

June 16, 2011

Via E-Mail and U.S. Mail

City of Menlo Park
Community Development Department
Attn: Thomas Rogers, Associate Planner
701 Laurel Street
Menlo Park, CA 94025
E-Mail: throgers@menlopark.org

Re: Comments on the Menlo Park El Camino Real and Downtown
Specific Plan Draft Environmental Impact Report

Dear Mr. Rogers:

Members of the Menlo Park Downtown Alliance, a coalition of downtown business and property owners, have asked us to write you concerning the Menlo Park El Camino Real and Downtown Specific Plan Draft Environmental Impact Report (“DEIR”). We respectfully submit these comments to help ensure that the City of Menlo Park fully complies with the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 et seq., and the CEQA Guidelines, California Code of Regulations, title 14, section 15000 et seq. (“Guidelines”).

After carefully reviewing the DEIR for the Specific Plan, we have concluded that it fails in numerous respects to comply with the requirements of CEQA. As described below, the DEIR violates CEQA because it fails to: (1) provide an accurate project description; (2) provide specific, project-level review for the City’s short-term public projects; (3) sufficiently analyze the impacts to historical and biological resources; (4) analyze construction related traffic and air quality impacts; (5) consider the potential for urban decay; (6) properly analyze the impacts on water supply; (7) consider a reasonable range of alternatives; and (8) because it relies on mitigation measures that are not certain to occur.

The EIR is “the heart of CEQA.” *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 392 (1988) (citations omitted). It is “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended ‘to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.’ Because the EIR must be certified or rejected by public officials, it is a document of accountability.” *Id.* (citations omitted).

Where, as here, the DEIR fails to fully and accurately inform decision-makers, and the public, of the environmental consequences of proposed actions, it does not satisfy the basic goals of the statute. *See* Pub. Res. Code § 21061 (“The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect that a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”)

As a result of the DEIR’s numerous and serious inadequacies, there can be no meaningful public review of the Menlo Park El Camino Real and Downtown Specific Plan (the “Specific Plan” or “Project”). The City must revise and recirculate the DEIR in order to permit an adequate understanding of the environmental issues at stake.

I. The DEIR Fails to Provide an Accurate Project Description.

In order for an environmental document to adequately evaluate the adverse impacts of a project, it must first provide a comprehensive description of the project itself. “An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal.App.4th 713, 730 (1994) (quoting *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 193 (1977)). This is because “[a]n accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity.” *Id.* (quoting *McQueen v. Bd. of Directors*, 202 Cal.App.3d 1136, 1143 (1988)). While extensive detail is not necessary, the law requires that EIRs describe proposed projects with sufficient detail and accuracy to permit informed decision making. *See* Guidelines §15124 (project description). The DEIR here fails to meet this basic threshold.

A. The DEIR impermissibly truncates a description of the Specific Plan's full build-out potential.

Under CEQA, the project description must describe the “whole of an action” which is being approved, including all components and future activities that are reasonably anticipated to become part of the project. Guidelines §15378. The requirements of CEQA cannot be avoided by chopping a large project into many little ones or by excluding reasonably foreseeable future activities that may become part of the project. *Rio Vista Farm Bureau Center v. County of Solano*, 5 Cal.App.4th 351, 370 (1992). The DEIR here fails to describe the full scope of the Project being approved, and thus fails to disclose the full range and severity of the Project's environmental impacts.

As stated in the DEIR, “[t]he Specific Plan includes polices intended to guide new development over the next 30 years.” DEIR 3-2. The Specific Plan would allow additional development and greater density in the Downtown and along El Camino Real with new zoning and development standards and the conversion of public parking plazas. The DEIR shows an Illustrative Plan of how the Project area “could *potentially* build out” under the Specific Plan over the next 30 years and purports to calculate the total square footage, dwelling units, and hotel rooms that will be generated by this development. DEIR 3-11 to 3-12 (emphasis added).

These “potential” build out numbers are also referred to as the “maximum allowable development.” DEIR 3-34. However, the “maximum allowable development” is not at all the maximum development that could actually be approved under the Specific Plan. Instead, it is an arbitrary level of development identified in the Specific Plan as a point at which the City Council could reevaluate plans for development in the Project area *if* it wishes to. *Id.* As the DEIR admits, “development above the maximum thresholds could be permitted” under the Specific Plan subject to project-level environmental review. *Id.*; *see also* DEIR 1-4 (the City may consider additional development projects “if and when the maximum allowable development is reached”). In other words, the Specific Plan actually allows a higher level of development than reflected in the DEIR's estimates.

Accordingly, the DEIR impermissibly chops the Project in two. It analyzes development that is shown on the Illustrative Plan (DEIR 3-12) and within the recommended development level. It fails to analyze development that is not shown but could be approved under the Specific Plan regardless. This approach violates CEQA.

Under well-settled case law, an EIR must analyze a planning document's maximum development potential, not an estimated or hoped for level of development.

As the court in *City of Redlands* explained, “an evaluation of a ‘first phase-general plan amendment’ must necessarily include a consideration of the larger project, i.e., the future development *permitted* by the amendment.” *City of Redlands v. County of San Bernardino*, 96 Cal. App. 4th 398, 409 (2002) (emphasis added). Environmental review of the development allowed by a planning enactment must take place regardless of whether that development will actually materialize. *See Bozung v. Local Agency Formation Comm’n of Ventura County*, 13 Cal.3d 263, 279, 282 (1975); *Christward Ministry v. Superior Court*, 184 Cal.App.3d 180, 194–95 (1986) (“The fact future development is not certain to occur and the fact the environmental consequences of a general plan amendment changing a land use designation are more amorphous does not lead to the conclusion no EIR is required.”).

The court in *City of Carmel-by-the-Sea v. Board of Supervisors of Monterey County*, 183 Cal.App.3d 229 (1986), reached a similar conclusion. That case involved the rezoning of a parcel of land in Monterey County from single family residential to open space and resort uses. *Id.* at 233–34. At the time of the rezone, the parcel was already being used for resort purposes in compliance with the local coastal program. The County argued that it need not prepare an EIR for the project because the existing use of the property was consistent with the rezone and “no expanded use of the property was proposed.” *Id.* at 235. The Court of Appeal rejected this argument, finding that “the rezoning by itself . . . did in fact represent a commitment to expanded use of the property” *Id.* at 244. Thus, it is the “commitment to expanded use” of property embodied in a land use enactment that is the “project” requiring review under CEQA, and not, as the DEIR defines the Project here, some lesser speculative amount of development predicted to occur.

Thus, the Specific Plan’s full build-out potential for future development of the area, whether or not construction of particular projects will actually occur, must be analyzed in the DEIR. To comply with CEQA, the DEIR must describe the level of development that could be built in compliance with the Specific Plan’s revised zoning and development standards and the planned conversion of public property for private development. This would generate the true maximum development allowed by the Specific Plan.

The level of development analyzed in the DEIR clearly fails to meet this standard. For instance, the Illustrative Plan (DEIR 3-12) shows a conference hotel adjacent to El Camino Real and does not show a hotel Downtown. But the DEIR states that there is demand for both a conference hotel *and* a boutique hotel within the Plan’s 30-year build out period. DEIR 3-7. The DEIR further states that hotels are new uses that would be allowed Downtown by the Specific Plan. DEIR 4.9-20. Prior documents

describing the Specific Plan showed a hotel on Downtown parking plaza 8. Tellingly, after community opposition, the DEIR no longer shows a downtown hotel in the Illustrative Plan. However, this does not mean that a Downtown hotel could no longer be built under the Specific Plan. As the DEIR admits, “the draft Specific Plan includes hotel use as a general [Downtown] use category that could be developed on private property if such an opportunity were to emerge.” *Id.* Accordingly, the project description is inaccurate because it omits a Downtown hotel. This omission occurs despite the fact that the Specific Plan allows for the hotel and an economic analysis shows a demand for it.

This mistake in the project description is compounded throughout the DEIR because all of the DEIR’s analyses (e.g., of traffic, air, and noise impacts), rely on an inaccurate level of development. For instance, Table 3-2 lists hotel rooms developed for the conference hotel on El Camino Real but not for the boutique hotel Downtown. The DEIR must recalculate Table 3-2 to show the maximum amount of development that could be approved under the Specific Plan’s land use changes, not the arbitrary numbers recommended by the Specific Plan. The DEIR must reanalyze the impacts associated with this development and the City must then recirculate the revised DEIR for comment.

It is especially important to conduct this analysis now, in the program EIR for the Specific Plan. As the CEQA Guidelines state, only a program EIR can “ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis.” Guidelines § 15168(b)(2). Further, failing to consider the project’s full build-out potential in the DEIR prevents the City from considering “broad policy alternatives and program wide mitigation measures . . . when the [City] has greater flexibility to deal with basic problems or cumulative impacts.” *Id.* § 15168(b)(4). If the City believes the Specific Plan may generate an undesirable level of development, the time to address that concern is now, *before* it approves the Project.

Moreover, the DEIR masks the full advantage that developers will receive by the City’s approval of a program-level EIR. If the effects of a proposed development project were examined in the program EIR, “no new environmental document would be required.” Guidelines § 15168(c). This is because the development would be within the scope of the project already covered by the program EIR. *Id.* Additional environmental review would only be required for such a development if the City Council substantially changed the Specific Plan, or if new information of substantial importance arose about the Specific Plan’s impacts or circumstances in the Project area. *Id.* §§ 15162; 15168(c). Because the City could approve development within the Project area without conducting any new environmental review, it is especially important that the DEIR must consider all development that could be approved under the Specific Plan.

Courts have found that, even if an EIR is adequate in all other respects, the use of a “truncated project concept” mandates the conclusion that the lead agency did not proceed in a manner required by law. *San Joaquin Raptor*, 27 Cal.App.4th at 730 (citation omitted). As written, the DEIR minimizes the full environmental impact that may occur under the development allowed by the Specific Plan. The DEIR must be revised to inform decision-makers and the public of the true level of development allowed by the Specific Plan and the environmental impacts that may result.

II. A Program EIR is Insufficient for the City’s Short-Term Public Projects.

The CEQA Guidelines provide for several methods of environmental review depending on the circumstances. A project EIR examines the environmental impacts of a “specific development project.” Guidelines § 15161. In contrast, for programs that require complex sequences of subsequent approvals, CEQA provides for tiering. Under the tiering methodology, an agency typically prepares an initial program EIR that analyzes the project’s impacts on a broad, general level. *Id.* at § 15152; *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal.App.4th 511, 528 (2000).

Tiering, however, may be used only in narrow circumstances. CEQA generally limits tiering to situations in which the program EIR considers the impacts of a “policy, plan, program or ordinance” Pub. Res. Code § 21068.5. Tiering is properly used, for example, in situations that start with the adoption of a plan “which is by its nature tentative and subject to change” and later progresses “to activities with a more immediate [site-specific] impact.” *Chaparral Greens v. City of Chula Vista*, 50 Cal.App.4th 1134, 1143 (1996) (quoting *Al Larson Boat Shop v. Bd. of Harbor Comm’rs of the City of Long Beach*, 18 Cal.App.4th 729, 740 (1993)). By contrast, public agencies may not use the broad, general analysis in a program EIR for a particularized, site-specific development project. Specific construction projects require the kind of detailed environmental review that a program document does not provide.

Thus, in *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48 Cal.App.4th 182 (1996), the Court of Appeal found that an agency could not use tiering to avoid detailed environmental review of specific development projects within a specific plan. In that case, Stanislaus County approved a specific plan for a destination resort and residential community in southwest Stanislaus County. *Id.* at 186. For this approval, the County prepared a program EIR that explicitly deferred environmental review of certain impacts associated with the project for “project-level review for future phases of development.” *Id.* at 195. The DEIR here does the same. *See, e.g.*, DEIR 4.2-12 (deferring construction air impacts), 4.4-14 (deferring historic resources evaluations).

The Court of Appeal held that, given the specificity of the approved project, this approach violated CEQA. It warned that “tiering is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause.” *Stanislaus Natural Heritage Project*, 48 Cal.App.4th at 199. According to the court, tiering may have been legally appropriate if the county had “simply adopt[ed] or amend[ed] a general plan so as to permit the building of homes and golf courses.” *Id.* at 203. But because “[t]he County adopted a specific plan calling for the construction of those facilities and of other particularly described facets of the [proposed resort],” the EIR could not defer analysis of the project’s environmental impacts. *Id.*

Here, the DEIR improperly conducts a program-level review for the public projects identified in the DEIR. The Specific Plan in *Stanislaus Natural Heritage Project* identified the “specific location” of each of the subprojects and “the timing of the construction” of those developments. *Id.* at 204. Here, many of the public projects identified in the Specific Plan are already developed to a project-level of detail, for instance, the Ravenswood Gateway project discussed on DEIR 3-18. The Specific Plan even calls for three specific projects to be built in the next five years: (1) streetscape improvements on Santa Cruz Avenue, (2) street conversion of Chestnut Street, and (3) construction of a parking garage on parking plaza 3. DEIR 3-35. Moreover, the DEIR makes clear that construction of the parking garage is necessary to allow the private developments and additional public space improvements envisioned in the Plan to move forward. DEIR 3-35. The impacts of these projects should be fully analyzed in the present EIR.

III. The DEIR’s Analysis of the Project’s Impacts is Inadequate.

Even if a program EIR is sufficient for other portions of the Specific Plan, the DEIR must contain a level of specificity that matches what is currently known about a project. This concept was well demonstrated in a recent superior court decision, *Foothill Conservancy v. East Bay Mun. Util. Dist.*, No. 34-2010-80000491 (Superior Court of Sacramento County, April 11, 2011), incorporated in this letter as Attachment A. *See also Rio Vista Farm Bureau Center v. County of Solano*, 5 Cal.App.4th 351, 368 (1992) (“the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible”). The court held that portions of a program EIR were insufficiently detailed given what was known about the agency’s planning project already. For instance, although the public agency did not know the specific configuration of an expanded reservoir project, under any scenario known recreational and cultural resources would be impacted. Accordingly, the court held that impacts to those resources must be analyzed. *Id.* at 19–20. The court held that “[t]iering *may* enable a public agency to avoid having to undertake a repetitious

analysis of significant environmental effects previously addressed in an earlier EIR. Tiering is *not* a device for deferring analysis of the significant environmental impacts of a proposed project.” *Id.* at 12.

Here, the Specific Plan covers a confined plan area and includes many detailed public projects and detailed development guidelines for private development. As such, the location of potential development projects and the level of development permitted by the Specific Plan are already known. Accordingly, these impacts must be analyzed to a level of detail that is now possible. Instead, as discussed below, the DEIR impermissibly defers or skims over many of these analyses. Doing so violates CEQA’s mandate to consider a project’s potential impacts on the environment.

A. Impacts on historical resources have not been sufficiently analyzed and have been improperly delayed.

1. The DEIR must analyze the potential change to the immediate surroundings of identified historic resources.

The DEIR identified several known historic resources in the plan area, including the 1863 Southern Pacific Railroad Station (now the Menlo Park Caltrain Station), which is the oldest railroad station in continuous operation in California, and six additional buildings. DEIR p. 4.4-5.

Under CEQA, a substantial adverse change in the significance of an historical resource is a significant effect on the environment. Pub. Res. Code § 21084.1; Guidelines § 15064.5(b). A substantial adverse change means “physical demolition, destruction, relocation, or alteration of the resource *or its immediate surroundings* such that the significance of an historical resource would be materially impaired.” Guidelines § 15064.5(b)(1) (emphasis added). This significance criterion recognizes that an historic site is not simply comprised of an historic structure. It includes the surrounding setting that places that structure in a historical context. Yet the DEIR’s discussion of potential impacts to these known historic resources fails to address whether the land use changes permitted by the Specific Plan would impair the setting that sustains the historic integrity of these resources. DEIR 4.4-13 to 4.4-15.

As just one example, the Specific Plan proposes extensive development surrounding the 1863 Southern Pacific Railroad Station. Could this development impair the setting that now surrounds the Station to such an extent that the Station would lose some of its historical significance? To comply with CEQA, the DEIR must be revised to provide this information for all of the known historic structures.

2. The DEIR fails to identify all historic resources within the Project Area.

The DEIR admits that additional historic resources potentially impacted by the Project may exist, yet fails to inform decision-makers or the public what these resources are and where they are located. For instance, the DEIR states that “[a]rchival research in the project area has identified numerous historic-period structures located within the project area, including resources found eligible for listing” in the California and national historic registers. DEIR 4.4-13. The DEIR gives but one example of these potentially historic resources. Further, the DEIR reveals that these resources “have not been comprehensively surveyed and evaluated, and may be eligible for the California or National Registers upon further review.” DEIR 4.4-13 to 4.4-14. These resources must be surveyed and evaluated in the DEIR to inform the public and decision-makers about the Project’s potential environmental impacts.

For instance, the DEIR fails to evaluate several historic-period structures considered to be significant by many Menlo Park residents. The British Bankers Club was built in 1924 and is shown in the attached photo of Menlo Park in the 1920s. Attachment B at p. 1. The building at 1145 Merrill Street is located across from the historic Southern Pacific Railroad Station and was built around 1910. The prominent Beltramo’s building houses a long-time Menlo Park family business. As the DEIR admits, the “[i]mplementation of the Specific Plan could result in the demolition or alteration of these potential historical resources, which would be considered a significant impact.” DEIR 4.4-14.

The DEIR’s attempt to mitigate this potentially significant impact is wholly inadequate and impermissibly defers analysis. The DEIR proposes to conduct site-specific evaluations and further environmental review when an individual project is proposed. *Id.* However, the DEIR does not, and cannot provide any reason why a comprehensive survey and evaluation to identify all historical resources potentially impacted by the Specific Plan could not be conducted at this point. It is especially important to conduct this survey now, during program-level environmental review. It is only at this stage that decision-makers and the public can gain a complete understanding of the area’s historical resources, including how they interact with each other and how they may be impacted by streetscape improvements and other public projects that may not need additional environmental review. Deferring this analysis fails to achieve one of CEQA’s primary purposes of a Program EIR: to “[e]nsure consideration of cumulative impacts that might be slighted in a case-by-case analysis.” Guidelines § 15168(b)(2).

3. The DEIR must analyze the historic nature of Menlo Park's downtown design and parking plazas.

CEQA's definition of an historical resource includes "[a]ny object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California" Guidelines § 15064.5(a)(3). This includes an area that:

- (A) Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;
- (B) Is associated with the lives of persons important in our past;
- (C) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual

Id.

The existing design of Downtown Menlo Park, distinguished by its model parking plazas designed by Charles P. Burgess, meets this definition and should be analyzed in the DEIR. Attachment B includes several newspaper articles and other reports that chronicle this historical significance. As one article summarizes, "in 1948, Menlo Park gained nationwide interest when the town first embarked on the program of providing free, municipal parking facilities." Attachment B at p. 5. This program was envisioned by Charles P. Burgess, longtime Menlo Park mayor and councilman, who was "one of California's best-known, small city leaders during the 1950s." *Id.* at p. 3. Burgess has been described as "[t]he dominant figure in Menlo Park civic affairs and the man chiefly credited for shaping the city in the post-war years" *Id.* at p. 17. Indeed, Menlo Park's parking plazas served as models to California and the Nation. For example, "[i]n 1953 the U.S. Chamber of Commerce in its nationally circulated publication featured Menlo Park for its foresighted purchase of parking plazas through downtown assessment districts." *Id.* at p. 2. This is just a small portion of the evidence of the historical nature of Menlo Park's Downtown design that must be analyzed by the DEIR.

B. The DEIR fails to adequately analyze and mitigate the Project's impacts on biological resources.

The DEIR's treatment of potential impacts to the site's biological resources fails to comply with CEQA's mandate to analyze the Project's impacts on the environment. *See* Pub. Res. Code § 21061.

1. The DEIR must identify the number and location of heritage trees within the Project Area and ensure their protection.

The DEIR admits that protected or heritage trees could be damaged or removed by construction projects in the project area. DEIR 4.3-33. However, the DEIR fails to identify the number or location of these heritage trees. Without this basic information, it is impossible to estimate the Specific Plan's impact on protected trees. For instance, will any of the public street improvement projects require removal of heritage trees?

Similarly, the DEIR's conclusion that the Project's impact to heritage trees is less-than-significant is not supported by substantial evidence. The DEIR relies on Design Guidelines in the Specific Plan that emphasize retention and enhancement of trees "to the extent possible." DEIR 4.3-33. Yet, as discussed above, there is no analysis of whether preservation of any heritage trees will be possible. It is common knowledge, for instance, that construction activities are often unable to preserve adjacent trees, especially where access to the construction site is limited. Furthermore, the Specific Plan's design guidelines are discretionary, not mandatory. Accordingly, there is no assurance that heritage trees will be protected. Indeed, the DEIR admits that the City may approve of removal permits at its discretion. *Id.* The DEIR must identify the number and location of heritage trees within the Project area and explain the true potential of this Project to impact those trees.

2. The DEIR's analysis of impacts to special status species is inadequate.

The Project Area provides habitat for Cooper's Hawk, a California watchlist species, and the Pallid Bat, a California species of special concern. In addition, San Francisquito Creek is known to be inhabited by Red Legged frogs and Steelhead trout, both listed as threatened under the federal Endangered Species Act. DEIR 4.3-15 to 4.3-16. The DEIR describes San Francisquito Creek as "one of the most promising steelhead habitats in the South Bay." DEIR 4.8-5.

The DEIR analyzes the Project's potential impacts to special status bird, bat, amphibian and reptile species, but completely fails to analyze the potential impacts to special status fish species. DEIR 4.3-24 to 4.3-32. Accordingly, the DEIR skips over the Project's potential impacts to Steelhead trout. This glaring omission must be rectified in a revised and recirculated EIR.

Evidence contained in the DEIR itself suggests that the Project's impacts to Steelhead trout and other special status species inhabiting San Francisquito Creek may be significant. For example:

- San Francisquito Creek is listed under the Clean Water Act as impaired for siltation, which "is the primary threat to steelhead trout" because it damages their habitat. DEIR 4.8-4 to 4.8-5. A total maximum daily load (TMDL) for siltation has yet to be approved for the Creek. DEIR 4.8-4.
- Trash "can threaten aquatic life" and is a "water quality concern for . . . San Francisquito Creek." DEIR 4.8-5.
- San Francisquito Creek runs perpendicular to El Camino Real. Storm water is collected via the street network and conveyed into two storm drains along El Camino Real, one of which drains into San Francisquito Creek. DEIR 4.8-1.
- A 2003 study of the City's storm drain system found that "existing storm drain lines, with very few exceptions, do not convey the ten-year-storm flow per the City's design policies" and recommended that most storm drains be replaced. DEIR 4.8-2. Yet the DEIR contains no mitigation measures that would require the City to make these upgrades. An insufficient storm drain system means that pollution and trash located throughout the Project area will be collected by overflowing runoff and deposited in San Francisquito Creek.
- The DEIR's measures to protect the Creek from runoff, such as encouraging an increase of permeable surfaces, are not guaranteed by the Specific Plan. For instance, the Specific Plan simply recommends increasing impermeable surfaces. DEIR 4.8-15, 4.8-18.
- The DEIR concludes that construction activity is unlikely to impact the Creek because the only private property that extends into the Creek (100 El Camino Real) is an "unlikely redevelopment location," and the parcels on the other side of El Camino Real are separated from the Creek by Creek Drive and "occupied by buildings that do not appear to be immediate development sites." DEIR 4.3-34.

However, as discussed above, the DEIR must analyze all development permitted by the Specific Plan. The DEIR's vague language ("unlikely", "do not appear to") effectively concedes that development may occur that could harm important biological resources.

- Despite the fact that "discharge of hazardous materials into San Francisquito Creek could significantly impact" special status amphibians and reptiles, the DEIR assumes that "[a]ll stormwater runoff from the Plan area shall be monitored and follow best management practices, stormwater pollution prevention plan protocols, and National Pollutant Discharge and Elimination System permit provisions." DEIR 4.3-31 to 4.3-32. Such an approach fails to satisfy CEQA's mitigation requirements. The DEIR may not rely on compliance with applicable environmental laws to conclude this impact is less than significant absent "a project-specific analysis of potential impacts and the effect of regulatory compliance." 1 Stephen L. Kostka and Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 14.15 (2d ed. 2011) (citing *Californians for Alternatives to Toxics v. Dep't of Food & Agric.*, 136 Cal.App.4th 1 (2005); *Ebbetts Pass Forest Watch v. Cal. Dep't of Forestry & Fire Prot.*, 43 Cal.4th 936 (2008)).
- The DEIR repeats this inadequacy by relying on adherence to the C.3 provisions of the municipal storm water requirements set by the Regional Water Quality Control Board to conclude that storm water runoff impacts to water quality will be less-than-significant. DEIR 4.8-18. These requirements apply only to projects that create or replace 10,000 square feet of impervious surface, however. *Id.* The DEIR fails to analyze how many of the potential development sites within the Project area would actually be required to comply with these standards.

The DEIR fails to analyze how these impacts may affect Steelhead trout and fails to identify other potential Project impacts that Steelhead trout may be vulnerable to. The DEIR must be revised to analyze and mitigate the Project's potentially significant impacts to this threatened species.

3. The DEIR fails to analyze the Project's potentially significant cumulative impacts to biological resources.

CEQA requires lead agencies to disclose and analyze a project's "cumulative impacts," defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Guidelines § 15355. Cumulative impacts may result from a

number of separate projects, and occur when “the incremental impact of the project is added to other closely related past, present, and reasonably foreseeable probable future projects,” even if each project contributes only “individually minor” environmental effects. *Id.*

Extensive case authority highlights the importance of a thorough cumulative impacts analysis. In *San Bernardino Valley Audubon Soc’y v. Metro. Water Dist. of S. Cal.*, 71 Cal.App.4th 382 (1999), for example, the court invalidated a negative declaration and required an EIR be prepared for the adoption of a habitat conservation plan and natural community conservation plan. The court specifically held that the negative declaration’s “summary discussion of cumulative impacts is inadequate,” and that “it is at least potentially possible that there will be incremental impacts . . . that will have a cumulative effect.” *Id.* at 399; *see also Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 728–29 (1990) (EIR’s treatment of cumulative impacts on water resources was inadequate where the document contained “no list of the projects considered, no information regarding their expected impacts on ground water resources and no analysis of the cumulative impacts.”).

In contravention of these authorities, the DEIR provides no substantive discussion of the Project’s cumulative impacts on biological resources. The DEIR simply relies on: (1) the assertion that “[e]nvironmentally protective laws and regulations have been applied with increasing rigor since the early 1970s,” and (2) the DEIR’s unsupported conclusion that the Project “has the potential for relatively minor impacts on biological resources” to conclude, without further analysis, that the Project’s cumulative impacts are less-than-significant. DEIR 4.3-36. This approach is wholly inconsistent with CEQA’s requirements to analyze a project’s cumulative impacts, even when those impacts are “individually minor.” Guidelines §§ 15355(a)–(b). The DEIR must make a good faith effort to analyze the Project’s cumulative impacts on biological resources. For example, the DEIR must identify other development projects along San Francisquito Creek to analyze cumulative impacts to Steelhead trout.

In short, the DEIR’s analysis of impacts to biological resources completely fails to address cumulative impacts or the Project’s impacts to threatened Steelhead trout. The DEIR also understates the Project’s potential to significantly affect other special status species. At the same time, the DEIR fails to provide effective, enforceable measures to mitigate such potentially significant impacts. To comply with CEQA, the City must prepare an EIR fully analyzing the Project’s potential impacts to these resources and identifying effective mitigation measures.

C. The DEIR fails to analyze the Project's construction-related traffic and air quality impacts.

The DEIR has completely failed to consider transportation and air quality impacts that are certain to occur during the construction period.

1. Construction air impacts can and must be analyzed in the DEIR.

The DEIR states that “[g]iven that detailed construction information such as construction techniques and scheduling that would be utilized for each individual development project is not currently known, estimation of emissions from individual development projects would be too speculative to warrant quantification at this time.” DEIR 4.6-16. The DEIR proves itself wrong, however, because it is able to provide the necessary details to conduct its analysis of construction noise impacts. DEIR 4.10-9 to 4.10-10. This includes an estimate of the types of construction equipment that would be used. *Id.*

With this same information, the DEIR certainly could estimate construction-related air quality impacts. For instance, the DEIR must estimate the increase in diesel particulate emissions (“DPM”) and PM2.5 from engine exhaust and analyze the health effects from exposure to DPM and PM2.5. In addition, the DEIR must analyze fugitive dust and develop control efficiency mitigation measures.

In short, the DEIR must analyze the impacts of construction-related emissions on ambient air quality and potential health impacts on sensitive receptors. It is especially important to do so now, given that these impacts will contribute to the already significant level of air quality and climate change impacts. Decision-makers must know the full extent of these impacts now, before it considers approval of the Specific Plan.

2. The DEIR fails to analyze or mitigate the Project's construction-related transportation impacts.

According to the DEIR, construction of the proposed Project would occur over the next thirty years. DEIR 3-11. One would expect that, given the scale and prolonged duration of construction in the Project area, the DEIR would have comprehensively analyzed what are certain to be extensive local and regional traffic impacts. For example, construction will result in lane closures, rerouting of traffic, delivery of materials, hauling of excavated material, and construction employees commuting to and from the job site. These activities will impact automobile, pedestrian, bicycle, and transit circulation patterns, parking supply, and access to local businesses.

The DEIR must at a minimum analyze the construction-related transportation impacts from the public improvement projects identified in the DEIR, the exact locations of which are already known. *See, e.g.*, DEIR 3-18 and 3-35.

Unfortunately, the DEIR has not even begun to analyze the Project's construction-related transportation impacts. *See* DEIR 4.13. As a result, the DEIR also fails to adopt feasible measures to mitigate these impacts. This deferral of analysis and development of mitigation is improper under CEQA. *Sundstrom v. County of Mendocino*, 202 Cal.App.3d at 307 (1988).

The DEIR must include measures to mitigate the Project's construction-related transportation impacts. For instance, the City should contact and interview individual businesses in the Project area to gather information and develop an understanding of how these businesses carry out their enterprise. The survey should identify business usage, customer access, delivery/shipping patterns, and critical times of the day for business activities. The City can then use this information to develop a construction traffic mitigation plan that (1) identifies techniques during construction to maintain critical business activities, (2) develops alternative access routes for customers and deliveries to businesses, (3) develops traffic control and detour plans, and (4) identifies alternative means of transportation to facilitate customer access during construction. In addition, the DEIR should commit to a community construction information and outreach program to provide on-going dialogue between the City and the affected community regarding construction impacts and planned mitigation measures. This program should include dedicated personnel to coordinate construction, respond to community inquiries and complaints, and coordinate business outreach programs.

A revised DEIR must be prepared that (1) provides a complete analysis of the Project's construction-related transportation impacts, and (2) includes measures to mitigate these impacts. The public and decision-makers must be apprised of the magnitude of these impacts and the actions that will be necessary to mitigate them, prior to the Project's approval.

IV. The DEIR Must Consider the Potential for Urban Decay.

In *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184 (2004), the court expressly held that an EIR must analyze a project's potential to cause urban decay if there is substantial evidence showing that the project may lead to such impacts. The court pointed out that CEQA requires the project proponent to disclose and analyze the project's economic and social impacts where they "directly or indirectly will lead to adverse physical changes in the environment." *Id.* at

1205. “[A]n EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes in turn caused by the economic or social changes.” *Id.* (quoting Guidelines § 15131(a); citing Guidelines § 15064(e)).

Bakersfield Citizens concerned a proposal to construct two Wal-Mart Stores within three miles of each other, and recognized that such a concentration of discount retail uses could have an environmental impact: the Wal-Marts could cause economic harm to local retail outlets, which in turn could lead to physical deterioration. *Id.* at 1193. The court concluded that such urban decay impacts are an essential part of CEQA review. *Id.* The *Bakersfield Citizens* court also held that environmental review must also consider cumulative urban decay impacts. *Id.* In other words, it is necessary to analyze the urban decay impacts of the proposed project together with other past, present and future projects in the area. The DEIR here fails to follow the clear direction of *Bakersfield Citizens*.

The Specific Plan would convert most of the downtown surface parking plazas to other uses, such as mixed-use buildings, residences, a covered marketplace, and multi-level parking structures. Such permanent conversions would eliminate a significant amount of the existing surface parking spaces, thereby removing (next to street parking) the most desired parking areas in the downtown. Small-town charm and surface parking close to storefronts have been critical ingredients in the success of Menlo Park’s downtown. The Specific Plan’s elimination of these assets will have a detrimental impact on local businesses.

For instance, in a recent letter to the editor, a Los Altos resident noted that the City’s convenient parking plazas are one of the reasons she shops in downtown Menlo Park as opposed to Palo Alto. *See* Attachment C at p. 1. In response to the Specific Plan’s proposal to replace such parking with a parking structure, she states “I refuse to park in a parking garage. They feel threatening, particularly at night, and even more so as the crime rate rises.” *Id.* In another letter to the editor, a Menlo Park resident notes that the Specific Plan’s reduction of existing parking will “destroy[]” local businesses. *Id.* A downtown business owner similarly concluded that the parking garage plan “would eliminate a lot of the smaller businesses.” *Id.* at p. 2.

Two other downtown revitalization projects, one in Sunnyvale and another in Redwood City, demonstrate that such projects can lead to urban decay. *See* Attachment C at pp. 3, 4. Construction of the Sunnyvale Town Center reduced local business by 35 to 50 percent and insufficient financing has led to “vacant lots, nearly completed buildings and the steel skeletons of others.” *Id.* at p. 3. The only successful

area in this downtown revitalization effort is Murphy Avenue, the one street where the historic downtown charm was allowed to remain. *Id.* In Redwood City, an effort to revitalize the downtown with “palm-tree lined streets and trendy new restaurants” resulted in property owners insisting on higher rents, and the loss of small businesses which could not afford to pay them. *Id.* at p. 4. As a result, more than a quarter of the entire ground-floor retail space in buildings in downtown Redwood City is vacant and one local business “has two boarded-up buildings as its neighbors.” *Id.*

The Project could also cause urban blight through its increased traffic and localized air pollution alone. The DEIR concluded that the Project would result in long-term emissions of criteria pollutants from increased vehicle traffic that would contribute substantially to air quality violation. DEIR 5-3. In addition, the DEIR found the Specific Plan would result in traffic that would adversely affect operation of area intersections, local roadway segments, and local intersections. *Id.* Such traffic congestion could depress property values, drive patrons and businesses away from Menlo Park, and create a downward spiral of urban blight. For instance, residents already complain that existing traffic congestion along El Camino Real makes it difficult to reach the downtown, and one resident wrote that he “dread[s] to think what it will be like trying to drive through Menlo Park” if the Specific Plan is implemented. *See* Attachment C at p. 5. These impacts were not analyzed.

The DEIR must be revised to include a complete analysis of the potential environmental impacts stemming from urban decay. The threshold of significance must recognize the possibility that urban decay could be caused by the deterioration of existing uses in the area as a result of the impacts and nuisance factors generated by the Project, such as traffic and noise or by the type of economically-induced blight discussed in *Bakersfield Citizens*. Until it includes such analysis, and the required mitigation measures, the DEIR cannot support approval of the Project.

V. There Is No Evidence to Conclude that the Project’s Water Supply Impacts Are Not Significant.

Under CEQA, an EIR must demonstrate that sufficient water supplies are available for a development project, and must consider the environmental impacts of providing that water. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 431 (2007). If “it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies.” *Id.* at 432 (emphasis added). Here, the DEIR’s conclusion that sufficient water supplies are available is not

supported by substantial evidence. Nor does the DEIR analyze the environmental consequences of securing the water required by the Project.

The DEIR admits that when specific critical dry year events occur or when multiple dry years prevail, the SFPUC could curtail water deliveries by 20 percent and Cal Water and the Bear Gulch District “would have insufficient water supplies to meet the projected water demand associated with development at the project site” DEIR 4.12-34. Despite this finding, the DEIR concludes that sufficient water supply exists for the project because in such an instance, Cal Water can “mandate demand customer reductions within its service area” *Id.* In other words, the DEIR concludes that there is a sufficient supply of water for the Project because if there isn’t, the shortfall can be borne by all Cal Water users. Not only does this conclusion defy logic, it fails to analyze the environmental consequences of such area-wide reductions.

Courts have frequently struck down EIRs for failing to examine a project’s water supply impacts, including failing to do so in a program EIR. *Stanislaus Natural Heritage Project*, 48 Cal.App.4th at 198–99. In *Santiago County Water Dist. v. County of Orange*, 118 Cal.App.3d 818, 829 (1981), the court struck down an EIR for failing to include “facts from which to evaluate the pros and cons of supplying the amount of water that [the project] will need.” The DEIR here is similarly deficient. It must be revised to include the necessary analysis and then recirculated for public review and comment.

VI. The DEIR Fails to Analyze a Reasonable Range of Alternatives.

A core substantive requirement of CEQA is that “public agencies should not approve projects as proposed if there are feasible alternatives . . . which would substantially lessen the significant environmental effects of such projects” Pub. Res. Code § 21002. Accordingly, a major function of the EIR “‘is to ensure that all *reasonable alternatives* to proposed projects are thoroughly assessed by the responsible official.’” *Laurel Heights*, 47 Cal. 3d at 400 (quoting *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 197 (1976)). To fulfill this function, an EIR must consider a “reasonable range” of alternatives “that will foster informed decisionmaking and public participation.” Guidelines § 15126.6(a).

A reasonable alternative is one that would feasibly attain most of the project’s basic objectives while avoiding or substantially lessening the project’s significant impacts. Guidelines § 15126.6(a); *see Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal.App.3d 433, 443–45 (1988). The DEIR does not comply with these requirements.

A. The DEIR must analyze an alternative that reduces the Project's significant impacts on air quality, greenhouse gasses and traffic.

Here, the DEIR fails to consider *any* alternative that avoids or substantially lessens the Specific Plan's significant impacts from criteria pollutants, greenhouse gasses, and congestion to area intersections and local roadway segments. *See* DEIR Table 5-3. These significant impacts are all related, of course. DEIR Table 4.6-4 shows that over 60% of the Project's GHG emissions come from motor vehicle trips. Motor vehicles are also responsible for the Project's significant criteria pollutants and traffic congestion impacts. DEIR 4.2-5 to 4.2-8. In order to substantially lessen the Project's significant impacts to climate change, air pollution, and traffic, the City must analyze an alternative that reduces the motor vehicle trips generated by the Specific Plan.

Such an alternative is feasible. As the DEIR states, the "primary goal of the Specific Plan is to 'enhance community life, character and vitality through mixed use infill projects . . .'" DEIR 1-1. These infill projects will be located next to a major commuter rail station—the Menlo Park Caltrain station. Mixed use infill development and transit-oriented development are *the* key land use strategies to reduce greenhouse gas emissions and traffic congestion. *See* Senate Bill 375 (discussed on DEIR 4.6-7). The DEIR, however, fails to analyze *any* alternative that would take advantage of these opportunities to avoid the Project's significant impacts to climate change, traffic, and air pollution. For instance, an alternative could be developed that would include Transportation Demand Management ("TDM") strategies implemented by the City. The DEIR, however, only considers TDM strategies that could be implemented "by individual project applicants." DEIR 2-7 (discussing Mitigation Measure TR-2).

Reducing greenhouse gas emissions in order to limit the harms associated with climate change is one of the most urgent challenges of our time, one recognized by the targets embodied in Executive Order S-3-05, AB 32, and SB 375. By these authorities, California has committed to reducing emissions to 1990 levels by 2020, and to 80 percent below 1990 levels by 2050.

Despite California's well-founded commitment to reducing emissions, the DEIR fails to analyze an alternative that would reduce the Project's significant climate change impacts and its associated impacts on traffic and air quality. The DEIR must analyze an alternative that actually serves the purpose of CEQA's alternatives requirements—reducing or avoiding the Project's significant and unavoidable impacts. Unless and until such an alternative is analyzed, the DEIR will remain insufficient to support Project approval. "An EIR which does not produce adequate information

regarding alternatives cannot achieve the dual purpose served by the EIR” *Kings County Farm Bureau*, 221 Cal.App.3d at 733.

B. By artificially limiting the Project’s objectives and rejecting any alternatives that relocate development, the DEIR fails to consider a reasonable range of alternatives.

During the planning process to develop the Specific Plan, members of the Downtown Property Owners Vision Group repeatedly encouraged the City to focus new development along El Camino Real and to maintain the small-town character and parking opportunities that distinguish the Downtown. The City summarily brushed aside these requests, offering justifications that do not withstand scrutiny, and the DEIR fails to consider this alternative to the Project. As a result, the DEIR violates CEQA by artificially limiting the Project’s objectives and failing to consider a reasonable range of alternatives.

The first step in conducting an alternatives analysis under CEQA is to define the project’s objectives. This step is crucial because project objectives “will help the Lead Agency develop a reasonable range of alternatives to evaluate in the EIR” Guidelines § 15124(b). Here, in developing its list of project objectives, the City included both the more general “guiding principles” of the Specific Plan and the much more specific 12 goals of the earlier Vision Plan. DEIR 5-2. The purpose of the Vision Plan goals was to “inform and guide” the Specific Plan, however, not to serve as limiting Project objectives. DEIR 5-1.

By relying on the detailed list of Vision Plan goals, the DEIR artificially curtails the Project’s objectives and consideration of alternatives. For example, the Specific Plan’s guiding principles include “generating vibrancy.” *Id.* This objective could be met in the Downtown area by public streetscape and other civic improvements while focusing private development along El Camino Real. Yet, the DEIR fails to consider such an alternative because the list of Project objectives incorporated the much narrower Vision Plan goal to “[e]xpand shopping, dining and neighborhood services to ensure a vibrant downtown.” *Id.* By designing its objectives to make increased private development in the Downtown a foregone conclusion, the City failed to proceed according to law.

Because the DEIR’s narrow objectives for the Specific Project prevent decisionmakers from evaluating a reasonable range of alternatives, including focusing increased private development along El Camino Real and enhancing the public realm Downtown, the DEIR violates CEQA. Guidelines § 15126.6(a); *see Nat’l Parks &*

Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1072 (9th Cir. 2010) (striking down a narrowly drawn statement of project objectives where it “necessarily and unreasonably constrain[ed] the possible range of alternatives” and “foreordain[ed] approval of the [proposed project].”).¹

VII. The DEIR Improperly Relies on Mitigation Measures that are Not Certain to Occur.

To ensure effectiveness, mitigation measures proposed in an environmental document must be “fully enforceable;” they may not be so undefined that it is impossible to gauge their effectiveness. Pub. Res. Code § 21081.6(b); Guidelines § 15126.4(a)(2); *San Franciscans for Reasonable Growth v. City & County of San Francisco*, 151 Cal.App.3d 61, 79 (1984). Further, mitigation may be deferred only if (1) there is a reason or basis for the deferral, and (2) the measures contain specific performance standards that will be met. *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645, 669–71 (2007). Even for planning projects, “[w]hen mitigation measures are incorporated in a plan, the agency must take steps to ensure that they will actually be implemented as a condition of later development approved under the plan, ‘not merely adopted and then neglected or disregarded.’” 1 Kostka & Zischke, *Practice Under the Cal. Env'tl. Quality Act*, supra §14.16 (quoting *Fed'n of Hillside & Canyon Assn's v. City of Los Angeles*, 83 Cal.App.4th 1252, 1261 (2000)).

The DEIR fails to meet this standard. In many instances, it relies on Specific Plan *policies*, to conclude either that the Project's impact to certain resources is less-than-significant, or that a significant impact has been mitigated to a less-than-significant level. This approach is fundamentally flawed, however, because, policies within the Specific Plan are not requirements that must “actually be implemented as a condition of later development.” *Id.* Instead, they are simply recommendations that the City may or may not require for any particular development. As such, they are not the type of “fully enforceable” mitigation measure that CEQA requires.

CONCLUSION

For all of the reasons discussed above, the DEIR for the Project is wholly inadequate under CEQA. It must be thoroughly revised to provide analysis of, and

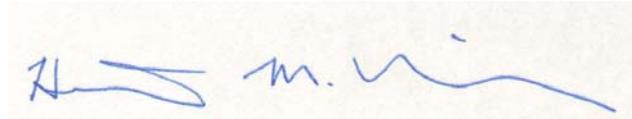
¹ Because CEQA was patterned on the National Environmental Policy Act (“NEPA”), NEPA case law is treated as “persuasive authority” in interpreting CEQA. *Citizens of Goleta Valley v. Bd. of Supervisors* (“*Goleta II*”), 52 Cal.3d 553, 565 n. 4 (1990).

City of Menlo Park
June 16, 2011
Page 23

mitigation for, all of the Project's impacts. This revision will necessarily require that the DEIR be recirculated for further public review. Until this DEIR has been revised and recirculated, the Project may not lawfully be approved.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

A handwritten signature in blue ink, appearing to read "H. M. Minner", is written over a light-colored rectangular background.

Heather M. Minner

Attachments (3)

Cc: Nancy Couperus & Mark Flegel
Co-chairs, Menlo Park Downtown Alliance