368 Montague: 134 DUs on an 9.2 acres;
- 750 E. Capitol Ave.: three, 12 story towers with 460 DUs on 5.6 acres; and
- 1315 McCandless: 351 units and 62,000 s.f. commercial space in Building 1 and 211 units and 3,976 s.f. commercial space in Building 2; and
- 1200 Piper Drive: 732 DUs on 16 acres

The 750 E. Capitol Ave. project exceeds size thresholds for operational greenhouse gasses and construction criteria pollutants. The 1315 McCandless project exceeds size thresholds for operational greenhouse gasses and construction criteria pollutants. Collectively, the six projects, along with the 1765 McCandless Dr. project, greatly exceed all threshold sizes.

[6] http://www.oaklandnet.com/government/ceda/revised/planningzoning/majorProjectsSection/AltaBates/DEIR/ch4_sec4-4_absmc-deir.pdf

No consideration was given in the Staff Report to the other projects proposed in the vicinity of 1765 McCandless Dr. and the potential exceedences of BAAQMD thresholds for screening sizes and for the emissions that would be the cumulative result of the six projects. The TASP also does not consider the exceedences of the BAAQMD thresholds from the projects. We note that when the TASP was prepared, the 2011 BAAQMD CEQA guidance had not been published and therefore the comparisons to screening sizes to determine project significance were not possible. A DEIR is therefore required to analyze significant cumulative air emissions that were not analyzed in the 1765 McCandless Dr. MND and that were not considered in the TASP.

Sincerely,

Matt Hagemann, P.G., C.Hg.

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Geologic and Hydrogeologic Characterization
Industrial Stormwater Compliance
Investigation and Remediation Strategies
CEQA Review
Litigation Support and Testifying Expert

Education:

M.S. Degree, Geology, California State University Los Angeles, Los Angeles, CA, 1984.
B.A. Degree, Geology, Humboldt State University, Arcata, CA, 1982.

Professional Certification:

California Professional Geologist
California Certified Hydrogeologist

Professional Experience:

Matt has 25 years of experience in environmental policy, assessment and remediation. He spent nine years with the U.S. EPA in the RCRA and Superfund programs and served as EPA's Senior Science Policy Advisor in the Western Regional Office where he identified emerging threats to groundwater from perchlorate and MTBE. While with EPA, Matt also served as a Senior Hydrogeologist in the oversight of the assessment of seven major military facilities undergoing base closure. He led numerous enforcement actions under provisions of the Resource Conservation and Recovery Act (RCRA) while also working with permit holders to improve hydrogeologic characterization and water quality monitoring.

Matt has worked closely with U.S. EPA legal counsel and the technical staff of several states in the application and enforcement of RCRA, Safe Drinking Water Act and Clean Water Act regulations. Matt has trained the technical staff in the States of California, Hawaii, Nevada, Arizona and the Territory of Guam in the conduct of investigations, groundwater fundamentals, and sampling techniques.

Positions Matt has held include:

- Founding Partner, Soil/Water/Air Protection Enterprise (SWAPE) (2003 – present);
- Geology Instructor, Golden West College, 2010 – present;
- Senior Environmental Analyst, Komex H2O Science, Inc (2000 -- 2003);
- Executive Director, Orange Coast Watch (2001 – 2004);
- Senior Science Policy Advisor and Hydrogeologist, U.S. Environmental Protection Agency (1989–1998);

- Hydrogeologist, National Park Service, Water Resources Division (1998 – 2000);
- Adjunct Faculty Member, San Francisco State University, Department of Geosciences (1993 – 1998);
- Instructor, College of Marin, Department of Science (1990 – 1995);
- Geologist, U.S. Forest Service (1986 – 1998); and
- Geologist, Dames & Moore (1984 – 1986).

Senior Regulatory and Litigation Support Analyst:

With SWAPE, Matt's responsibilities have included:

- Lead analyst and testifying expert in the review of numerous environmental impact reports under CEQA that identify significant issues with regard to hazardous waste, water resources, water quality, air quality, greenhouse gas emissions and geologic hazards.
- Lead analyst and testifying expert in the review of environmental issues in license applications for large solar power plants before the California Energy Commission.
- Stormwater analysis, sampling and best management practice evaluation at industrial facilities.
- Manager of a project to provide technical assistance to a comunity adjacent to a former Naval shipyard under a grant from the U.S. EPA.
- Technical assistance and litigation support for vapor intrusion concerns.
- Manager of a project to evaluate numerous formerly used military sites in the western U.S.
- Manager of a comprehensive evaluation of potential sources of perchlorate contamination in Southern California drinking water wells.
- Manager and designated expert for litigation support under provisions of Proposition 65 in the review of releases of gasoline to sources drinking water at major refineries and hundreds of gas stations throughout California.
- Expert witness on two cases involving MTBE litigation.
- Expert witness and litigation support on the impact of air toxins and hazards at a school.
- Expert witness in litigation at a former plywood plant.

With Komex H2O Science Inc., Matt's duties included the following:

- Senior author of a report on the extent of perchlorate contamination that was used in testimony by the former U.S. EPA Administrator and General Counsel.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of MTBE use, research, and regulation.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of perchlorate use, research, and regulation.
- Senior researcher in a study that estimates nationwide costs for MTBE remediation and drinking water treatment, results of which were published in newspapers nationwide and in testimony against provisions of an energy bill that would limit liability for oil companies.
- Research to support litigation to restore drinking water supplies that have been contaminated by MTBE in California and New York.
- Expert witness testimony in a case of oil production-related contamination in Mississippi.
- Lead author for a multi-volume remedial investigation report for an operating school in Los Angeles that met strict regulatory requirements and rigorous deadlines.
- Development of strategic approaches for cleanup of contaminated sites in consultation with clients and regulators.

Executive Director:

As Executive Director with Orange Coast Watch, Matt led efforts to restore water quality at Orange County beaches from multiple sources of contamination including urban runoff and the discharge of wastewater. In reporting to a Board of Directors that included representatives from leading Orange County universities and businesses, Matt prepared issue papers in the areas of treatment and disinfection of wastewater and control of the dischrge of grease to sewer systems. Matt actively participated in the development of countywide water quality permits for the control of urban runoff and permits for the discharge of wastewater. Matt worked with other nonprofits to protect and restore water quality, including Surfrider, Natural Resources Defense Council and Orange County CoastKeeper as well as with business institutions including the Orange County Business Council.

Hydrogeology:

As a Senior Hydrogeologist with the U.S. Environmental Protection Agency, Matt led investigations to characterize and cleanup closing military bases, including Mare Island Naval Shipyard, Hunters Point Naval Shipyard, Treasure Island Naval Station, Alameda Naval Station, Moffett Field, Mather Army Airfield, and Sacramento Army Depot. Specific activities were as follows:

- Led efforts to model groundwater flow and contaminant transport, ensured adequacy of monitoring networks, and assessed cleanup alternatives for contaminated sediment, soil, and groundwater.
- Initiated a regional program for evaluation of groundwater sampling practices and laboratory analysis at military bases.
- Identified emerging issues, wrote technical guidance, and assisted in policy and regulation development through work on four national U.S. EPA workgroups, including the Superfund Groundwater Technical Forum and the Federal Facilities Forum.

At the request of the State of Hawaii, Matt developed a methodology to determine the vulnerability of groundwater to contamination on the islands of Maui and Oahu. He used analytical models and a GIS to show zones of vulnerability, and the results were adopted and published by the State of Hawaii and County of Maui.

As a hydrogeologist with the EPA Groundwater Protection Section, Matt worked with provisions of the Safe Drinking Water Act and NEPA to prevent drinking water contamination. Specific activities included the following:

- Received an EPA Bronze Medal for his contribution to the development of national guidance for the protection of drinking water.
- Managed the Sole Source Aquifer Program and protected the drinking water of two communities through designation under the Safe Drinking Water Act. He prepared geologic reports, conducted public hearings, and responded to public comments from residents who were very concerned about the impact of designation.
- Reviewed a number of Environmental Impact Statements for planned major developments, including large hazardous and solid waste disposal facilities, mine reclamation, and water transfer.

Matt served as a hydrogeologist with the RCRA Hazardous Waste program. Duties were as follows:

- Supervised the hydrogeologic investigation of hazardous waste sites to determine compliance with Subtitle C requirements.
- Reviewed and wrote "part B" permits for the disposal of hazardous waste.
- Conducted RCRA Corrective Action investigations of waste sites and led inspections that formed the basis for significant enforcement actions that were developed in close coordination with U.S. EPA legal counsel.
- Wrote contract specifications and supervised contractor's investigations of waste sites.

With the National Park Service, Matt directed service-wide investigations of contaminant sources to prevent degradation of water quality, including the following tasks:

- Applied pertinent laws and regulations including CERCLA, RCRA, NEPA, NRDA, and the Clean Water Act to control military, mining, and landfill contaminants.
- Conducted watershed-scale investigations of contaminants at parks, including Yellowstone and Olympic National Park.
- Identified high-levels of perchlorate in soil adjacent to a national park in New Mexico and advised park superintendent on appropriate response actions under CERCLA.
- Served as a Park Service representative on the Interagency Perchlorate Steering Committee, a national workgroup.
- Developed a program to conduct environmental compliance audits of all National Parks while serving on a national workgroup.
- Co-authored two papers on the potential for water contamination from the operation of personal watercraft and snowmobiles, these papers serving as the basis for the development of nation-wide policy on the use of these vehicles in National Parks.
- Contributed to the Federal Multi-Agency Source Water Agreement under the Clean Water Action Plan.

Policy:

Served senior management as the Senior Science Policy Advisor with the U.S. Environmental Protection Agency, Region 9. Activities included the following:

- Advised the Regional Administrator and senior management on emerging issues such as the potential for the gasoline additive MTBE and ammonium perchlorate to contaminate drinking water supplies.
- Shaped EPA's national response to these threats by serving on workgroups and by contributing to guidance, including the Office of Research and Development publication, Oxygenates in Water: Critical Information and Research Needs.
- Improved the technical training of EPA's scientific and engineering staff.
- Earned an EPA Bronze Medal for representing the region's 300 scientists and engineers in negotiations with the Administrator and senior management to better integrate scientific principles into the policy-making process.
- Established national protocol for the peer review of scientific documents.

Geology:

With the U.S. Forest Service, Matt led investigations to determine hillslope stability of areas proposed for timber harvest in the central Oregon Coast Range. Specific activities were as follows:

- Mapped geology in the field, and used aerial photographic interpretation and mathematical models to determine slope stability.
- Coordinated his research with community members who were concerned with natural resource protection.
- Characterized the geology of an aquifer that serves as the sole source of drinking water for the city of Medford, Oregon.

As a consultant with Dames and Moore, Matt led geologic investigations of two contaminated sites (later listed on the Superfund NPL) in the Portland, Oregon, area and a large hazardous waste site in eastern Oregon. Duties included the following:

- Supervised year-long effort for soil and groundwater sampling.
- Conducted aquifer tests.
- Investigated active faults beneath sites proposed for hazardous waste disposal.

Teaching:

From 1990 to 1998, Matt taught at least one course per semester at the community college and university levels:

- At San Francisco State University, held an adjunct faculty position and taught courses in environmental geology, oceanography (lab and lecture), hydrogeology, and groundwater contamination.
- Served as a committee member for graduate and undergraduate students.
- Taught courses in environmental geology and oceanography at the College of Marin.

In Fall 2010, Matt taught Physical Geology (lecture and lab) to students at Golden West College in Huntington Beach, California.

Invited Testimony, Reports, Papers and Presentations:

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Presentation to the Public Environmental Law Conference, Eugene, Oregon.

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Invited presentation to U.S. EPA Region 9, San Francisco, California.

Hagemann, M.F., 2005. Use of Electronic Databases in Environmental Regulation, Policy Making and Public Participation. Brownfields 2005, Denver, Coloradao.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Nevada and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Las Vegas, NV (served on conference organizing committee).

Hagemann, M.F., 2004. Invited testimony to a California Senate committee hearing on air toxins at schools in Southern California, Los Angeles.

Brown, A., Farrow, J., Gray, A. and **Hagemann, M.**, 2004. An Estimate of Costs to Address MTBE Releases from Underground Storage Tanks and the Resulting Impact to Drinking Water Wells.

Presentation to the Ground Water and Environmental Law Conference, National Groundwater Association.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Arizona and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Phoenix, AZ (served on conference organizing committee).

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in the Southwestern U.S. Invited presentation to a special committee meeting of the National Academy of Sciences, Irvine, CA.

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River. Invited presentation to a tribal EPA meeting, Pechanga, CA.

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River. Invited presentation to a meeting of tribal repesentatives, Parker, AZ.

Hagemann, M.F., 2003. Impact of Perchlorate on the Colorado River and Associated Drinking Water Supplies. Invited presentation to the Inter-Tribal Meeting, Torres Martinez Tribe.

Hagemann, M.F., 2003. The Emergence of Perchlorate as a Widespread Drinking Water Contaminant. Invited presentation to the U.S. EPA Region 9.

Hagemann, M.F., 2003. A Deductive Approach to the Assessment of Perchlorate Contamination. Invited presentation to the California Assembly Natural Resources Committee.

Hagemann, M.F., 2003. Perchlorate: A Cold War Legacy in Drinking Water. Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. From Tank to Tap: A Chronology of MTBE in Groundwater. Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. A Chronology of MTBE in Groundwater and an Estimate of Costs to Address Impacts to Groundwater. Presentation to the annual meeting of the Society of Environmental Journalists.

Hagemann, M.F., 2002. An Estimate of the Cost to Address MTBE Contamination in Groundwater (and Who Will Pay). Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. An Estimate of Costs to Address MTBE Releases from Underground Storage Tanks and the Resulting Impact to Drinking Water Wells. Presentation to a meeting of the U.S. EPA and State Underground Storage Tank Program managers.

Hagemann, M.F., 2001. From Tank to Tap: A Chronology of MTBE in Groundwater. Unpublished report.

Hagemann, M.F., 2001. Estimated Cleanup Cost for MTBE in Groundwater Used as Drinking Water. Unpublished report.

Hagemann, M.F., 2001. Estimated Costs to Address MTBE Releases from Leaking Underground Storage Tanks. Unpublished report.

Hagemann, M.F., and VanMouwerik, M., 1999. Potential Water Quality Concerns Related to Snowmobile Usage. Water Resources Division, National Park Service, Technical Report.

VanMouwerik, M. and **Hagemann, M.F**. 1999, Water Quality Concerns Related to Personal Watercraft Usage. Water Resources Division, National Park Service, Technical Report.

Hagemann, M.F., 1999, Is Dilution the Solution to Pollution in National Parks? The George Wright Society Biannual Meeting, Asheville, North Carolina.

Hagemann, M.F., 1997, The Potential for MTBE to Contaminate Groundwater. U.S. EPA Superfund Groundwater Technical Forum Annual Meeting, Las Vegas, Nevada.

Hagemann, M.F., and Gill, M., 1996, Impediments to Intrinsic Remediation, Moffett Field Naval Air Station, Conference on Intrinsic Remediation of Chlorinated Hydrocarbons, Salt Lake City.

Hagemann, M.F., Fukunaga, G.L., 1996, The Vulnerability of Groundwater to Anthropogenic Contaminants on the Island of Maui, Hawaii. Hawaii Water Works Association Annual Meeting, Maui, October 1996.

Hagemann, M. F., Fukanaga, G. L., 1996, Ranking Groundwater Vulnerability in Central Oahu, Hawaii. Proceedings, Geographic Information Systems in Environmental Resources Management, Air and Waste Management Association Publication VIP-61.

Hagemann, M.F., 1994. Groundwater Characterization and Cleanup at Closing Military Bases in California. Proceedings, California Groundwater Resources Association Meeting.

Hagemann, M.F. and Sabol, M.A., 1993. Role of the U.S. EPA in the High Plains States Groundwater Recharge Demonstration Program. Proceedings, Sixth Biennial Symposium on the Artificial Recharge of Groundwater.

Hagemann, M.F., 1993. U.S. EPA Policy on the Technical Impracticability of the Cleanup of DNAPL-contaminated Groundwater. California Groundwater Resources Association Meeting.

Hagemann, M.F., 1992. Dense Nonaqueous Phase Liquid Contamination of Groundwater: An Ounce of Prevention... Proceedings, Association of Engineering Geologists Annual Meeting, v. 35.

Other Experience:

Selected as subject matter expert for the California Geologist licensing examination, 2009-2010.

EXHIBIT B

Tom Brohard and Associates

October 25, 2011

Mr. Richard Drury, Attorney at Law
Lozeau Drury LLP
410 12th Street, Suite 250
Oakland, CA 94607

SUBJECT: Mitigated Negative Declaration for the Harmony Residential Project at 1765 McCandless Drive and Rezoning Application for Nearby Parcels in the City of Milpitas – Traffic Issues

Dear Mr. Drury:

Tom Brohard, P.E., has reviewed the September 28, 2011 Milpitas Planning Commission Agenda Report for the Harmony Residential Project (Development Project) at 1765 McCandless Drive proposing 276 dwelling units including 93 townhomes and 183 condominiums on the west side of McCandless Drive north of Montague Expressway. The Agenda Report also includes rezoning of a portion of the Harmony Residential Project site as well as property on the east side of McCandless Drive north of Montague Expressway and property located at the southeast corner of Montague Expressway at Trade Zone Boulevard (Rezoning Application). Chapter 3.3 (Transportation) of the October 2007 Draft EIR for the Milpitas Transit Area Specific Plan (TASP EIR) has also been reviewed.

I understand that the City of Milpitas Planning Commission is scheduled to discuss the Harmony Residential Project and the Rezoning Application on October 26, 2011. According to the Agenda Report, the Planning Division conducted an initial environmental assessment and believes that a Mitigated Negative Declaration (MND) should be issued for the Development Project and the Rezoning Application. This conclusion was apparently reached in part after staff determined that the Development Project and the Rezoning Application would result in fewer trips than were evaluated in the certified EIR for the Transit Area Specific Plan adopted on June 3, 2008 by the City Council.

From my review of the TASP EIR, a number of significant traffic impacts in the immediate vicinity will occur. The Development Project and the Rezoning Application are located within the TASP on McCandless Drive in the vicinity of Montague Expressway/Trade Zone Boulevard. As such, there is at least a "fair argument" that the Development Project and the Rezoning Application will contribute traffic to adjacent intersections and street segments that are forecast to operate at Level of Service (LOS) F under Background Conditions and Cumulative Conditions as disclosed in the TASP EIR.

Further environmental review including detailed traffic analyses of the Development Project and Rezoning Application are required to determine if any mitigation is feasible. If the significantly impacted intersections and street

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segments cannot be mitigated, then the City must adopt a statement of overriding consideration for both the Development Project, the Harmony Residential Project at 1765 McCandless Drive, and for the Rezoning Application.

Education and Experience

Since receiving a Bachelor of Science in Engineering from Duke University in Durham, North Carolina in 1969, I have gained over 40 years of professional engineering experience. I am licensed as a Professional Civil Engineer both in California and Hawaii and as a Professional Traffic Engineer in California. I formed Tom Brohard and Associates in 2000 and now serve as the City Traffic Engineer for the City of Indio and as Consulting Transportation Engineer for the Cities of Big Bear Lake, Mission Viejo, and San Fernando. I have extensive experience in traffic engineering and transportation planning. During my career in both the public and private sectors, I have reviewed numerous environmental documents and traffic studies for various projects.

Traffic Issues

Based on the information regarding the Harmony Residential Project at 1765 McCandless Drive, the Rezoning Application, and my review of the TASP EIR, there is at least a "fair argument" that the requested approvals will contribute traffic to adjacent intersections on Montague Expressway and street segments on both Montage Expressway and Trade Zone Boulevard that are forecast to be significantly impacted in the TASP EIR. Additional study is required to determine if any mitigation is feasible while considering the following concerns and issues:

1) Vehicle Trips with the Harmony Residential Project – The TASP EIR utilized trip generation rates published in April 2002 by the San Diego Association of Governments, SANDAG, in their Not So Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region. As indicated in Table 3.3-7 on Page 3.3-41 of the TASP EIR, each multi-family residential dwelling unit is forecast to generate 8 daily trips including 0.64 AM peak hour trips and 0.80 PM peak hour trips. Applying these trip rates to the proposed Harmony Residential Project indicates the 276 dwelling units will generate 2,208 daily trips including 177 AM peak hour trips and 221 PM peak hour trips.

2) Incorrect Assumptions for Trip Generation for Proposed Rezoning – While Table 3 on Page 10 of the Agenda Report provides acreage and estimated densities for the Rezoning Application, inconsistencies between this table and other information within the Initial Study and the Agenda Report were identified as follows:

   a) Multi-Family Residential High Density (R3) Dwelling Units – From Page 12 of the Milpitas City Council Minutes of their February 15, 2011 meeting

(Attachment E to the Agenda Report), the minimum density in the R3 zone is 21 units per acre. The proposed rezoning includes about four acres in the southern section of the 12.3 acre Harmony Project as well as the parcel at the southeast corner of Montague Expressway and Trade Zone Boulevard. Rezoning these remaining 9.13 acres to R3 in the top lines of Table 3 would result in a minimum of 192 dwelling units, not 175 dwelling units, for the parcel to be rezoned at the southeast corner of Montague Expressway and Trade Zone Boulevard.

b) Parks, Open Space, and Elementary School – Figure 6 on Page 8 of the Environmental Checklist for the MND identifies the rezoning of property on the east side of McCandless Drive to "School Site and City Park". Page 43 of the Environmental Checklist for the MND states "The number of new students generated by buildout of the proposed Plan will require at least one new elementary school and expansions of existing facilities." For the 10.87 acre site, Figure 3-6 in Attachment D identifies the northern 4.77 acres as "School Site and City Park" and the southern 6.10 acres as "Sports fields and passive recreation or school playgrounds." The "Estimated Density" of this rezoned parcel in Table 3 should include an elementary school rather than "None."

c) Resulting Trip Generation for Harmony Project and Rezoning – Page 47 of the Environmental Checklist provides calculations of daily and peak hour trips for the proposed rezoning. This table does not include trips to and from the Harmony Project or trips associated with the elementary school. The minimum number of dwelling units at the southeast corner of Montague Expressway and Trade Zone Boulevard also appear to be incorrectly calculated as identified above. Trip rates used on Page 47 do not correspond to those used in the TASP EIR published in by the San Diego Association of Governments, SANDAG, in April 2002 in their Not So Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region. Corrected trip generation calculations for the Harmony Project and the Rezoning Application using SANDAG trip rates are as follows:

Component	Size	Daily Trips	AM Peak Hour	PM Peak Hour
Harmony	276 du	2,208	177	221
Elementary School	10.87 ac.	979	314	89
SE Montague/Trade Ctr.	192 du	1,536	123	154
Minimum Number of Trips		4,723	614	464

In the table above, the number of dwelling units is based on the minimum density of 21 dwelling units per acre in the R3 zone. The actual number of dwelling units and the corresponding number of trips will likely be higher.

3) Most Trips Will Use Montague Expressway or Trade Zone Boulevard – Vehicular access to and from the Harmony Residential Project will occur along McCandless Drive north of Montague Expressway. Most traffic to or from the Harmony Residential Project and the other two parcels in the Rezoning Application will pass through the intersection of McCandless Drive/Trade Zone Boulevard at Montague Expressway and then use Montague Expressway or Trade Zone Boulevard.

4) Montague Expressway Intersections Significantly Impacted By TASP – In its analysis, the TASP EIR determined Background Conditions by adding traffic volumes associated with planned but not completed or fully occupied projects to existing traffic volumes. The analysis also included planned and fully funded improvement projects. Traffic to and from the TASP was then added to Background Conditions and compared to identify significant traffic impacts. Table 3.3-10 beginning on Page 3.3-55 of the TASP EIR forecast 15 of the 52 intersections in the study area would be significantly impacted by the TASP.

   Most trips generated by the Harmony Residential Project and the Rezoning Application will use the McCandless Drive/Montague Expressway/Trade Zone Boulevard intersection. The Harmony Residential Project and the Rezoning Application will add trips to this location and at other intersections that are forecast to be significantly impacted by TASP trips in Table 3.3-10 beginning on Page 3.3-55 of the TASP EIR.

   The intersection of McCandless Drive/Montague Expressway/Trade Zone Boulevard (Intersection #39) will be significantly impacted by TASP project trips under Background Conditions during both peak hours. In the AM peak hour at this intersection, the average vehicle delay was forecast to increase from 93.0 seconds at LOS F to 176.3 seconds at LOS F with the addition of TASP trips. In the PM peak hour at this intersection, the average vehicle delay was forecast to increase from 133.9 seconds at LOS F to 304.7 seconds at LOS F with the addition of TASP trips.

   Just to the west at Montague Expressway and South Main Street/Oakland Road (Intersection #38), significant traffic impacts were forecast in the TASP EIR under Background Conditions in both peak hours. In the AM peak hour at this intersection, the average vehicle delay was forecast to increase from 68.5 seconds at LOS E to 144.2 seconds at LOS F with the addition of TASP trips. In the PM peak hour at this intersection, the average vehicle delay was forecast to increase from 83.9 seconds at LOS F to 170.2 seconds at LOS F with the addition of TASP trips.

   Just to the east at Montague Expressway and Great Mall Parkway/Capitol Avenue (Intersection #26), significant traffic impacts were forecast in the TASP EIR in both peak hours. In the AM peak hour at this intersection, the

average vehicle delay was forecast to increase from 98.9 seconds at LOS F to 129.8 seconds at LOS F with the addition of TASP trips. In the PM peak hour at this intersection, the average vehicle delay was forecast to increase from 121.4 seconds at LOS F to 165.7 seconds at LOS F with the addition of TASP trips.

5) Street Segments Significantly Impacted By TASP Trips – For Year 2030 cumulative conditions with buildout of the City's General Plan and the TASP, Table 3.3-12 beginning on Page 3.3-62 of the TASP EIR indicates that 31 roadway segments in the AM peak hour and 49 roadway segments in the PM peak hour will be significantly impacted by traffic to and from the TASP.

   Most trips to and from the Harmony Residential Project and the Rezoning Application will use the McCandless Drive/Montague Expressway/Trade Zone Boulevard intersection. The Development Project and the Rezoning Application will add trips to roadway segments on Montague Expressway and Trade Zone Boulevard that have been forecast to be significantly impacted by TASP trips in Table 3.3-12 beginning on Page 3.3-62 of the TASP EIR.

   Between Great Mall Parkway/Capitol Avenue and McCandless Drive, the westbound Montague Expressway roadway segment was forecast to operate at LOS F in the AM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions. Between McCandless Drive and South Main Street/Oakland Road, the westbound Montague Expressway roadway segment was forecast to operate at LOS F in the AM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions. South of Montague Expressway, both northbound and southbound Trade Zone Boulevard was forecast to operate at LOS F in the AM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions.

   Between South Main Street/Oakland Road and McCandless Drive, the eastbound Montague Expressway roadway segment was forecast to operate at LOS F in the PM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions. Between McCandless Drive and Great Mall Parkway/Capitol Avenue, the eastbound Montague Expressway roadway segment was forecast to operate at LOS F in the PM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions. South of Montague Expressway, both northbound and southbound Trade Zone Boulevard was forecast to operate at LOS F in the PM peak hour and to be significantly impacted by the TASP under Year 2030 Cumulative Conditions.

6) TASP Impacts Considered Significant and Unavoidable – On Page 3.3-77 of the TASP EIR, Table 3.3-14 indicates that the traffic impacts at McCandless

Drive/Montague Expressway/Trade Zone Boulevard (Intersection #39) are deemed significant and unavoidable, and no mitigation measures are feasible (further discussion is provided on Page 3.3-87). On Page 3.3-77 of the TASP EIR, Table 3.3-14 also indicates that the traffic impacts at Montague Expressway/South Main Street/Oakland Road (Intersection #38) are deemed significant and unavoidable, and no mitigation measures are feasible (further discussion is provided on Page 3.3-86). On Page 3.3-76 of the TASP EIR, Table 3.3-14 indicates that the traffic impacts at Montague Expressway and Great Mall Parkway/Capitol Avenue (Intersection #26) are significant and unavoidable. The table indicates an urban interchange at this location is proposed in regional planning documents and further discussion is provided on Page 3.3-84.

Page 3.3-89 of the TASP EIR indicates that no mitigation measures are considered feasible for any roadway segments except for the Great Mall Parkway/Tasman Drive corridor. Traffic analyses of the Development Project and Rezoning Application are required to determine if any mitigation of the significantly impacted intersections and roadway segments is feasible.

In summary, the Harmony Residential Project at 1765 McCandless Drive (Development Project) and Rezoning Application will contribute traffic to adjacent intersections on Montague Expressway and to roadway segments on Montague Expressway and Trade Zone Boulevard that have been forecast to be significantly impacted in the TASP EIR. The Development Project and Rezoning Application will therefore have a cumulatively significant adverse impact on traffic. Additional study is required to determine if any mitigation is feasible. If the significantly impacted intersections and roadway segments cannot be mitigated, then the City must adopt a statement of overriding consideration. If you have questions regarding these comments, please call me at your convenience.

Respectfully submitted,

Tom Brohard and Associates

Tom Brohard

Tom Brohard, PE
Principal

Enclosure

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Tom Brohard, PE

Licenses:	1975 / Professional Engineer / California – Civil, No. 24577 1977 / Professional Engineer / California – Traffic, No. 724 2006 / Professional Engineer / Hawaii – Civil, No. 12321
Education:	1969 / BSE / Civil Engineering / Duke University
Experience:	40+ Years
Memberships:	1977 / Institute of Transportation Engineers – Fellow, Life 1978 / Orange County Traffic Engineers Council - Chair 1982-1983 1981 / American Public Works Association - Member

Tom is a recognized expert in the field of traffic engineering and transportation planning. His background also includes responsibility for leading and managing the delivery of various contract services to numerous cities in Southern California.

Tom has extensive experience in providing transportation planning and traffic engineering services to public agencies. Since May 2005, he has served as Consulting City Traffic Engineer for the City of Indio. He also currently provides "on call" Traffic and Transportation Engineer services to the Cities of Big Bear Lake, Mission Viejo, and San Fernando. In addition to conducting traffic engineering investigations for Los Angeles County from 1972 to 1978, he has previously served as City Traffic Engineer in the following communities:

- Bellflower ..... 1997 - 1998
- Bell Gardens ..... 1982 - 1995
- Huntington Beach ..... 1998 - 2004
- Lawndale ..... 1973 - 1978
- Los Alamitos ..... 1981 - 1982
- Oceanside ..... 1981 - 1982
- Paramount ..... 1982 - 1988
- Rancho Palos Verdes ..... 1973 - 1978
- Rolling Hills ..... 1973 - 1978, 1985 - 1993
- Rolling Hills Estates ..... 1973 - 1978, 1984 - 1991
- San Marcos 1981
- Santa Ana ..... 1978 - 1981
- Westlake Village ..... 1983 - 1994

During these assignments, Tom has supervised City staff and directed other consultants including traffic engineers and transportation planners, traffic signal and street lighting personnel, and signing, striping, and marking crews. He has secured over $5 million in grant funding for various improvements. He has managed and directed many traffic and transportation studies and projects. While serving these communities, he has personally conducted investigations of hundreds of citizen requests for various traffic control devices. Tom has also successfully presented numerous engineering reports at City Council, Planning Commission, and Traffic Commission meetings in these and other municipalities.

In his service to the City of Indio since May 2005, Tom has accomplished the following:

- Oversaw preparation and adoption of the Circulation Element Update of the General Plan including development of Year 2035 buildout traffic volumes, revised and simplified arterial roadway cross sections, and reduction in acceptable Level of Service criteria under certain constraints. Reviewed Riverside County's updated traffic model for consistency with the adopted City of Indio Circulation Plan.

- Oversaw preparation of fact sheets/design exceptions to reduce shoulder widths on Jackson Street over I-10 as well as justifications for protected-permissive left turn phasing at I-10 on-ramps, the first such installation in Caltrans District 8 in Riverside County; reviewed plans and provided assistance during construction of a $1.5 million project to install traffic signals and widen three of four ramps at the I-10/Jackson Street Interchange under a Caltrans encroachment permit.

- Oversaw preparation of fact sheets/design exceptions to reduce shoulder widths on Monroe Street over I-10 as well as striping plans to install left turn lanes on Monroe Street at the I-10 Interchange under a Caltrans encroachment permit; reviewed plans to install traffic signals and widen three of four ramps at the I-10/Monroe Street Interchange.

- Reviewed traffic impact analyses for Project Study Reports evaluating different alternatives for buildout improvement of the I-10 Interchanges at Jefferson Street, Monroe Street, Jackson Street and Golf Center Parkway.

- Oversaw preparation of plans, specifications, and contract documents and provided construction assistance for over 40 traffic signal installations and modifications.

- Reviewed and approved over 600 work area traffic control plans as well as signing and striping plans for all City and developer funded roadway improvement projects.

- Oversaw preparation of a City wide traffic safety study of conditions at all schools.

- Prepared over 500 work orders directing City forces to install, modify, and/or remove traffic signs, pavement and curb markings, and roadway striping.

- Oversaw preparation of engineering and traffic surveys to establish enforceable speed limits on over 200 street segments.

- Reviewed and approved traffic impact studies for more than 25 major developments.

- Developed the Golf Cart Transportation Program and administrative procedures; implemented routes forming the initial baseline system.

Since forming Tom Brohard and Associates in 2000, Tom has reviewed many traffic impact reports and environmental documents for various development projects. He has provided expert witness services and also prepared traffic studies for public agencies and private sector clients.