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[Exempt from Filing Fee Gov. Code, § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

SAVE MOUNT DIABLO,

Petitioner and Plaintiff,

v.

CITY OF PITTSBURG; PITTSBURG CITY COUNCIL; DOES 1-20.

Respondents and Defendants.

DISCOVERY BUILDERS, INC. ON BEHALF OF FARIA LAND INVESTORS, LLC; DISCOVERY BUILDERS, INC.;

Case No. CIVMSN21-0462

Assigned for All Purposes to the Honorable Edward G. Weil
Dept. 39

NOTICE OF MOTION AND MOTION FOR NEW TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES

Action Filed: March 30, 2021
Writ Hearing Date: December 1, 2021
Writ Hearing Time: 9:00 a.m.

Code Civ. Proc. §§ 1085, 1094.5; Pub. Res.

FARIA LAND INVESTORS, LLC; DOES 21-40. Real Parties in Interest.	Code § 21000 et seq. (California Environmental Quality Act ("CEQA")); Gov. Code § 65300 et seq. (State Planning and Zoning Law)

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____ at _____ or as soon thereafter as this matter may be heard, in Department 39 of the above entitled Court, Respondents CITY OF PITTSBURG ("City") and CITY COUNCIL OF THE CITY OF PITTSBURG (collectively, "Respondents") and Real Parties in Interest DISCOVERY BUILDERS, INC., and FARIA LAND INVESTORS, LLC (collectively, "Real Parties") will move this Court for an order granting a new trial.

This motion is made pursuant to Code of Civil Procedure section 657, on the basis that the Court's decision is not supported by the evidence and controlling legal authorities. Specifically, Respondents and Real Parties respectfully submit that there were several portions of this Court's February 10, 2022 Statement of Decision that may not have fully considered evidence in the administrative record. Respondents and Real Parties submit this Motion to call this Court's attention to that evidence and to respectfully request that this Court conduct a new hearing on Petitioner Save Mount Diablo's ("SMD") motion for peremptory writ of mandate to consider this additional relevant evidence in the administrative record.

Respondents and Real parties respectfully request that this Court vacate its Statement of Decision and enter a new decision denying SMD's motion for peremptory writ of mandate. In the alternative, Respondents and Real Parties respectfully request that this Court vacate its Statement of Decision and schedule a new hearing on SMD's motion for peremptory writ of mandate. If this Court desires, Respondents and Real parties would be happy to submit supplemental briefing on the legal and factual issues discussed in this motion, and raised within the administrative record.

This Motion is based on this notice, the attached memorandum of points and authorities, the concurrently filed declarations of Louis Parsons and Ellis Raskin, the administrative record, and all pleadings, papers, and records on file in this action, including such oral and documentary

evidence as may be presented prior to or at the hearing on this Motion.

Respectfully Submitted,

DATED: February 25, 2022

RICHARDS, WATSON & GERSHON
A Professional Corporation

CITY OF PITTSBURG,
OFFICE OF THE CITY ATTORNEY

By: 

DONNA R. MOONEY

Attorneys for Respondents
CITY OF PITTSBURG & PITTSBURG CITY COUNCIL

DATED: February 25, 2022

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By: 

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DISCOVERY BUILDERS, INC. ON BEHALF OF FARIA LAND INVESTORS, LLC; DISCOVERY BUILDERS, INC.; and FARIA LAND INVESTORS, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 1, 2021, this Court held a short trial to determine whether the City complied with the California Environmental Quality Act ("CEQA;" Pub. Resources Code, § 21000 et seq.) and the CEQA Guidelines ("Guidelines;" Cal. Code Regs., tit. 14, § 15000 et seq.) when it approved Real Parties' proposal to bring up to 1,500 units of new housing to the City at the Faria/Southwest Hills Annexation Project ("Project") site. As this Court is aware, the Project represents the culmination of over 20 years of collaborative efforts between the City and Real Parties to develop much-needed housing in the City. The proposal reflects the will of the City's Planning Commission and City Council, and it also reflects the will of the City's electorate, which approved a voter initiative that pre-zoned the Project site for future residential development of 1,500 homes in 2005.

Despite these efforts, the City and Real Parties have been met with ongoing opposition from SMD.

On February 10, 2022, this Court issued a Statement of Decision that granted, in limited part, SMD's motion for peremptory writ of mandate. This Court generally agreed that the City complied with CEQA and the Guidelines and that there was no merit to the majority of the concerns submitted by SMD, but found that further disclosures were required for four discrete issues, two of which are closely interrelated: the analysis of potential impacts associated with accessory dwelling units ("ADUs"), analysis of the ADUs' projected water demands, biological resource surveys, and proposed mitigation measures for air quality and greenhouse gas ("GHG") impacts. (*See* Statement of Decision at p. 37.)

Respondents and Real Parties do not bring this motion to re-litigate this matter. Rather, Respondents and Real Parties take this opportunity to respectfully call this Court's attention to evidence in the administrative record that is relevant to these issues. Respondents and Real Parties also respectfully take this opportunity to call this Court's attention to relevant controlling legal authority.

As explained in Respondents' and Real Parties' legal argument below, the first-tier,

program-level Environmental Impact Report ("EIR") for Real Parties' Project complies with CEQA. To the extent it is feasible to do so at this level of environmental review, environmental impacts associated with the proposed ADUs have been disclosed and analyzed in the EIR.[1] The EIR's analysis of biological resource impacts also complies with CEQA, and so does the EIR's proposed mitigation of air quality and GHG impacts.

II. BACKGROUND AND PROCEDURAL HISTORY

The Project represents the culmination of a nearly two-decade-long planning and environmental review process, involving thorough public scrutiny and input. In fact, the City and its residents have contemplated the development of new housing in the southwest hillside area of Pittsburg for over 20 years. (AR 5778.) Since 2001, the City's General Plan has envisioned that the approximately 606 acres comprising the Project site could accommodate a maximum buildout of 1,500 dwelling units. (AR 1006.) In 2005, City voters approved an initiative entitled "Measure P (City of Pittsburg Voter Approved Urban Limit Line and Pre-zoning Act)," which brought this land into the Urban Limit Line of Pittsburg and pre-zoned the entire Project site. (AR 1006, 5778.) Since 2006, Real Parties have worked diligently and in collaboration with the City to refine the Project proposal. (*See* AR 5764-5765 [Project history].)

On February 22, 2021 and March 15, 2021, the City Council approved (1) General Plan mapping and text amendments to re-designate 478-acres of Low Density Residential ("LDR") and 128 acres of Open Space, to 341-acres of LDR and 265-acres of Open Space, and amend or delete existing City goals/policies; (2) prezoning amendments, including approval of a Master Plan, to allow for corresponding RS-4-P (Single Family Residential, 4,000 square foot minimum lot size with Master Plan) and OS-P (Open Space with Master Plan) designations on the site; (3) initiation of annexation proceedings; and (4) approval of a development agreement ("DA"). (AR 5.) In response, SMD filed a writ petition, asking the Court to invalidate the City's approval on various

[1] As explained in further detail below in Section IV(A), the ADUs will not be built as separate, standalone structures. Instead, they will be built within the building envelope of up to 150 of the other houses at the Project site. The ADUs will function as a room within up to 150 of the other houses at the Project site that may be rented out for a restricted rental rate at the option of the homeowner.

grounds.

Following briefing and oral argument, the Court filed a Statement of Decision on February 10, 2022. In the Statement of Decision, the Court found that the City violated CEQA, citing four limited grounds: (1) the Project description did not include the 150 Accessory Dwelling Units; (2) the EIR failed to consider the water supply impact based on 1,650 units; (3) the EIR failed to describe the baseline of biological resources, specifically special status plant species; and (4) the discussion of air pollution and greenhouse gas impacts and mitigation measures was too vague.

III. LEGAL STANDARD

"The Legislature has granted trial courts broad discretion to order new trials," and the only "relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) In writ of mandate proceedings, a party may bring a motion for a new trial to request that a court rehear a motion for peremptory writ of mandate (i.e., grant a new "trial"). (Code Civ. Proc., § 1110.)

A decision may be modified or vacated, in whole or in part, and a new trial may be granted on all or part of the issues in controversy, if the Court determines that one of seven enumerated deficiencies occurred. (Code Civ. Proc., § 657.) One of the seven enumerated deficiencies is "insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law." (*Id*.) Though they are listed together, the determination of "insufficiency of the evidence to justify the […] decision," and the determination that a "decision is against the law" are two wholly separate conclusions, requiring different distinct analyses by the Court. (*See, e.g., Renfer v. Skaggs* (1950) 96 Cal.App.2d 380, 383.)

When examining whether evidence supporting a judgement is "insufficient," the trial court is empowered to "reweigh the evidence," and "draw reasonable inferences therefrom." (*Barrese v. Murray* (2011) 198 Cal.App.4th 494, 503.) If, in reviewing the evidence, the trial court judge determines that the "evidence, as a whole" was not "sufficient to sustain" the decision, then it is the court's duty to grant a new trial. (*Id*.; *see also Quinn v. Oil Fields Trucking Co.* (1955) 130 Cal.App.2d 720 ("It is the duty of the trial judge to set aside a verdict in the exercise of sound discretion if he is of the opinion that the verdict is contrary to the weight of the evidence.") A trial

court may grant a new trial even when there is substantial evidence to sustain the original decision, if it determines that that the preponderance of the evidence is against the original decision. (*In re Est. of Masrobian* (1962) 207 Cal.App.2d 133, 140.) A decision is considered "against the law" where the evidence is insufficient in law and without conflict on any material point. (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15; *see also Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892, 906.)

IV. LEGAL ARGUMENT

Respondents and Real Parties respectfully submit that the portions of this Court's February 10, 2022 Statement of Decision that identified CEQA violations (*see* p. 37) are not supported by evidence in the administrative record and are contrary to controlling legal authority. Accordingly, a new trial on these matters is warranted. (Code Civ. Proc., § 657.)

A. To the Extent Feasible in a First-Tier Environmental Document, the EIR Disclosed and Analyzed All Potential Environmental Impacts Associated with the Development of the Accessory Dwelling Units

The Statement of Decision concluded that "the City violated CEQA" because "[t]he Project description fails to include the 150 ADUs." (Statement of Decision at pp. 11, 14, 37.) Respondents and Real Parties respectfully submit that this conclusion is incorrect. Evidence in the Administrative Record shows the Project description complies with CEQA, as does the City's analysis of the ADUs' environmental effects.

In their joint opposition brief, Respondents and Real Parties informed this Court that the Project's Master Plan — which was included as Appendix A to the Draft EIR and referenced extensively throughout the EIR's Project description — stated that the Project would include "second units (accessory dwellings) in single-family residential developments." (AR 1616 [Master Plan at (D)(1)], cited at p. 14 of the Joint Opposition Brief.) Respondents and Real Parties also explained that "the ADUs are included in the footprint of the associated residential unit and are not intended to function as separate households." (Joint Opposition Brief at pp. 14-15, citing AR 37460 ["[i]t is important to note that these units are included into the footprint of the house, not separate stand-alone structures"] and AR 809; *see also* AR 821 [Section 3.09 of Development Agreement: ADUs must have "a separate entrance" because they will be part of the same structure

as other primary units]; *see also* Parsons Dec., ¶¶ 3-5.)[2] Accordingly, as counsel for Real Parties explained at the December 1, 2021 writ hearing, development of the ADUs will not result in a net increase in the EIR's population estimates for the Project, and the ADUs will not result in any environmental impacts above and beyond those impacts that were disclosed and analyzed in the Project's EIR. (Raskin Dec., ¶ 3.) These ADUs are simply a designated bedroom within the footprint of a future house with a separate entrance and exit, and the owner of the home may elect to rent this bedroom for a reduced and established rent amount. (Parsons Dec., ¶ 3.)

It is also important to note that site-specific development standards are prescribed in the Project's Master Plan. (*See* AR 1609-1610). For example, section 2(A)(2) sets a maximum density of "3-5 dwelling units per gross acre" in "Area 1" and "1-3 dwelling units per gross acre" in "Area 2," and section 2(A)(3)(a) sets a maximum building height of 35 feet. (AR 1609.) Those development standards ultimately determine building envelopes and thus the total population capacity at the Project site and anticipated resource consumption. The legal designation as ADUs of interior floor space (i.e., a bedroom) within 150 homes does not change or alter the underlying assumptions regarding population at the Project site or utility needs. And for that matter, the Programmatic EIR took a conservative approach when estimating the Project's environmental impacts. The Master Plan and other Project approvals specify that a *maximum* of 1,500 homes may be built at the Project site, but it is possible that Real Parties may map and develop fewer units. (*See* AR 1609.)

Furthermore, the Development Agreement specifies that at least 150 homes must be equipped with a separate door, kitchenette, and restroom facilities so that homeowners can have the *option* of renting a bedroom at an affordable rate (to a family member or someone else), but homeowners will not be forced to rent the ADUs if they do not want to do so. (AR 821, 865 ["The

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[2] In their Joint Opposition Brief, Respondents and Real Parties cited evidence that showed "the ADUs will allow extended families to live near each other" and "[i]t is likely that cohabitating family members will operate as a singular household." (AR 37460, cited at p. 14 of the Joint Opposition Brief [internal quotations omitted].) The City relied upon this evidence, as well as the description of the ADUs in the Project's Development Agreement, in its findings in support of the certification of the EIR. (AR 660.)

[ADU], if it is rented, shall be rented at not more than Qualifying Rent and occupied by Eligible Households."].) Consistent with their practice in other development projects in the City, the portions of homes designated as ADUs will be within the footprint of the future home and will have an interior door connection. (*See* Parsons Dec., Exh. 1 at p. 2 [floor plan showing interior door that connects ADU to the remainder of the house.) Homeowners may rent other rooms in a house, but those rooms would not be subject to a rent restriction. If a homeowner decides to rent a room in their house, it does not trigger additional CEQA review.

Assuming, arguendo, that the ADUs would result in site-specific environmental impacts, those impacts will be evaluated as part of a subsequent tier of the environmental review process (if the ADUs' approval is discretionary). (Joint Opposition Brief at p. 14; *see also* fn. 4, *infra* [ADUs are generally approved through a ministerial process].) The precise configuration and quantity of residential units at the Project site has not yet been determined, as this will be done with the Tentative Map processing, which will take into account determinations made in the subsequent environmental review process. (*Ibid.*; *see also* AR 829 ["Location of all required accessory dwelling units within a phase shall be finalized prior to the City's approval of such final subdivision map for such phase of the Project."].) To this end, the Draft EIR on page 3-14 (AR 1023) specifically states that tentative maps are not being proposed, meaning the exact distribution of residential units and ADUs is unknown, and will not be known, until subdivision maps are plotted and proposed — this means that subsequent environmental review will be necessary. (*See* Joint Opposition Brief at pp. 14-15, citing *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1450.)[3] This Court endorsed this methodological approach for geological hazards, grading, fire hazards, effects on streams, and the presence of agricultural land. All of

[3] In *Save Round Valley*, the court upheld an EIR where the project description for a tentative map did not mention the possibility that future lot owners could apply for a conditional use permit to construct a second dwelling unit. The court held: "even if the building of some second units might be foreseeable, it is impossible to predict how many units will be built, the size of such units, on which lots they might be built, their location within a lot, the visibility of a second unit from outside the subdivision, or how such units might impact the environment." (157 Cal.App.4th at p. 1450.)

these topics will be studied in further detail in a subsequent tier of the environmental review process. (*See* Statement of Decision at pp. 20, 25, 29, 37.) The same methodological approach should be applied to ADUs, and to the extent there may be impacts associated with their development, and to the extent that the ADUs are subject to a discretionary approval process, then those impacts will be disclosed and analyzed in the future after tentative maps have been submitted to the City.[4]

Respondents and Real Parties also respectfully submit that the Statement of Decision incorrectly concluded that "the City violated CEQA" because "[t]he EIR fails to consider the water supply impact based on 1,650 units." (Statement of Decision at pp. 26-27, 37.) As noted above, development of the ADUs would not result in a net increase in the EIR's water use estimates for the Project, and the ADUs will not result in any environmental impacts above and beyond those impacts that were disclosed and analyzed in the Project's EIR. (Joint Opposition Brief at pp. 14-15 ["the ADUs are included in the footprint of the associated residential unit and are not intended to function as separate households"], citing AR 37460 and AR 809; see also AR 821; Raskin Dec., ¶ 3; Parsons Dec., ¶ 3 and Exh. 2.)

The ADUs will not have separate utility connections, and they will not use more water or result in any additional environmental impacts above and beyond the potential impacts that were disclosed and analyzed in the Project's EIR. (Parsons Dec., ¶ 3; *see also* Raskin Dec. at ¶ 4 and Exh. 1 [Per Contra Costa Water District's Code of Regulations, ADUs do not require a separate water meter connection].) Homes with ADUs will have the same number of water fixtures (e.g., sinks, toilets, faucets, etc.) as homes without ADUs. (Parsons Dec., ¶ 3 and Exh. 2.) In other words, the water needs of the ADUs is no greater than the water needs of the 1,500 main units,

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[4] While all environmental impacts associated with the ADUs have been appropriately disclosed and analyzed in the EIR (or will be studied in a future tier of environmental review), it is important to note that State and City laws generally mandate the ministerial approval of ADUs, which means that they are not subject to CEQA. (Gov. Code, § 65852.2(A)(3) ["A permit application for an accessory dwelling unit or a junior accessory dwelling unit shall be considered and approved ministerially without discretionary review or a hearing"]; Pittsburg Mun. Code, § 18.50.310 ["An application for an accessory dwelling unit and/or junior accessory dwelling unit meeting [applicable] development standards shall be processed ministerially"]; *see also* Pub. Resources Code, § 21080(b)(1) [CEQA does not apply to ministerial approvals].)

which was appropriately studied and evaluated in the EIR. (*See* Joint Opposition Brief, p. 27, citing AR 1412-1414.) No further environmental review is needed.

B. The EIR's Analysis of Potential Impacts to Biological Resources Complies with CEQA

Respondents and Real Parties respectfully submit that the Statement of Decision incorrectly concluded that "the City violated CEQA" because "[t]he EIR fails to describe the baseline of biological resources, specifically special status plant species." (Statement of Decision at pp. 16-18, 37.) The Statement of Decision determined that the EIR did not comply with CEQA because the EIR relied upon field surveys conducted in 2013 and 2014, as well as a reconnaissance-level survey conducted in 2017. (*See* Statement of Decision at pp. 16-18.) The Court found that "the 2013 and 2014 surveys were out of date" and "substantial evidence does not support the City's decision not to conduct at least one additional survey to document special-status plant species during a time of year when they would likely be present." (*Id.* at p. 18.)

The EIR's methodological approach is supported by substantial evidence in the administrative record. In 2017, shortly before the Draft EIR was circulated for public review, biological consultants revisited the Project site to examine whether habitat conditions at the Project site had changed since 2014 and whether the special-status plant species observed in 2014 could still be expected to occur at the Project site. (*See* AR 2215-2216 [Pacific Biology's 2017 Biological Evaluation Report].) The 2017 study found that the Project site "provides only marginal habitat for special-status plant species known from the region." (AR 2215.) Despite this observation, the 2017 survey carefully documented whether the Project site contained habitat that could potentially support special-status plant species:

> *Josh Phillips (Principal Biologist with Pacific Biology) and Jake Schweitzer (VNLC Senior Botanist/Wetland Ecologist) conducted a reconnaissance-level survey of the project site on August 22, 2017. The survey included driving all accessible roads and conducting more focused evaluations of representative habitat locations. The on-site and surrounding habitat types were characterized, and the potential occurrence of special-status plant and wildlife species was evaluated based on an analysis of on-site habitats, known home ranges and/or distribution of target species, and other biological characteristics. A focused search was conducted for streams and wetlands, which focused on areas with appropriate topography to support such features. Representative digital photographs were taken of habitat conditions and features of interest.*

(AR 2223.) These findings were incorporated into Table 4.4-1in the EIR, which discloses whether special-status plan species have the potential to occur at the Project site. (AR 1159-1168.)

Rather than re-document the special-status species that were observed in the 2013 and 2014 surveys, the EIR took a more *conservative* approach and *assumed* that the Project would impact all special-status plant species that have the potential to occur at the site (i.e., all species for which the 2017 study identified suitable habitat in which those species could potentially occur) and assumed that any impacts would be significant. (*See* Joint Opposition Brief at p. 17 ["the EIR assumed their presence and identified mitigation to reduce impacts to less than significant"]; AR 1196.) This approach made sense as well given that tentative maps and other subsequent approvals for development might be years away, such that an interim update would not provide as meaningful information as an updated survey performed during the tentative map process. Accordingly, the EIR requires compliance with extensive mitigation measures to address any potential impacts to special-status plant species that may occur at the site. The EIR presumed that special-status plant species will be present at the Project site, it presumed that impacts to those species will be significant, and it adopted mitigation measures that will address those impacts.

Nothing further would be gained by conducting additional surveys at the Project site at this time, because the EIR assumed the presence of all special-status species. Except, perhaps, for the possibility that surveys would show less need for the proposed mitigation measures. In any event, the legal authorities cited in the Joint Opposition Brief (at pp. 16-19) show that the EIR complies with CEQA.

C. Mitigation Measures for Air Quality and Greenhouse Gas Impacts Comply with CEQA

Respondents and Real Parties respectfully submit that the Statement of Decision incorrectly concluded that "the City violated CEQA" because "[t]he discussion of air pollution impacts and mitigation measures is too vague." (Statement of Decision at pp. 30-31, 37.)

The EIR's mitigation measures are appropriate for a first-tier CEQA document, and deferral of site-specific mitigation is appropriate under CEQA. (Joint Opposition Brief, pp. 30-32, citing Guidelines, §§ 15152(c), 15126.4(a)(1)(B).) This approach has been approved in similar

cases. (Joint Opposition Brief at p. 20, citing *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 376 ["We do not agree with appellant, however, that the FEIR ignored mitigation measures or stated them inconclusively, given the broad, nebulous scope of the project under evaluation."].) There is no reason to deviate from this well-established rule here.

In any event, the EIR's mitigation measures are not vague. Nearly identical mitigation measures have been approved in other cases. Mitigation Measure 4.3-1 mandates the use of Tier 4 construction equipment. (AR 926-927.) Nearly identical mitigation was approved in *Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 970 (court approved mitigation that required use of Tier 2 equipment, even though commenters requested use of Tier 4 equipment). Mitigation Measure 4.3-1 mandates the use of BAAQMD's recommended mitigation measures, including, e.g., ridesharing and solar water heating, among other programs. (AR 927-930.) Nearly identical mitigation was approved in *Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 971–972 (court approved use of "prescriptive mitigation measures, such as attic fans, whole house fans, and photovoltaic, solar water heaters").

V. CONCLUSION

For the foregoing reasons, Respondents and Real Parties respectfully request that the Court grant Respondents and Real Parties' motion for a new trial. Respondents and Real parties respectfully request that this Court vacate its Statement of Decision and enter a new decision denying SMD's motion for peremptory writ of mandate. In the alternative, Respondents and Real Parties respectfully request that this Court vacate its Statement of Decision and schedule a new hearing on SMD's motion for peremptory writ of mandate. If this Court desires, Respondents and Real parties would be happy to submit supplemental briefing on the legal and factual issues discussed in this motion, and raised within the administrative record.

Evidence in the administrative record shows that the first-tier, program-level EIR complies with CEQA. To the extent it is feasible to do so at this level of environmental review, environmental impacts associated with the proposed ADUs have been disclosed and analyzed in the EIR. The EIR's analysis of biological resource impacts also complies with CEQA, and so does the EIR's proposed mitigation of air quality and GHG impacts.

Respectfully Submitted,

DATED: February 25, 2022

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