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January 7, 2014

***Via E-Mail and Federal Express***

Mr. Sheldon S. Ah Sing, Senior Planner

Milpitas Planning Division

455 East Calaveras Boulevard

Milpitas, CA 95035

**Re: Final Environmental Impact Report for the Pacific Mall Project  
SCH # 201302200006**

Dear Mr. Ah Sing:

Thank you for the opportunity to offer our comments on the Final Environmental Impact Report for the Pacific Mall Project (SCH # 201302200006) (the "Final EIR").

Briscoe Ivester and Bazel LLP (the "Firm") represents Milpitas Square, LLC ("Milpitas Square"), a landowner with property in the vicinity of the Pacific Mall Project (the "Project"). Milpitas Square owns and operates various commercial and retail uses near the Pacific Mall Project site. As we explained in our June 20, 2013 comment letter on the Draft EIR (the "June 20<sup>th</sup> Comment Letter"), the Project would result in significant environmental impacts on Milpitas Square and the surrounding commercial and retail uses. Because the Final EIR dismissed our comments on the EIR and failed to thoroughly evaluate the Project's environmental impacts, we are compelled to once again comment on the Pacific Mall Project EIR.

Our comments focus on two aspects of the Final EIR. First, it appears that with the changes in the phasing of the Project development and the potential replacement of the hotel with retail uses, the Pacific Mall Project may result in even greater Project-related impacts compared to the analysis of impacts contained in the EIR. The amended Final EIR failed to evaluate these greater impacts. Secondly, we note that the Final EIR dismissed many of our comments on the Draft EIR without addressing them. For ease of reference, we have identified the key Final EIR responses for which the Final EIR failed to adequately address our comments in accordance with CEQA, and for which we noted inconsistencies with the Planning Commission January 8, 2014 Agenda Report Agenda Item: IX-2 (the "Staff Report").

1. **Response D-2.** Thank you for clarifying that the Project will not exceed an FAR of 0.54 based on the 25.1-acre site (and not the 37.9-acre site referenced in the Draft EIR) and further clarifying the proposed project square footage evaluated in the EIR. We note however, that the Staff Report states that the new Freeway Corridor Overlay District would allow an increase in FAR to 0.52, not 0.54 as applied to the Project site (see Staff Report, pages 1 and 21). Please confirm the correct FAR.

2. **Response D.4.** The amended Final EIR states that,

“The Draft EIR assumes 292,186 square feet of new retail space and a 178,692 square foot hotel. The square footages of existing (267,606 square feet of which 127,896 square feet will remain with the project) and proposed (470,878 square feet) building space are consistent throughout the project description and the analysis in the Draft EIR.”

By comparison, pages 5 through 7 of the Staff Report indicate, “The total net increase in floor area is 304,726 square feet, including the hotel space.” Page 6 of the Staff Report also states,

“The development would include up to 284,587 square feet (net increase of 132,767 square feet) of retail space and a 12-story hotel (171,959 square feet on the project site). The total difference in square footage is 304,726 more than the existing retail buildings proposed for demolition.”

Please confirm the correct net new building square footage and the total proposed development square footage, and revise the Project analysis to reflect the correct information. As was the case with the Draft EIR, the actual size of the project is unclear.

3. **Response D-6.** The Amended Final EIR reiterates on page 37 that the Project includes General Plan and Zoning Ordinance text amendments to allow an FAR increase overlay for the Project. As we stated in our June 20<sup>th</sup> Comment Letter, the Draft EIR did not identify or describe the applicable General Plan FAR overlay, and we raised the concern in our letter that without a description of the overlay, it was unknown if the overlay would apply city-wide. The Final EIR Response to Comment D-8 dismissed our comment by stating that the overlay only applies to the Pacific Mall Project site without including any discussion of the overlay zoning, itself. As it turns out, the Staff Report states that the Project includes a *new* “Freeway Corridor Overlay District,” the purpose of which is “to allow for increased intensity where roadway

capacity can accommodate the development.” The Staff Report indicates that the (-FC) overlay can be combined with any “non-residential zoned property within 300 feet of a freeway” (see Staff Report at page 10).

Even though the EIR indicates that the overlay district will apply only to the Project site, because the City is proposing to adopt new General Plan and zoning overlay districts for *any* site located within 300 feet of a freeway, this land use category and zoning district overlay may result in increased development intensities on other sites, not just the Pacific Mall Project site. Since the General Plan and Zoning Ordinance amendments would create a new overlay which can be applied to the Pacific Mall site or other sites in Milpitas, the EIR should disclose that information and evaluate the environmental impacts associated with an increase at other locations to which the overlay may be applied (even if only the Pacific Mall Project site would have that overlay today) (see e.g., *Heninger v. Board of Supervisors* (1986) 186 Cal.App. 3d 601, (county’s amendment of septic tank ordinances to allow alternative disposal was a project even though one project sought the ordinance amendment, because other sites could be developed under the ordinance)). Without that information, the EIR does not include a meaningful analysis of the corresponding environmental impacts associated with increased development intensity on other properties located in Milpitas. The EIR should be revised and recirculated.

4. **Response D-10**. The Final EIR did not answer the question we raised in our June 20<sup>th</sup> Comment Letter as to whether or not the Project includes any pile driving as recommended in the geotechnical report. If there will be pile-driving then there will be a significant noise impact which has not been evaluated in the initial study and the EIR, and the EIR must be revised and recirculated to address the associated significant environmental impacts.

5. **Response D-11**. The Final EIR did not address the nature of the condominium space or answer our questions about whether or not an owner of a condominium unit can change the retail use in a storefront to take-out food/concession stands? If a condominium owner can convert the space in the future without the need for further discretionary approvals, then the EIR should evaluate the potential impacts associated with the whole of the action since approval of a condominium unit would allow those kinds of land use changes.

The Final EIR also failed to address our comments requesting that the City of Milpitas explain how it will assure that there is sufficient parking and infrastructure to support any substantial changes in the retail configuration on site *in the future* if those kinds of changes are allowed under the existing general commercial zoning. We appreciate the Planning Department’s recommended Conditional Use Permit Condition of Approval #10 (included with

the Staff Report) to limit restaurant use to the second floor of the Project in an effort to further regulate future parking conditions in accordance with the City's adopted parking requirements. Although this condition appears to limit the "owner or designee's" ability to locate restaurant uses, it is unclear if this condition also restricts the ability of future condominium owners from converting retail space to restaurant uses. Will the Project CC&Rs be required to include a similar limitation on restaurant space conversions? If not, how does the City intend to regulate future condominium owners and ensure that the Pacific Mall Project includes sufficient parking in the future?

6. **Response D-17 - Parking.** Our June 20th Comment Letter explained why we believe that the Project would result in significant parking impacts<sup>1</sup>. The Final EIR did not explain why the EIR analysis was adequate and why the parking impacts would be less than significant notwithstanding our comments to the contrary. Instead, the Final EIR ignored our comments on the parking analysis and associated potential impacts.

As we stated in our June 20<sup>th</sup> Comment Letter, the conclusions of the parking analysis appear valid only if the retail/commercial uses and restaurant space are limited to the square footage amounts specified in Table 9 of the Draft EIR. If the square footage of restaurant and other retail uses will change as a result of the replacement of the hotel use with more retail use, and/or the future conversion of retail uses to restaurant uses, then the EIR should be revised to address the corresponding substantial increase in parking impacts associated with such changes. The amended Final EIR does not contain any analysis of the parking demand associated with the Project without the hotel, nor does it contain any analysis of the additional parking demand which could result from future owners of condominiums converting their space to restaurant uses (even if such uses are limited to the second floor of the mall). If the hotel use is replaced by more retail use, we would anticipate that the new retail space would require additional parking spaces. There is no mention of what the proposed parking supply would be in the absence of the hotel. We request that the Final EIR analyze the parking requirements for the Project without the hotel, and analyze the parking supply versus the demand if future restaurant uses are allowed on the second floor of the mall in excess of the 6,907 square feet of restaurant-sit down use and 12,519 square feet of restaurant-take out use identified in Table 9 of the Draft EIR.

CEQA states that when the new information shows a mitigation measure which is considerably different from those considered in the EIR clearly would lessen the environmental

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<sup>1</sup> We understand that the City considers parking to be adequate based on the City's Municipal Code parking requirements (see Final EIR, page 30). Our concerns address future conditions when the condominium owners propose to convert their space to other commercial uses.

impacts of a project and the project proponent declines to adopt it, then the EIR must be re-circulated. Our comment letter provided information showing a feasible mitigation measure to address the significant parking impacts of the Project. This mitigation (i.e., impose a condition of approval on the project to limit restaurant uses to 12,519 square feet of take out uses and 6,907 square feet of sit down restaurant uses based on the analysis in the EIR) was different from the mitigation measures considered in the EIR, and the mitigation we proposed would clearly lessen the project's environmental impacts. Because the EIR did not even acknowledge the Project's parking impacts and the corresponding proposed mitigation measure we identified in our comment letter, we are assuming that the City and/or the project proponent has declined to adopt it. If that's the case, then the EIR must be recirculated with the information indicating that the Project would have a significant environmental impact.

**Response D-18.** The Final EIR indicates that our prior comments on the Draft EIR did not raise any specific concerns about the environmental analysis. If the Project will be supported on pile foundations then there will be groundwater and noise impacts. CEQA considers these categories of effects to constitute physical environmental impacts (see Appendix G to the CEQA Guidelines). Thus, we respectfully disagree with the EIR consultant and the City as we raised specific concerns about the environmental analysis in our Draft EIR comment letter. Once again, we respectfully request that the Final EIR address whether or the Project will have such physical effects on the environment. If the Project will have significant environmental impacts then the EIR must be revised and recirculated with that information. If the Project requires additional on-site parking because of the deficiencies in its analysis, then additional geotechnical impacts could occur as a result of the need for expanded subsurface parking structures. Again, this is of particular concern considering that businesses in the surrounding area will be impacted single-event noise levels generated by ongoing pile driving, and noise sensitive receptors located 300 feet from the southern edge of the project site and 520 feet away may experience significant noise impacts (see e.g., Initial Study at 59). The EIR should be revised to address the noise impacts of pile driving if a pile-supported foundation is proposed.

### **Economic Impacts**

The Final EIR did not address any of our comments on the Draft EIR regarding the following environmental impacts:

- The secondary environmental impacts associated with the economic impact of the project on local businesses (e.g., parking, traffic, etc., including the physical effects associated with constructing additional subsurface parking spaces, or obtaining off-

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site parking should be addressed in the EIR in accordance with CEQA) (see June 20<sup>th</sup> Comment Letter, p. 10).

- The physical effects of the proposed Pacific Mall Project on the existing land uses (e.g., the EIR did not include an analysis of urban decay caused by the Pacific Mall Project to the surrounding retail and commercial uses). The Draft EIR should explain why the project does not require additional police and fire services, particularly, since there is no analysis in the Initial Study attached to the Draft EIR explaining why the impacts are not significant (see June 20<sup>th</sup> Comment Letter, p. 10). The EIR did not address the feasibility of the mitigation measures we proposed in our June 20<sup>th</sup> Comment Letter to address the physical impacts to the surrounding businesses. The Final EIR simply ignored the mitigation measures without *any* discussion in violation of CEQA.

Our client remains interested in working with the City to ensure that the Pacific Mall Project does not impact the viability of the existing businesses and services located within the area surrounding the Pacific Mall Project. We appreciate your consideration of our comments and look forward to the City's responses.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP

A handwritten signature in blue ink that reads "Alicia Guerra / CST".

Alicia Guerra  
Partner

Enclosure

cc: Mary Lavelle, City Clerk  
Tony Morici  
Philip Su  
Chris Kinzel

## RESPONSES TO COMMENTS FROM BRISCOE IVESTER & BAZEL, JANUARY 7, 2014

### **Comment 1:**

Thank you for the opportunity to offer our comments on the Final Environmental Impact Report for the Pacific Mall Project (SCH # 201302200006) (the "Final EIR").

Briscoe Ivester and Bazel LLP (the "Firm") represents Milpitas Square, LLC ("Milpitas Square"), a landowner with property in the vicinity of the Pacific Mall Project (the "Project"). Milpitas Square owns and operates various commercial and retail uses near the Pacific Mall Project site. As we explained in our June 20, 2013 comment letter on the Draft EIR (the "June 201 Comment Letter"), the Project would result in significant environmental impacts on Milpitas Square and the surrounding commercial and retail uses. Because the Final EIR dismissed our comments on the EIR and failed to thoroughly evaluate the Project's environmental impacts, we are compelled to once again comment on the Pacific Mall Project EIR.

Our comments focus on two aspects of the Final EIR. First, it appears that with the changes in the phasing of the Project development and the potential replacement of the hotel with retail uses, the Pacific Mall Project may result in even greater Project-related impacts compared to the analysis of impacts contained in the EIR. The amended Final EIR failed to evaluate these greater impacts. Secondly, we note that the Final EIR dismissed many of our comments on the Draft EIR without addressing them. For ease of reference, we have identified the key Final EIR responses for which the Final EIR failed to adequately address our comments in accordance with CEQA, and for which we noted inconsistencies with the Planning Commission January 8, 2014 Agenda Report Agenda Item: IX-2 (the "Staff Report").

**Response 1:** Responses to the general issues raised in these introductory paragraphs of this comment letter are provided in the following pages.

### **Comment 2:** Response D-2

Thank you for clarifying that the Project will not exceed an FAR of 0.54 based on the 25.1 -acre site (and not the 37.9-acre site referenced in the Draft EIR) and further clarifying the proposed project square footage evaluated in the EIR. We note however, that the Staff Report states that the new Freeway Corridor Overlay District would allow an increase in FAR to 0.52, not 0.54 as applied to the Project site (see Staff Report, pages 1 and 21). Please confirm the correct FAR.

**Response 2:** The EIR analyzed an FAR of 0.54. Changes to the project though review by City staff for compliance with building and fire codes and the Municipal Code necessitated the project to be reduced in size and thus the FAR for the entitled project as currently proposed will be 0.52 (which is approximately 24,255 square feet over the base FAR threshold).

### **Comment 3:** Response D-4

The amended Final EIR states that,

"The Draft EIR assumes 292,186 square feet of new retail space and a 178,692 square foot hotel. The square footages of existing (267,606 square feet of which

127,896 square feet will remain with the project) and proposed (470,878 square feet) building space are consistent throughout the project description and the analysis **in** the Draft EIR."

By comparison, pages 5 through 7 of the Staff Report indicate, "The total net increase in floor area is 304,726 square feet, including the hotel space." Page 6 of the Staff Report also states,

"The development would include up to 284,587 square feet (net increase of 132,767 square feet) of retail space and a 12-story hotel (171,959 square feet on the project site). The total difference **in** square footage is 304,726 more than the existing retail buildings proposed for demolition."

Please confirm the correct net new building square footage and the total proposed development square footage, and revise the Project analysis to reflect the correct information. As was the case with the Draft EIR, the actual size of the project is unclear.

**Response 3:** As noted in Response 2, the size of the project has been reduced in size based on City staff review of the project. The staff report correctly summarizes the size of the project being considered for approval. Because the EIR analyzes a larger project than would be approved, it fully addresses the impacts of the proposed project.

**Comment 4:** Response D-6

The Amended Final EIR reiterates on page 37 that the Project includes General Plan and Zoning Ordinance text amendments to allow an FAR increase overlay for the Project. As we stated in our June 20th Comment Letter, the Draft EIR did not identify or describe the applicable General Plan FAR overlay, and we raised the concern in our letter that without a description of the overlay, it was unknown if the overlay would apply city-wide. The Final EIR Response to Comment D-8 dismissed our comment by stating that the overlay only applies to the Pacific Mall Project site without including any discussion of the overlay zoning, itself. As it turns out, the Staff Report states that the Project includes a new "Freeway Corridor Overlay District," the purpose of which is "to allow for increased intensity where roadway capacity can accommodate the development." The Staff Report indicates that the (-FC) overlay can be combined with any "non-residential zoned property within 300 feet of a freeway" (see Staff Report at page 10).

Even though the EIR indicates that the overlay district will apply only to the Project site, because the City is proposing to adopt new General Plan and zoning overlay districts for any site located within 300 feet of a freeway, this land use category and zoning district overlay may result in increased development intensities on other sites, not just the Pacific Mall Project site. Since the General Plan and Zoning Ordinance amendments would create a new overlay which can be applied to the Pacific Mall site or other sites in Milpitas, the EIR should disclose that information and evaluate the environmental impacts associated with an increase at other locations to which the overlay may be applied (even if only the Pacific Mall Project site would have that overlay today) (see e.g., *Heninger v. Board of Supervisors* (1986) 186 Cal.App . 3d 601, (county's amendment of septic tank ordinances to allow alternative disposal was a project even

though one project sought the ordinance amendment, because other sites could be developed under the ordinance)). Without that information, the EIR does not include a meaningful analysis of the corresponding environmental impacts associated with increased development intensity on other properties located in Milpitas. The EIR should be revised and recirculated .

**Response 4:** The General Plan Amendment describes the overlay and the Zoning Amendment allow for the process to add an Overlay to a project site. The Pacific Mall project is utilizing this process for the 25.1 acre location. Other sites that are eligible for the overlay will need to initiate a Zoning Amendment and complete a full analysis of potential environmental impacts through the course of processing the amendment.

**Comment 5:** Response D-10

The Final EIR did not answer the question we raised in our June Comment Letter as to whether or not the Project includes any pile driving as recommended in the geotechnical report. If there will be pile-driving then there will be a significant noise impact which has not been evaluated in the Initial Study and the EIR, and the EIR must be revised and recirculated to address the associated significant environmental impacts.

**Response 5:** As stated on page 63 of the Initial Study (Appendix A of the EIR) and in Response D-10 of the Final EIR, the only sensitive receptors in the immediate project area are two hotels. Hotels are not considered as sensitive to noise as more traditional sensitive receptors (such as residential properties) because the inhabitants are transitory and are typically in the hotel for a limited period of time. While construction activities may interfere with hotel operations, any temporary loss of business due to perceived nuisance issues would not be considered an environmental impact under CEQA.

While the geotechnical report recommended pile-driving, it was not proposed as part of the project and, therefore, not addressed in the EIR. If pile driving is determined to be necessary during the building permit stage, subsequent environmental review could be required to address any potential impacts.

**Comment 6:** Response D-11

The Final EIR did not address the nature of the condominium space or answer our questions about whether or not an owner of a condominium unit can change the retail use in a storefront to take-out food/concession stands? If a condominium owner can convert the space in the future without the need for further discretionary approvals, then the EIR should evaluate the potential impacts associated with the whole of the action since approval of a condominium unit would allow those kinds of land use changes.

The Final EIR also failed to address our comments requesting that the City of Milpitas explain how it will assure that there is sufficient parking and infrastructure to support any substantial changes in the retail configuration on site *in the future* if those kinds of changes are allowed under the existing general commercial zoning. We appreciate the Planning Department's recommended Conditional Use Permit Condition of Approval #10 (included with the Staff Report) to limit

restaurant use to the second floor of the Project in an effort to further regulate future parking conditions in accordance with the City's adopted parking requirements. Although this condition appears to limit the "owner or designee's" ability to locate restaurant uses, it is unclear if this condition also restricts the ability of future condominium owners from converting retail space to restaurant uses. Will the Project CC&Rs be required to include a similar limitation on restaurant space conversions? If not, how does the City intend to regulate future condominium owners and ensure that the Pacific Mall Project includes sufficient parking in the future?

**Response 6:** As noted in Response D-11 of the Final EIR, the project being presented to the City Council is the project described in the EIR. No variations on this project (i.e., new land uses) are proposed and any assumptions on major changes to the interior uses would be speculative. The proposed building square footage may be used in a manner consistent with the City's zoning, which establishes allowed uses and certain requirements and performance standards, including parking. The property owner would, however, have to show as part of the appropriate permit application of a given allowed use (e.g., a building permit for restaurant improvements) to the satisfaction of the Planning Department that there is sufficient parking and infrastructure to support any substantial changes in the retail configuration on-site. If sufficient parking is not available, then the proposed changes in use could not be approved.

The following condition of approval is proposed for the project:

Owner or designee shall construct the Project in strict conformance to the requirements set forth above in Condition #1 (of Resolution 14-001). After the Project has been constructed and approved by City, any alterations, improvements, construction or otherwise on the Project site requiring a building permit or other City approval(s) may require additional or subsequent traffic, parking, or other studies and analysis as a condition precedent of any such permit or approval as determined by City.

**Comment 7:** Response D-17 - Parking

Our June 20th Comment Letter explained why we believe that the Project would result in significant parking impacts. The Final EIR did not explain why the EIR analysis was adequate and why the parking impacts would be less than significant notwithstanding our comments to the contrary. Instead, the Final EIR ignored our comments on the parking analysis and associated potential impacts.

**Response 7:** It is understood that the commenter believes the project would have a parking impact and that the Final EIR ignored the commenters concerns, but the City respectfully disagrees. The parking analysis completed as part of the environmental analysis is very specifically explained in Responses D-24 and D-25 of the Final EIR. How parking supply will be considered when there are proposed modifications to retail spaces within the project site is also discussed in Response D-25.

**Comment 8:** As we stated in our June 20 Comment Letter, the conclusions of the parking analysis appear valid only if the retail/commercial uses and restaurant space are limited to the square footage

amounts specified in Table 9 of the Draft EIR. If the square footage of restaurant and other retail uses will change as a result of the replacement of the hotel use with more retail use, and/or the future conversion of retail uses to restaurant uses, then the EIR should be revised to address the corresponding substantial increase in parking impacts associated with such changes.

**Response 8:** As was previously stated, the EIR analyzed the proposed project. As such, assumptions regarding the mix of retail uses are stated in the analysis. The mechanisms by which parking requirements, per the Municipal Code, will be met in the future (i.e., a parking analysis prior to issuance of a building permit for a new restaurant occupant) will ensure that as tenants change over time, the cumulative parking demand would not exceed the on-site supply (refer to page 30 of the Final EIR).

The parking analysis is based upon a good faith effort at full disclosure of the proposed environmental effects. Speculation of all possible combinations of retail uses is not required under CEQA (Section 15145) and is not discussed further.

**Comment 9:** The amended Final EIR does not contain any analysis of the parking demand associated with the Project without the hotel, nor does it contain any analysis of the additional parking demand which could result from future owners of condominiums converting their space to restaurant uses (even if such uses are limited to the second floor of the mall). If the hotel use is replaced by more retail use, we would anticipate that the new retail space would require additional parking spaces. There is no mention of what the proposed parking supply would be in the absence of the hotel. We request that the Final EIR analyze the parking requirements for the Project without the hotel, and analyze the parking supply versus the demand if future restaurant uses are allowed on the second floor of the mall in excess of the 6,907 square feet of restaurant -sit down use and 12,519 square feet of restaurant -take out use identified in Table 9 of the Draft EIR.

**Response 9:** As noted on Page 44 of the First Amendment to the Final EIR, the trip generation estimates for the project without the hotel would result in a reduction in traffic trips. The project with the hotel would generate 5,649 net new trips. Without the hotel, the net new trips would be 4,010, a reduction of 1,639 trips. It is reasonable to assume that a reduction in traffic trips would result in a net reduction in parking demand and required parking. The project, however, is not proposing to reduce the parking supply as the parking needs to be constructed in the first phase. This is why there is no mention of a new parking count in the First Amendment to the Final EIR. As proposed, the project has sufficient parking, whether or not the hotel is constructed.

If future changes to the retail uses are proposed, the parking would be addressed by staff consistent with the Condition of Approval noted in Response 6.

**Comment 10:** CEQA states that when the new information shows a mitigation measure which is considerably different from those considered in the EIR clearly would lessen the environmental impacts of a project and the project proponent declines to adopt it, then the EIR must be re-circulated. Our comment letter provided information showing a feasible mitigation measure to address the significant parking impacts of the Project. This mitigation (i.e., impose a condition of

approval on the project to limit restaurant uses to 12,519 square feet of take-out uses and 6,907 square feet of sit down restaurant uses based on the analysis in the EIR) was different from the mitigation measures considered in the EIR, and the mitigation we proposed would clearly lessen the project's environmental impacts. Because the EIR did not even acknowledge the Project's parking impacts and the corresponding proposed mitigation measure we identified in our comment letter, we are assuming that the City and/or the project proponent has declined to adopt it. If that's the case, then the EIR must be recirculated with the information indicating that the Project would have a significant environmental impact.

**Response 10:** As stated on Page 39 of the Draft EIR, the California Court of Appeal has upheld that parking is not part of the permanent physical environment, that parking conditions change over time as people change their travel patterns, and that unmet parking demand created by a project need not be considered a significant environmental impact under CEQA unless it would cause significant secondary effects.<sup>1</sup> Inadequate parking supply was not identified. The commenter has not identified any secondary physical effects, such as blocked emergency access or increased air pollutants. Similarly, the December 2009 amendments to the State CEQA Guidelines (which were effective March 18, 2010) removed parking from the State's Environmental Checklist (Appendix G of the State CEQA Guidelines) as an environmental factor to be considered under CEQA.

The identification of CEQA thresholds of significance is under the purview of the Lead Agency, the City of Milpitas. No parking threshold was included in the EIR and, therefore, no CEQA mitigation would be required even if there was a deficiency in parking. While a CEQA threshold for parking was not included in the analysis, the adequacy of parking supply was discussed, and the parking supply would be adequate. As noted in the previous response, any deficiencies identified due to retail use changes would be addressed through the City's permitting process.

**Comment 11:** Response D-18

The Final EIR indicates that our prior comments on the Draft EIR did not raise any specific concerns about the environmental analysis.

**Response 11:** The statement in the Final EIR that the commenter did not raise any specific concerns about the environmental analysis was made in response to very specific statements in the commenter's letter. Specifically, Comments D-1 and D-2 which were introductory paragraphs that did not provide any specific examples of the purported deficiencies in the EIR. In Responses D-1 and D-2, the commenter was directed to the subsequent responses which addressed the commenter's specific concerns. In addition, Comment D-18 reiterated a finding of the geotechnical report without commenting on any specific issue related to the Draft EIR analysis. There was no comment to respond to. For other comments, specific, detailed responses were provided.

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<sup>1</sup> *San Franciscans Upholding the Downtown Plan v. the City and County of San Francisco* (2002) 102 Cal.App.4th 656.

**Comment 12:** If the Project will be supported on pile foundations then there will be groundwater and noise impacts. CEQA considers these categories of effects to constitute physical environmental impacts (see Appendix G to the CEQA Guidelines) . Thus, we respectfully disagree with the EIR consultant and the City as we raised specific concerns about the environmental analysis in our Draft EIR comment letter. Once again, we respectfully request that the Final EIR address whether or the Project will have such physical effects on the environment.

**Response 12:** As previously stated, the project does not propose pile driving for foundations and the proposed project would not have a significant construction noise impact.

**Comment 13:** If the Project will have significant environmental impacts then the EIR must be revised and recirculated with that information. If the Project requires additional on-site parking because of the deficiencies in its analysis, then additional geotechnical impacts could occur as a result of the need for expanded subsurface parking structures. Again, this is of particular concern considering that businesses in the surrounding area will be impacted single-event noise levels generated by ongoing pile driving, and noise sensitive receptors located 300 feet from the southern edge of the project site and 520 feet away may experience significant noise impacts (see e.g., Initial Study at 59). The EIR should be revised to address the noise impacts of pile driving if a pile-supported foundation is proposed.

**Response 13:** As noted previously, no additional parking is proposed so the geotechnical aspects of the project related to underground parking have not changed. No pile driving is proposed and even if single-event noise were to be disruptive to nearby businesses, they are not considered sensitive receptors and it would not be an impact under CEQA. The only sensitive receptors that could be affected by construction noise are the nearest residences which are 520 feet from the construction zone. Because construction generated noise levels drop off at a rate of about six decibels per doubling of distance between the source and the receptor (page 59 of the Initial Study) and because there is an eight-lane freeway between the houses and the project site, the residential receptors would not be impacted by the temporary effects of construction. For all these reasons, the City disagrees with the commenter's opinion that the EIR needs to be revised and recirculated.

**Comment 14:** The Final EIR did not address any of our comments on the Draft EIR regarding the following environmental impacts:

- The secondary environmental impacts associated with the economic impact of the project on local businesses (e.g., parking, traffic, etc., including the physical effects associated with constructing additional subsurface parking spaces, or obtaining off-site parking should be addressed in the EIR in accordance with CEQA) (see June 20<sup>th</sup> Comment Letter, p. 10).
- The physical effects of the proposed Pacific Mall Project on the existing land uses

(e.g., the EIR did not include an analysis of urban decay caused by the Pacific Mall Project to the surrounding retail and commercial uses). The Draft EIR should explain why the project does not require additional police and fire services, particularly, since there is no analysis in the Initial Study attached to the Draft EIR explaining why the impacts are not significant (see June 20th Comment Letter, p. 10). The EIR did not address the feasibility of the mitigation measures we proposed in our June 20th Comment Letter to address the physical impacts to the surrounding businesses. The Final EIR simply ignored the mitigation measures without *any* discussion in violation of CEQA.

Our client remains interested in working with the City to ensure that the Pacific Mall Project does not impact the viability of the existing businesses and services located within the area surrounding the Pacific Mall Project. We appreciate your consideration of our comments and look forward to the City's responses.

**Response 14:** It appears that there was an error in the Final EIR in which the commenter's original comments regarding economic impacts were not addressed. Please see the following response which addresses the commenters original comment letter and the subsequent comment letter.

The commenter stated that the Draft EIR contains no analysis of the economic impact of the project on local businesses. The commenter correctly states that a project's economic and social impacts are not considered environmental effects under CEQA. As for the secondary environmental effects associated with the purported economic impact of the project, the City has explained in detail how the parking was calculated and why it is sufficient. The commenter has provided no supportable data to demonstrate that the parking is insufficient or will cause a secondary effect on nearby businesses.

In the June 20<sup>th</sup> comment letter, the commenter noted the potential for urban decay and the possible need for additional police and fire services based on issues at a retail center in Canada on which this project is modeled. The project is redevelopment of an existing commercial site and would not introduce new uses that would clearly result in the closure of other commercial development and urban decay in the City of Milpitas or surrounding areas. Urban decay can occur where businesses or other facilities close and are not maintained or are abandoned. There is no evidence presented by the commenter that the proposed project would adversely affect nearby commercial centers such that those developments would no longer be maintained or operated in conformance with City of Milpitas code requirements. For these reasons it would be speculative to evaluate any degradation in conditions or blight resulting as a secondary effect of the proposed commercial redevelopment. Per Sections 15064(d)(3) and 15145 of the CEQA Guidelines, a change which is speculative or unlikely to occur is not considered reasonably foreseeable and does not need to be considered further for evaluation in an EIR.

As this is an existing retail center, the existing police and fire services within the City would be sufficient to support it. It is assumed that operators of the facility will comply with local laws and regulations and work with polices and fire services if problems arise. Furthermore,

CEQA would only identify a significant environmental effect related to increased police or fire services if new facilities would need to be constructed to support an increase in personnel. It is unreasonable to assume that a new 304,000 square foot retail/hotel building would, by itself, require a new police or fire station to be constructed.

Based on the available data, there is no supportable evidence to suggest that the proposed project would result in physical impacts to the surrounding businesses. As such, no impact has been identified and no mitigation measures are required or proposed.