EXHIBIT B

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May 21, 2010

Mr. Kristen E. Pigman, President
The Pigman Companies, LLC
2481 Sunrise Boulevard, Suite 200
Gold River, CA 95670

Subject: Responses to Comments by Tom Brohard and Associates Related to the Napa Commerce Center Traffic Impact Analysis (TIA)

Dear Mr. Pigman:

This letter has been prepared in response to a comment letter submitted by Tom Brohard and Associates related to our Napa Commerce Center TIA. Our responses address the various technical issues raised by Mr. Brohard. Because a number of Mr. Brohard's comments reflect his being unaware of other traffic data, we have also provided updated information that confirms the validity of our TIA.

Although Mr. Brohard raised a number of comments, they essentially involve the following five (5) issues:

1. Validity of the baseline analysis scenario
2. On-site queuing impacts at project driveways
3. Need for a cumulative analysis
4. Adequacy of mitigation measures
5. Consistency with the Napa Pipe Project

1. Validity of the Baseline Analysis Scenario:

The baseline scenario was established through consultations with Mr. Rick Marshall, the Deputy Director of Public Works for Napa County. This scenario reflects the buildout of the adjacent Greenwood Business Park; the proposed Napa Commerce Center trips were then added to identify the short term traffic impacts. Due to the size of these developments (378,891 sq.ft. in the approved Greenwood Business Park and 490,503 sq.ft. in the proposed Napa Commerce Center project), the traffic generated by these combined developments would represent a very conservative estimate of traffic growth over the next 2-3 years. Our TIA short term baseline scenario is conservative and valid.

With regard to other "Annual Ambient Growth", we assume Mr. Brohard is referring to potential background traffic increases on State Route 29 (SR 29) and SR 12 in the project area. However, Caltrans traffic volume records indicate that volumes on SR 29 and SR 12 have been constant or have actually decreased slightly over the 2006-2009 (the most recent 3 year period for which Caltrans has volume data). There is no evidence that our short term baseline analysis should have included increased traffic volumes on SR 29 or SR 12 – our TIA analysis is appropriate.

With regard to impacts at SR 29/SR 12-Airport Boulevard, our TIA found that when project trips are added to the baseline conditions, this intersection would continue to operate at an acceptable LOS "D". Cumulative buildout mitigation measures are being established (and the appropriate traffic impact fee identified) as a part of the "Update of Airport Industrial Area Traffic Mitigation Fee Program" (see section 3 of this letter).

2. On-Site Queuing Impacts at Project Driveways:

Our TIA provided Level of Service (LOS) and operations calculations for each of the four project driveways (three on Devlin Road and one on Airport Boulevard). As outlined in our report (Table 5, page 13, all of the driveways outbound traffic would operate at LOS "C" or better. This would be considered very acceptable urban peak hour conditions.

With regard to queuing, our TIA also provided 95th percentile vehicle queue calculations for each driveway (Table 6, page 18 of the TIA). The following compares the queue lengths with the distance between the adjacent roadway travel lane and the internal parking aisle:

- Devlin Road north driveway; 50 foot queue/55 foot distance
- Devlin Road center driveway; 65 foot queue/60 foot distance
- Devlin Road south driveway; 49 foot queue/70 foot distance
- Airport Boulevard driveway; 62 foot queue/65 foot distance

As this comparison indicates, at three of the project driveways, the calculated 95th percentile queue for vehicles exiting the project would not back up beyond the nearest internal parking aisle. Even at the project's Devlin Road center driveway, the calculated queue would be approximately equal to the available distance between the travel lane and the internal parking aisle. There is no evidence that the driveway queuing would significantly impact internal circulation. Similarly, based on the traffic circulation analysis, there is no reason to conclude that the driveways' operation would impact traffic flows on the adjacent streets.

3. Need for a Cumulative Analysis:

As noted above, the scope of our TIA was established through consultations with Mr. Rick Marshall, the Deputy Director of Public Works for Napa County. Consistent with County traffic analysis direction, our TIA relied on the cumulative buildout traffic findings included in the County's cumulative analysis - the "Update of Airport Industrial Area Traffic Mitigation Fee Program".

The Airport Industrial Area is subject to a County traffic mitigation fee program for the purpose of constructing long term traffic mitigation within and adjacent to the area. That fee is currently $3,551 per PM peak hour trip. The current update has involved a cumulative traffic analysis including complete buildout of the Airport Industrial Area, cumulative development outside of the Area and long term traffic growth on the nearby State highways.

The proposed Napa Commerce Center project was included in the cumulative analysis conducted as a part of the Update of Airport Industrial Area Traffic Mitigation Fee Program. Thus, a cumulative traffic analysis is available relative to the proposed Napa Commerce Center.

4. Adequacy of Mitigation Measures:

The TIA for the Napa Commerce Center project concluded that traffic impacts at the Airport Boulevard/Devlin Road intersection would require mitigation. The TIA identifies specific mitigation measures to address the impacts resulting from the proposed project (and the cumulative baseline traffic generated by the Greenwood Business Park). These measures include the widening of Airport Boulevard and Devlin Road to accommodate dual westbound left turn lanes. These measures would address queuing impacts that would be reduced to "less than significant" levels.

The TIA also identifies intersection queuing problems at SR 29/Soscol Ferry and SR 29/Airport-SR 12 that would be exacerbated by the proposed Napa Commerce Center project. However, as noted in the TIA, these problems currently exist and are related to the overall operation of the intersections. The Napa County cumulative analysis conducted as a part of the Update of Airport Industrial Area Traffic Mitigation Fee Program applies to the Napa Commerce Center project and addresses the future improvements on these regional facilities. The proposed Napa Commerce Center project would participate in the implementation of these cumulative mitigation measures through the adopted fee program. The current traffic mitigation fee of $3,551 per PM peak hour trip would yield a total of $1,498,522 – this fee would be applied toward the project's "fair share" of the longer term mitigation measures on these regional facilities.

5. Consistency with the Napa Pipe Project:

The Napa Pipe Project would be a large mixed use development north of the Airport Industrial Area. The project application is being considered by Napa County, and appropriate environmental documents (including traffic studies) have been completed.

This project has been included in the cumulative analysis conducted as a part of the Update of Airport Industrial Area Traffic Mitigation Fee Program. Thus, there will ultimately be a consistent set of mitigation measures that address impacts associated with the Airport Industrial Area and other cumulative development.

In summary, the TIA for the Napa Commerce Center was prepared based on consultations with Mr. Rick Marshall, the Deputy Director of Public Works for Napa County. The analysis included recommended mitigation measures to address short term base plus project impacts. With regard to cumulative traffic conditions, the proposed project would participate in the Airport Industrial Area Traffic Mitigation Fee Program, a program designed to allow specific development projects to pay their "fair share" toward cumulative mitigation measures. With the project specific mitigation and participation in the Airport Industrial Area Traffic Mitigation Fee Program, there would be no residual significant traffic impacts associated with the project.

I trust that this letter responds to your needs and those of Napa County. Please let me know if further input is required.

Sincerely,

OMNI-MEANS, Ltd.
Engineers & Planners

George Nickelson

George W. Nickelson, P.E.
Branch Manager

Cc: Brad Shirhall; Alicia Guerra,

GWN
C1409LTR002.doc

EXHIBIT C

Tom Brohard and Associates

May 17, 2010

Mr. Richard Drury, Attorney at Law
Lozeau/Drury LLP
1516 Oak Street, Suite 216
Alameda, California 94501

SUBJECT: Review of the Mitigated Negative Declaration, Initial Study Checklist, Use Permit, and Final Traffic Impact Analysis for the Napa 34 Holdings Commerce Center in the County of Napa – Traffic Issues

Dear Mr. Drury:

Tom Brohard, P.E., has reviewed the March 17, 2010 Mitigated Negative Declaration (MND), the Initial Study Checklist, Use Permit, and related documents prepared for the proposed Napa 34 Holdings Commerce Center (Project) in the County of Napa. The Omni-Means February 2010 Final Traffic Impact Analysis (Traffic Study) for the Project has also been reviewed, and additional information has been received from George Nickelson, the traffic engineering consultant with Omni-Means who oversaw the Traffic Study.

Education and Experience

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

Project Description

Page 1 of the Notice of Intent to Adopt a Mitigated Negative Declaration describes the Napa 34 Holdings Commerce Center as:

"An industrial park totaling approximately 490,500 square feet of new development in eight buildings... Approximately 73% percent (or +/- 356,000 square feet) of the total development floor area would be dedicated to warehousing uses, while the remaining 27 percent (or +/- 134,500 square feet) would be utilized as office space. Access would be provided from three new driveways located off an extension of Devlin Road south of the existing Devlin Road/Airport Boulevard intersection and a single right-in right-out driveway off

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Airport Boulevard. Roadway improvements, including road construction at Devlin Road and road widening at Airport Boulevard are also proposed. Parking for 740 vehicles is to be provided on-site, along with six loading docks."

Traffic Issues

Based on the information provided in the Initial Study Checklist, Use Permit, Traffic Study, and related documents for the Napa 34 Holdings Commerce Center, my review indicated the following:

- Update of Traffic Impact Fee Program – The Traffic Study indicates the County of Napa did not require an analysis of cumulative conditions as an area-wide traffic study to accomplish this task and to update the County of Napa Traffic Impact Fee Program is nearly complete. In my telephone discussion on May 12, 2010, George Nickelson indicated an administrative draft of cumulative traffic conditions and the corresponding update of the Traffic Impact Fee Program was now being reviewed by County staff. From his experience in the area, Mr. Nickelson indicated the current fee of $3,551 per PM peak hour trip will likely increase when the update is adopted.

  At the current fee, the Napa 34 Holdings Commerce Center Project would pay nearly $1.5 million (422 PM peak hour trips times $3,551 equals $1,498,522) for mitigation of its cumulative traffic impacts. Assuming that the County of Napa continues all of the various components of their overall Traffic Impact Fee Program as they have historically done, it appears that the Napa 34 Holdings Commerce Center Project will be required to pay their "fair share" of the regional roadway improvements needed to mitigate the cumulative traffic impacts of all projects in the area.

If you have questions regarding these comments, please call me at your convenience.

Respectfully submitted,

Tom Brohard and Associates

Tom Brohard

Tom Brohard, PE
Principal

Enclosure

EXHIBIT D

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• Also admitted in Arizona
•• Admitted in Hawaii
••• Also admitted in Nevada
•••• Also admitted in Illinois

May 12, 2010

BY ELECTRONIC MAIL and US MAIL

Honorable Members of the Planning Commission
County of Napa
c/o John McDowell
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Chris Cahill
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RE: Mitigated Negative Declaration for Napa 34 Holdings Commerce Center Use Permit and Variation to Development Standards Application No P09-00329-UP and TPM and LLA Application No P09-00330-TPM;
SCH Number: 2010032066

Honorable Members of the Planning Commission and Mr. Cahill:

I am writing on behalf of Carpenters Local 751, its members, and City of Napa resident, Mr. Dan Digardi (collectively, "Local 751") concerning the proposed Preliminary Mitigated Negative Declaration and its initial study and supporting documents ("IS/MND") for Napa 34 Holdings Commerce Center Use Permit and Variation to Development Standards Application No P09-00329-UP and TPM and LLA Application No P09-00330-TPM; SCH Number: 2010032066 ("Project" or "Napa 34 Project"). We urge the Planning Commission to approve the Napa 34 Project with supplemental environmental projects (SEPs) that the developer has in good faith voluntarily agreed to implement. These SEPs will address all of the environmental issues raised by Local 751 and will result in a model "green" project with minimal environmental impacts, just as contemplated by CEQA. As such no environmental impact report ("EIR") and no recirculation of the mitigated negative declaration should be required. The developer should not be penalized for its good faith efforts to improve the Project with any further delays.

I. INTRODUCTION: Napa 34 Holdings has Voluntarily Agreed to Incorporate Numerous Supplemental Environmental Projects to Address Public Comments and Make the Project Even More Environmentally Friendly. Napa 34 Should not be Penalized for its Good Faith Efforts to Improve the Project with Further Delays.

As discussed in our letter dated April 29, 2010, we are very pleased that after receiving our comments dated April 20, 2010, Napa 34 Holdings, LLC ("Napa 34") agreed in good faith to incorporate numerous supplemental environmental project (SEPs) to address the concerns raised by Local 751 during the CEQA public comment period. We are pleased that in response to staff concerns, Napa 34 has agreed to incorporate even more supplemental measures to further reduce each impact discussed by Local 751, and to make the Napa 34 Project a clean and green project that should serve as a model for similar projects in the future.

As discussed in detail in the comment letter of environmental consultant, Mathew Hagemann, PG, our experts confirm that these additional measures are sufficient to reduce the Project's impacts below applicable CEQA significance thresholds. Thus, no environmental impact report (EIR) or recirculation of the mitigated negative declaration should be required. Indeed, this is precisely the type of good faith response that CEQA is designed to promote so that parties can work out their differences in the administrative process without the need for litigation, and that projects can be built with the minimum environmental impacts.

Certainly, Napa 34 should not be punished for its good faith behavior in adding SEPs in response to public comments with a mandate to prepare an EIR or to recirculate the negative declaration, which could result in months of delay. Instead, Napa 34 should be rewarded for its good faith efforts to improve the Project voluntarily, and the County should grant Project approval as expeditiously as possible.

II. SUPPLEMENTAL ENVIRONMENTAL PROJECTS ADDRESS ALL ISSUES RAISED BY PUBLIC COMMENTS.

Although Napa 34 and the County's IS/MND conclude that the Project has no significant impacts and the project already incorporates many environmental commitments and an environmentally-sensitive design, Napa 34 has agreed to request that the County include supplemental environmental measures for Use Permit and Variation to Development Standards Application No. P 09-00329-UP and Tentative Parcel Map and Lot Line Adjustment Application No. P 09-00330-TPM. Although the IS/MND includes mitigation measures to address all of the environmental topics considered in the IS/MND, the purpose of the supplemental environmental measures is to reduce any residual impacts of the Project even further and to allay any community concerns.

In particular, Napa 34 agreed to request that the County include supplemental environmental measures to further reduce the Project's impacts in the areas of construction emissions, greenhouse gas, water usage, nitrogen oxide emissions, and stormwater. I discuss

these measures below, and they are analyzed in detail by Mr. Hagemann in his attached comment letter.

1. GREENHOUSE GAS AND NOx

a. SOLAR PANEL CAPACITY: The Project buildings are to be designed to support structural loads associated with roof-mounted solar arrays. To further reduce greenhouse gas and nitrogen oxide ("NOx") emissions, in conjunction with construction of Project buildings, Napa 34 shall explore opportunities to provide individual buildings designed to support roof-mounted solar panels that may be installed by future tenants ("Solar Panels"), and shall enable tenant use of the Solar Panels to help to meet the Project's electricity needs.

b. GREENHOUSE GAS OFFSETS: Napa 34 agrees to purchase and retire 800 metric tons (MT) of carbon dioxide offset credits per year for ten years (total of 8000 MT) from the Chicago Climate Exchange or comparable broker.

DISCUSSION: As discussed by Mr. Hagemann, these measures will reduce the Project's greenhouse gas impacts below the level of significance proposed by the Bay Area Air Quality Management District's ("BAAQMD"). Mr. Hagemann explains that the Project as proposed will generate 1896 MT/yr of carbon dioxide emissions, but meets the 2,870.4 MT/Y CO2e efficiency threshold based on the analysis contained in the Napa 34 Initial Study/Mitigated Negative Declaration (see p. 13 of 41). The Bay Area Air Quality Management District's proposed CEQA significance threshold for greenhouse gases is 1100 MT/yr. Therefore, carbon offset credits of 800 MT/yr will reduce the Project's carbon emissions to below the applicable draft significance threshold and will still meet the BAAQMD efficiency threshold. Installation of solar panels will reduce greenhouse gas and NOx emissions even further. With these measures, Mr. Hagemann concludes that the Project will have no unmitigated significant impacts in the area of greenhouse gases.

2. CONSTRUCTION EMISSIONS

ALTERNATIVE FUEL CONSTRUCTION EQUIPMENT: Napa 34 shall require in its construction contracts that all construction equipment used by selected contractors to construct the Project shall be powered by one of the following alternative fuels: biodiesel, biodiesel blend, electricity, or natural gas, except where construction equipment capable of utilizing such alternative fuels is not available to the selected contractor through the exercise of reasonable diligence.

DISCUSSION: As discussed by Mr. Hagemann, this measure goes far beyond the Bay Area Air Quality Management District's ("BAAQMD") suggested construction mitigation of 15% alternative fuel vehicles. Mr. Hagemann concludes that with the other construction mitigation measures that the developer has already incorporated in the Project and the mitigation measures included in the Initial Study/Mitigated Negative Declaration, including the BAAQMD's

suggested measures, the Project has incorporated all feasible mitigation measures and will have no significant unmitigated air quality impacts.

3. STORMWATER

STORM WATER POLLUTION PREVENTION PLAN: Prior to the commencement of Project construction, Napa 34 shall retain a qualified third-party consultant to develop a stormwater pollution prevention plan ("SWPPP") in conformance with all applicable requirements of the State Porter Cologne Water Quality Act (Cal. Water Code §§ 13000 – 14598) and Federal Clean Water Act (13 U.S.C. 1251 et seq.).

DISCUSSION: Mr. Hagemann explains that development of a stormwater pollution prevention plan (SWPPP) is the standard means to mitigate stormwater impacts. Requirements for the SWPPP are set forth in the State Porter Cologne Water Quality Act (Cal. Water Code §§ 13000 – 14598) and Federal Clean Water Act (13 U.S.C. 1251 et seq.). Use of a third-party expert consultant will enhance the objectivity and adequacy of the plan. Mr. Hagemann concludes that with this measure, and the other mitigation measures recommended in the MND, the Project will have no significant unmitigated stormwater impacts.

4. WATER SUPPLY

a. DROUGHT-TOLERANT LANDSCAPING: Napa 34 shall ensure that landscaping for the Project employs native, drought-tolerant plant species to the extent practicable, provided that such landscaping shall not conflict with the provisions of any mitigation and monitoring plans providing for the preservation, restoration and creation of any existing and proposed wetlands.

b. WATER-CONSERVING PLUMBING FIXTURES: Napa 34 shall install water-conserving plumbing fixtures that maximize efficiency and water conservation in Project office-buildings, including dual-flush toilets and ultra-low flush or waterless urinals as required by applicable building codes.

DISCUSSION: Napa 34 has already agreed to the mitigation measures included in the project Water Supply Report incorporated by reference in the IS/MND (see page 39 of 41) and agreed to pay mitigation fees in accordance with the City of American Canyon water capacity fee program (see p. 16 of the Water Supply Report). In addition, the developer has agreed to the above supplemental mitigation measures. Mr. Hagemann explains that two of the largest areas of commercial water usage are landscaping and plumbing fixtures. The developer has agreed to incorporate two of the most effective measures to reduce water usage. Ultra-low flush plumbing fixtures can reduce water usage by one-half or more. Drought-tolerant landscaping can also reduce water usage by more than one-half. Mr. Hagemann concludes that with these measures, and the other water conservation measures in the MND, the developer has incorporated feasible mitigation measures in the project, and the project will have no significant unmitigated water supply impacts.

5. ODORS

Mr. Hagemann concludes that no additional measures would be required because the Napa 34 Project is a wine storage, warehouse, distribution and office complex and will not generate odor emissions that would affect residences located over 1,000 feet away from this industrial area.

DISCUSSION: Mr. Hagemann explains that the 1999 BAAQMD CEQA Guidelines state that the screening distance for significant odor impacts from a wastewater treatment plant is one mile. The wastewater treatment plant is just beyond the screening distance of one mile away from the Napa 34 Project. The second step in the odor analysis under the BAAQMD CEQA Guidelines is to determine whether there has been one or more confirmed odor complaints each year for the past three years. There appear to be no such complaints. Mr. Hagemann therefore concludes that the Project has no significant odor impacts.

III. LEGAL ANALYSIS

A. An EIR is Not Required for the Project as Mitigated Because there is No Fair Argument that the Project as Mitigated will have Significant Adverse Environmental Impacts.

In determining the existence of a "fair argument," the agency must analyze the "whole record." CEQA Guidelines section 15073.5(D); *Apartment Assoc. v. Los Angeles* (2001) 90 Cal.App.4th 1162, 1175-76. Evidence that may be substantial in isolation may not rise to the level of a "fair argument" when viewed in light of the "whole record." *Id.* at 1173-76. For example, ***if an uncontradicted expert concludes that a project will not have a significant impact as mitigated, the agency may rely on that conclusion as substantial evidence.*** *Uhler v. Encinitas* (1991) 227 Cal.App.3d 795, 805. An agency may rely on any expert with proper qualifications, including its own staff, to conclude that a project as mitigated will not have significant impacts, and there is no fair argument if the expert testimony is uncontradicted. *Gentry v. Murietta* (1995) 36 Cal.App.4th 1359, 1379-80.

The court held in *San Bernardino Audobon Society v. Met. Water Dist.* (1999) 71 Cal.App.4th 382, that in the context of a mitigated negative declaration, there is not a "fair argument" requiring an EIR unless there is expert testimony or other substantial evidence indicating that the project ***as mitigated*** has significant adverse environmental impacts. The court stated:

> Upon issuance of a mitigated negative declaration, the project opponent must demonstrate by substantial evidence that the proposed mitigation measures are inadequate and that the project as revised and/or mitigated may have a significant adverse effect on the environment.

Id. at 390; citing CEQA Guidelines section 15070 and *Citizens Comm. v. Claremont* (1995) 37 Cal.App.4th 1157, 1167. The court stated that it must consider "whether there is substantial evidence in the record to support a fair argument that the stated mitigation measures may not achieve this goal." Id.

Local 751 submits herewith expert testimony that the project with the supplemental mitigation measures has no significant adverse impacts. Furthermore, the County may rely on its own in-house expert opinions or other experts as substantial evidence that the Project as mitigated will not have significant adverse impacts. (See, *Uhler, supra*; *Gentry, supra*) ***There is absolutely no expert testimony or other substantial evidence that the revised project, including the SEPs, has any significant adverse environmental impacts.*** Therefore, in light of the whole record, there is no "substantial evidence that the proposed mitigation measures are inadequate." *San Bernardino Audobon, supra.* The County may therefore approve the Project based on the MND with the SEPs.

B. The MND Does Not Have to be Recirculated.

CEQA requires a public review and comment period so that the public may review the proposed project and suggest additional mitigation measures. CEQA encourages an iterative process in which project proponents consider public comments in good faith and adopt reasonable suggestions from the public to further improve the project. That is precisely what occurred in this case. Local 751 commented on the Napa 34 Project, and in good faith, Napa 34 voluntarily agreed to adopt supplemental environmental measures to further improve the Project. In other words, CEQA operated exactly as intended.

CEQA recognizes that when a project proponent responds to public comments in good faith, and adopts supplemental mitigation measures to address community concerns, the proponent should be not penalized with additional project delays created by "recirculation." Napa 34 should be rewarded for its good conduct that furthers the purposes of CEQA and protects the environment, rather than being penalized with further project delays. Any other rule would create a perverse incentive for project proponents to resist public comments during the CEQA process in order to avoid delays. This would thwart the whole purpose of CEQA, which is to allay public concerns about projects and create an interactive comment and response process that benefits the environment. This in turn would force the parties to resolve their disputes in court rather than through the administrative process, adding years of delay and needlessly consuming judicial resources. Not surprisingly, CEQA does not compel such an absurd result.

CEQA Guidelines section 15073.5 states:

(c) Recirculation is *not* required under the following circumstances:

(1) Mitigation measures are replaced with equal or more effective measures pursuant to Section 15074.1.

(2) ***New project revisions are added in response to written or verbal comments on the projects effects identified in the proposed negative declaration*** which are not new avoidable significant effects.

(3) Measures or conditions of project approval are added after circulation of the negative declaration which are not required by CEQA, which do not create new significant environmental effects and are not necessary to mitigate an avoidable significant effect.

(4) New information is added to the negative declaration which merely clarifies, amplifies, or makes insignificant modifications to the negative declaration.

All of the above provisions apply to Napa 34's SEPs, but sections (c)1 and (c) 2 apply directly to this matter. The comments submitted by Local 751 did not identify any new significant impacts. Instead, they only elaborated on impacts already discussed in the mitigated negative declaration, including traffic, air quality, greenhouse gases, stormwater and water usage. In response to those comments, Napa 34 agreed in good faith to add "equal or more effective mitigation measures." (15073.5(c)(1)) Napa 34 also agreed to make "project revisions . . . in response to written or verbal comments on the project's effects identified in the proposed negative declaration." (15073.5(c)(2)) Therefore, under the plain language of CEQA, recirculation of the mitigated negative declaration is ***not*** required.

A similar situation arose in *Long Beach Savings v. Long Beach Redevelopment Agency* (1986) 188 Cal.App.3d 249. In that case, in response to comments on a negative declaration, the developer and agency agreed to add mitigation measures to the negative declaration. The court held that the additional mitigation measures did not require recirculation of the mitigated negative declaration because they did not require "a fundamental reorganization of the negative declaration." The court noted that, "to allow the public review period to proceed ad nauseam would only serve to arm persons dead set against a project with a paralyzing weapon – hired experts who can always 'discover' flaws in mitigation measures." Id. at 263.

Napa 34's situation is even clearer than that in the *Long Beach* case. In Napa 34's case, unlike in *Long Beach*, all parties are satisfied that the SEPs address all of the Project's impacts, that an EIR is not required and that the SEPs do not require recirculation of the mitigated negative declaration. Under these circumstances, it is clear that Napa 34 should not be penalized for its good faith efforts to address community concerns with supplemental mitigation measures and that recirculation should not be mandated, despite the agreement of the parties.

C. The County Should Allow the Parties to Settle Their Dispute Rather Than Forcing the Parties to Continue their Dispute or Even Litigate.

Napa 34 has voluntarily agreed to implement numerous supplemental environmental projects (SEPs) to address all of the concerns raised by Local 751. Local 751 and its experts are satisfied that these SEPs adequately address all of the impacts of the Project and specifically all

of the impacts for which Local 751 raised concerns. Further, all of the parties agree that with these measures there is no need for an EIR, and that recirculation of the mitigated negative declaration is not required. In short, the parties have settled their disagreement in a manner that will provide real and concrete benefits for the environment and the public.

California law has long favored settlements between private parties as a beneficial and efficient way to resolve disputes without the need for litigation. In the case of *In re Marriage of McLaughlin*, 82 Cal. App. 4th 327, 331 (2000), "the court noted that ***the law favors settlements, and expressed its disinclination to second-guess the parties' agreement***." In *Folsom v. Butte County Assn. of Governments*, 32 Cal. 3d 668, 677 (1982), the court stated, "Compromise has long been favored." Citing, *Rohrbacher v. Aitken* (1904) 145 Cal. 485, 488; *Armstrong v. Sacramento Valley R. Co.*, 179 Cal. 648, 650. In *Ebensteiner Co., Inc. v. Chadmar Group*, 143 Cal. App. 4th 1174, 1179 (2006) the court explained that ***the law favors and encourages compromises and settlements of controversies made in or out of court***. Similarly, the court stated in, *Utility Consumers Action Network v. Public Utilities Com.*, 120 Cal. App. 4th 644, 660 (2004), "it was better for all concerned to compromise the matter rather than chance an adverse ruling in the federal lawsuit. It is not our role to second guess that judgment..."

Here, the parties to the dispute have reached a compromise that by any estimation will reduce the environmental impacts of the Napa 34 Project while enhancing its public benefits. The revised Project will unquestionably have lesser environmental impacts than the Project as previously proposed in the MND, which County staff had recommended for approval. It should not be the role of the County, sitting in its quasi-judicial capacity, to "second guess that judgment" and hold up the settlement. This is particularly true when, as here, a delay may force the parties to resolve their dispute through lengthy and costly litigation – litigation into which the County will necessarily be drawn. In short, given that County staff recommended approval of the Napa 34 Project based on an MND without any of the SEPs now agreed to, there should be no question that the revised Project, with the SEPs, and with lesser environmental impacts should be approved based on an MND.

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IV. CONCLUSION

Local 751 urges the County Planning Commission to approve the Napa 34 Holdings Project, with its supplemental environmental projects, based on the Napa 34 Project initial study/mitigated negative declaration without requiring recirculation of the document. There is no dispute that the SEPs address all of the environmental concerns raised by the public, that with these measures the Project has no significant environmental impacts, and that therefore no EIR is required. It is also clear that the SEPs do not require recirculation of the mitigated negative declaration since they are measures that provide an even greater level of environmental protection that were voluntarily implemented in response to public comments, and these measures, themselves, do not raise any new or greater significant adverse environmental impacts. Napa 34 should be rewarded for its good faith efforts to address community concerns, not penalized with further delays. This Project promises to be a model green development project thanks to the good faith cooperative efforts of all parties. Please do not delay the benefits that this Project could provide to our community. Thank you for considering our comments.

Sincerely,

Richard Drury

Attachment: Comment letter of Matthew Hagemann, PG

cc: Alicia Guerra, Counsel for Napa 34 Holdings, LLC

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

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May 11, 2010

Richard Drury
Lozeau | Drury LLP
1516 Oak Street, Suite 216
Alameda, CA 94501

Subject: Review of Supplemental Mitigation, Napa 34 Holdings Project, Napa County, California

Dear Mr. Drury:

I have reviewed the supplemental mitigation measures proposed by the developer for the Napa 34 Holdings Project in Napa, California. The supplemental mitigation measures have been developed, in part, to respond to comments we prepared on the March 17, 2010 Mitigated Negative Declaration regarding issues of stormwater, air quality (including greenhouse gas emissions and NOx), construction emissions, and odor.[1]

The supplemental mitigation measures go well beyond what most developers have instituted on similar projects. With the supplemental mitigation measures, I find the project to have no unmitigated significant adverse impacts in the areas of stormwater, air quality, construction emissions, and odor. I discuss the supplemental mitigation measures below and the basis for my conclusion. I understand that the supplemental mitigation measures are in addition to the mitigation measures already set forth in the Mitigated Negative Declaration.

1. **GREENHOUSE GAS AND NOx**

a. The Project buildings are to be designed to support structural loads associated with roof-mounted solar arrays. To further reduce greenhouse gas and nitrogen oxide ("NOx") emissions, in conjunction with construction of Project buildings, Napa 34 shall explore opportunities to provide individual buildings designed to support roof-mounted solar panels that may be

[1] Comments on Mitigated Negative Declaration, for Napa 34 Holdings Commerce Center Use Permit and Variation to Development Standards Application No P09-00329-UP and TPM and LLA Application No P09-00330-TPM; SCH Number: 2010032066, Weinbeg, Roger & Rosenfeld, April 20, 2010, Exhibit B

installed by future tenants ("Solar Panels"), and shall enable tenant use of the Solar Panels to help to meet the Project's electricity needs.

b. Napa 34 agrees to purchase and retire 800 metric tons (MT) of carbon dioxide offset credits per year for ten years (total of 8000 MT) from the Chicago Climate Exchange or comparable broker.

DISCUSSION: The Project as proposed will generate 1896 MT/yr of carbon dioxide emissions, but meets the 2,870.4 MT/Y CO2e efficiency threshold based on the analysis contained in the Napa 34 Initial Study/Mitigated Negative Declaration (see p. 13 of 41). The Bay Area Air Quality Management District's ("BAAQMD") proposed CEQA significance threshold for greenhouse gases is 1100 MT/yr. Therefore, carbon offset credits of 800 MT/yr will reduce the Project's carbon emissions to below the applicable draft significance threshold and will still meet the BAAQMD efficiency threshold. Installation of solar panels will reduce greenhouse gas and NOx emissions even further. Napa 34 may purchase all of part of the 8000 MT of carbon credits early, thereby maximizing the environmental benefit through early retirement of credits. With these measures, the Project will not have any significant individual and cumulative greenhouse gas emission impacts.

2. CONSTRUCTION EMISSIONS

ALTERNATIVE FUEL CONSTRUCTION EQUIPMENT: Napa 34 shall require in its construction contracts that all construction equipment used by selected contractors to construct the Project shall be powered by one of the following alternative fuels: biodiesel, biodiesel blend, electricity, or natural gas, except where construction equipment capable of utilizing such alternative fuels is not available to the selected contractor through the exercise of reasonable diligence.

DISCUSSION: This measure goes far beyond the Bay Area Air Quality Management District's ("BAAQMD") suggested construction mitigation of 15% alternative fuel vehicles. With the other construction mitigation measures that the developer has already incorporated in the Project and the mitigation measures included in the Initial Study/Mitigated Negative Declaration, including the BAAQMD's suggested measures, the Project has incorporated all feasible mitigation measures and will have no significant unmitigated air quality impacts.

3. STORMWATER

Prior to the commencement of Project construction, Napa 34 shall retain a qualified third-party consultant to develop a stormwater pollution prevention plan ("SWPPP") in conformance with all applicable requirements of the State Porter Cologne Water Quality Act (Cal. Water Code §§ 13000 – 14598) and Federal Clean Water Act (13 U.S.C. 1251 et seq.).

DISCUSSION: Development of a stormwater pollution prevention plan (SWPPP) is the standard means to mitigate stormwater impacts. Requirements for the SWPPP are set forth in the State Porter Cologne Water Quality Act (Cal. Water Code §§ 13000 – 14598) and Federal Clean Water Act (13 U.S.C. 1251 et seq.). Use of a third-party expert consultant will enhance the objectivity and adequacy of the plan.

With this measure, and the other mitigation measures recommended in the MND, the Project will have no significant unmitigated stormwater impacts.

4. WATER SUPPLY

a. Napa 34 shall ensure that landscaping for the Project employs native, drought-tolerant plant species to the extent practicable, provided that such landscaping shall not conflict with the provisions of any mitigation and monitoring plans providing for the preservation, restoration and creation of any existing and proposed wetlands.

b. Napa 34 shall install water-conserving plumbing fixtures that maximize efficiency and water conservation in Project office-buildings, including dual-flush toilets and ultra-low flush or waterless urinals as required by applicable building codes.

DISCUSSION: SWAPE's comment letter on this project did not address water supply issues. Those comments were raised by the City of American Canyon. I understand that the developer has agreed to the mitigation measures included in the project Water Supply Report incorporated by reference in the IS/MND (see page 39 of 41) and agreed to pay mitigation fees in accordance with the City of American Canyon water capacity fee program (see p. 16 of the Water Supply Report). In addition, the developer has agreed to the above supplemental mitigation measures. Two of the largest areas of commercial water usage are landscaping and plumbing fixtures. The developer has agreed to incorporate two of the most effective measures to reduce water usage. Ultra-low flush plumbing fixtures can reduce water usage by one-half or more. Drought-tolerant landscaping can also reduce water usage by more than one-half. With these measures, and the other water conservation measures in the MND, the developer has incorporated feasible mitigation measures in the project, and the project will have no significant unmitigated water supply impacts.

5. ODORS

No additional measures required because the Napa 34 Project is a wine storage, warehouse, distribution and office complex and will not generate odor emissions that would affect residences located over 1,000 feet away from this industrial area.

DISCUSSION: The 1999 BAAQMD CEQA Guidelines state that the screening distance for significant odor impacts from a wastewater treatment plant is one mile. The wastewater treatment plant is just beyond the screening distance of one mile away from the Napa 34 Project. The second step in the odor analysis under the BAAQMD CEQA Guidelines is to determine whether there has been one or more confirmed odor complaints each year for the past three years. There appear to be no such complaints; therefore the Project has no significant odor impacts.

CONCLUSION

With the incorporation of the supplemental mitigation measures set forth above, and the mitigation measures already included in the MND, I conclude that the project has no unmitigated significant environmental impacts.

Sincerely,

Matt Hagemann, P.G

Attachment G

Richard Drury, *RE: Mitigated Negative Declaration for Napa 34 Commerce Center Use Permit and Variation to Development Standards Application No. P09-00329-UP and TPM and LLA Application No. P09-00330-TPM; SCH Number 2010032066,*

June 2, 2010

(including Clark and Hagemann {Air Quality, Hydrology} appendix.)

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• Also admitted in Arizona
•• Admitted in Hawaii
••• Also admitted in Nevada
•••• Also admitted in Illinois

June 2, 2010

BY ELECTRONIC MAIL and US MAIL

RECEIVED
JUN 03 2010
NAPA CO. CONSERVATION
DEVELOPMENT & PLANNING DEPT.

Honorable Members of the Planning Commission
County of Napa
c/o John McDowell
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Chris Cahill
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RE: Mitigated Negative Declaration for Napa 34 Holdings Commerce Center Use Permit and Variation to Development Standards Application No P09-00329-UP and TPM and LLA Application No P09-00330-TPM;
SCH Number: 2010032066

Honorable Members of the Planning Commission and Mr. Cahill:

This letter supplements my letter dated May 23, 2010 in which I explained that Napa 34 Holdings, LLC ("Napa 34") had voluntarily agreed to adopt supplemental environmental projects ("SEPs") to address all of the issues raised by Carpenters Local 751, its members, and Mr. Dan Digardi (collectively, "Local 751") concerning the proposed Preliminary Mitigated Negative Declaration and its initial study and supporting documents ("IS/MND") for Napa 34 Holdings Commerce Center Use Permit and Variation to Development Standards Application No P09-00329-UP and TPM and LLA Application No P09-00330-TPM; SCH Number: 2010032066 ("Project" or "Napa 34 Project"). With this letter we submit the supplemental analysis of atmospheric scientist Dr. James Clark, Ph.D., and hydrogeologist Matthew Hagemann, PG.

Dr. Clark and Mr. Hagemann explain that the Napa 34 Project will implement measures to reduce construction emissions and greenhouse gas impacts that will render the Project's impacts insignificant even in light of draft CEQA significance thresholds that have been

proposed by the Bay Area Air Quality Management District ("BAAQMD"), but not yet formally adopted.

In light of these mitigation measures, and others that will reduce the Projects impact on traffic, water use, operational emissions, stormwater, and all other areas, all of the experts agree that the Napa 34 Project' traffic impacts will be fully mitigated. We urge the Planning Commission to approve the Napa 34 Project with the mitigation measures contained in the Initial Study/Mitigated Negative Declaration and the supplemental environmental projects that the developer has in good faith voluntarily agreed to implement. These SEPs will address all of the environmental issues raised by Local 751 and will result in a model "green" project with minimal environmental impacts, just as contemplated by CEQA. As such no environmental impact report ("EIR") and no recirculation of the mitigated negative declaration should be required. The developer should not be penalized for its good faith efforts to improve the Project with any further delays. Thank you for your consideration.

Sincerely,

Richard Drury

Attachment: Comment letter of Dr. James Clark, Ph.D. and Matthew Hagemann, PG

cc: Alicia Guerra, Counsel for Napa 34 Holdings, LLC

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June 2, 2010

Richard Drury
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Subject: Review of Supplemental Mitigation, Napa 34 Holdings Project, Napa County, California

Dear Mr. Drury:

We have prepared the attached analysis to respond to questions from Napa County Planning staff related to the Napa 34 Holdings Project ("Project") in Napa, California. As explained in the letter dated May 11, 2010, Napa 34 Holdings ("Napa 34") has agreed to very significant supplemental environmental projects ("SEPs") to respond to public comments regarding issues of stormwater, air quality (including greenhouse gas emissions and NOx), construction emissions and odor. The SEPs go well beyond what most developers have instituted on similar projects. As stated in the May 11, 2010 letter, with the supplemental measures, we find that the project has no unmitigated significant adverse impacts in the areas of stormwater, air quality, construction emissions, and odor.

After reviewing our letter, on May 24, 2010, County staff requested additional analysis of Greenhouse Gas ("GHG") impacts and construction impacts. In particular, County staff requested the following analysis:

1) Please submit an analysis, drafted by a qualified professional, which provides quantitative support for the assertion at page 2 of the SWAPE letter of May 11

(attached, most recently to the Drury letter of May 23) that the "Alternative Fuel Construction Equipment" mitigation proposed by Mr. Drury would reduce identified significant construction-phase emissions of ROG and NOX to a less than significant level. For purposes of this analysis, please have your expert treat the construction-phase thresholds included in the May 2010 draft BAAQMD CEQA Guidelines (54 lbs per day in each case - see Table 8-1 at Page 8-3 of the draft Guidelines) as the operative limits. The analysis should also address the language of the draft mitigation limiting alternative fuel use to "selected contractors" and excepting circumstances in which "construction equipment utilizing such alternative fuels is not available..." and, if the expert deems it necessary in order to defensibly reduce impacts to a less than significant level, propose alternate language which is more enforceable and verifiable.

2) Please provide some technical and/or legal justification for the 10-year term proposed for purchase of carbon credits to offset the identified (approx) 800 MT/Y CO2 emissions which this project create above and beyond the BAAQMD proposed 1,100 MT/Y standard.

We will address these issues in turn.

1. The Project Will Have No Significant Construction Phase Emissions.

As discussed in our letter of May 11, 2010, Napa 34 has agreed to adopt significant measures to reduce construction phase emissions:

> ALTERNATIVE FUEL CONSTRUCTION EQUIPMENT: Napa 34 shall require in its construction contracts that all construction equipment used by selected contractors to construct the Project shall be powered by one of the following alternative fuels: biodiesel, biodiesel blend, electricity, or natural gas, except where construction equipment capable of utilizing such alternative fuels is not available to the selected contractor through the exercise of reasonable diligence.
>
> DISCUSSION: This measure goes far beyond the Bay Area Air Quality Management District's ("BAAQMD") suggested construction mitigation of 15% alternative fuel vehicles. With the other construction mitigation measures that the developer has already incorporated in the Project and the mitigation measures included in the Initial Study/Mitigated Negative Declaration, including the BAAQMD's suggested measures, the Project has incorporated all feasible mitigation measures and will have no significant unmitigated air quality impacts.

In addition to the alternative fuel measure, the mitigated negative declaration ("MND") and Conditions of Approval already required a large number of construction mitigation measures. In our comment letter dated April 20, 2010, I cited the Bay Area Air Quality Management ("BAAQMD") draft CEQA Guidance document dated December 2010. BAAQMD has since issued a new draft CEQA Guidance document dated May 2010. County Staff has requested that we analyze the Napa 34 Project impacts with respect to the draft BAAQMD CEQA Guidance.

a. The May 2010 BAAQMD CEQA Guidelines is a Draft Document.

The May 2010 Draft BAAQMD CEQA Guidance document is a ***draft*** document. It has not been adopted in final form, and so is not yet legally binding. The final document may or may not be adopted by the BAAQMD Governing Board, and may or may not be revised. However, the operative BAAQMD CEQA Guidance Document dated December 1999 contains no significance threshold for construction emissions at all. Thus, our analysis applies only to the unique circumstance in which we find ourselves where there the operative BAAQMD CEQA document is silent as to CEQA significance thresholds for construction emissions, and the updated CEQA Guidance document is in draft but not final form. This analysis may well be different if and when BAAQMD adopts its new CEQA Guidance document in final form, depending on the terms of the final document.

b. The Napa 34 Project Has Agreed to Implement Measures that Render its Construction Impacts Insignificant Under the May 2010 Draft BAAQMD CEQA Guidelines.

Even if the May 2010 Draft BAAQMD CEQA Guidelines document were binding, the Napa 34 Project has agreed to implement measures that render the Project's construction impacts insignificant under the terms of that document. Section 3.5.1 of the BAAQMD Guidelines provides as follows:

3.5. CONSTRUCTION-RELATED IMPACTS

3.5.1. Criteria Air Pollutants and Precursors

This preliminary screening provides the Lead Agency with a conservative indication of whether the proposed project would result in the generation of construction-related criteria air pollutants and/or precursors that exceed the Thresholds of Significance shown in Table 2-4.

If all of the following Screening Criteria are met, the construction of the proposed project would result in a less-than-significant impact from criteria air pollutant and precursor emissions.

1. The project is below the applicable screening level size shown in Table 3-1; and

2. All Basic Construction Mitigation Measures would be included in the project design and implemented during construction; and

3. Construction-related activities would not include any of the following:

    a. Demolition;

    b. Simultaneous occurrence of more than two construction phases (e.g., paving and building construction would occur simultaneously);

    c. Simultaneous construction of more than one land use type (e.g., project would develop residential and commercial uses on the same site) (not applicable to high density infill development);

    d. Extensive site preparation (i.e., greater than default assumptions used by the Urban Land Use Emissions Model [URBEMIS] for grading, cut/fill, or earth movement); or

    e. Extensive material transport (e.g., greater than 10,000 cubic yards of soil import/export) requiring a considerable amount of haul truck activity.

(BAAQMD CEQA Guidelines, Section 3.5.1 (May 2010) (emphasis added))

Thus, if a project exceeds construction significance thresholds, its impacts will be rendered insignificant if it meets all of the listed criteria and if it implements the listed BAAQMD Basic Construction Mitigation Measures.

The Napa 34 Project meets all of the listed criteria. First, the Project is below the applicable screening level size shown in Table 3-1 of the BAAQMD Guidelines. The Napa 34 Project will be 490,500 square feet. Table 3-1 provides that the screening level size for a warehouse is 864,000 square feet. Thus, the project is below the applicable screening level size.

Second, we are informed that construction-related activities would not include any of the following:

a. Demolition – there is no existing structure on the property requiring demolition;

b. Simultaneous occurrence of more than two construction phases;

c. Simultaneous construction of more than one land use type – the Project does not involve more than one land use type;

d. Extensive site preparation (i.e., greater than default assumptions used by the Urban Land Use Emissions Model [URBEMIS] for grading, cut/fill, or earth movement) – the Project will not involve significant grading or cut/fill; or

e. Extensive material transport (e.g., greater than 10,000 cubic yards of soil import/export) requiring a considerable amount of haul truck activity – the Project will not require significant soil transport.

Third, the Napa 34 Project will implement all of the BAAQMD Basic Construction Mitigation Measures. Table 8-2 of the May 2010 BAAQMD CEQA Guidelines sets forth the Basic Construction Mitigation Measures as follows:

1. All exposed surfaces (e.g., parking areas, staging areas, soil piles, graded areas, and unpaved access roads) shall be watered two times per day.

2. All haul trucks transporting soil, sand, or other loose material off-site shall be covered.

3. All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited.

4. All vehicle speeds on unpaved roads shall be limited to 15 mph.

5. All roadways, driveways, and sidewalks to be paved shall be completed as soon as possible. Building pads shall be laid as soon as possible after grading unless seeding or soil binders are used.

6. Idling times shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to 5 minutes (as required by the California airborne toxics control measure Title 13, Section 2485 of California Code of Regulations [CCR]). Clear signage shall be provided for construction workers at all access points.

7. All construction equipment shall be maintained and properly tuned in accordance with manufacturer's specifications. All equipment shall be checked by a certified mechanic and determined to be running in proper condition prior to operation.

8. Post a publicly visible sign with the telephone number and person to contact at the Lead Agency regarding dust complaints. This person shall respond and take corrective action within 48 hours. The Air District's phone number shall also be visible to ensure compliance with applicable regulations.

The Mitigated Negative Declaration and Conditions of Approval already impose conditions 1 through 5 set forth above, but not conditions 6 through 8. Napa 34 Holdings, LLC, however, is willing to incorporate measures 6 through 8 as supplemental environmental projects (SEPs). Napa 34 has agreed to request that the County include supplemental environmental measures for Use Permit and Variation to Development Standards Application No. P 09-00329-UP and Tentative Parcel Map and Lot Line Adjustment Application No. P 09-00330-TPM as set forth in conditions 6 through 8 of the BAAQMD CEQA Guidelines Basic Construction Mitigation Measures (May 2010).

Since the Napa 34 Project will comply with all of the conditions set forth in section 3.5.1 of the BAAQMD CEQA Guidelines (May 2010), the Project ***"would result in a less-than-significant impact from criteria air pollutant and precursor emissions"*** from project construction.

c. The Alternative Fuel SEP Will Further Reduce Construction Emissions.

As discussed in our letter of May 11, 2010, Napa 34 has also agreed to use alternative fuels in almost all of its construction equipment. According to the California Air Resources Board ("CARB"), alternative fuels can reduce particulate matter emissions by up to 50% and nitrogen oxides ("NOx") by up to 15%. (http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm) Thus, Napa 34's use of alternative fuels will reduce construction emissions even further below significance. However, given the language of BAAQMD CEQA Guidelines section 3.5.1 (May 2010), it is not necessary to rely on the alternative fuels measure to reduce Project impacts below significance. Therefore, it is not necessary to quantify this reduction.

County staff has inquired as to why the term "selected contractors" is used in the proposed permit condition with respect to the use of alternative fuels. This term means that contractors selected to work on the Project will be required to use alternative fuels. It does not mean that selected contractors among those selected to work on the Project will be required to use alternative fuels. Of course, Napa 34 has no control over contractors who are not selected to work on the Project.

County staff also asks why the alternative fuel requirement allows exceptions when "construction equipment utilizing such alternative fuels is not available..." This exception is required since almost all contractors have some equipment that is not designed to use alternative fuels, and alternative fueled equipment is not available at all for some applications. Given the various types of construction equipment required for any given project, and the varying fuel requirements, it is generally understood that flexibility is required in any alternative fuels requirements. For example, the Sacramento Metropolitan Air Quality Management District ("SMAQMD") requires as standard CEQA mitigation that all heavy-duty (>50 hp) off-road vehicles to be used in a construction project shall achieve a project-wide fleet-average 20 percent NOx reduction and 45 percent particulate reduction compared to the most recent CARB fleet average at time of construction.[1] In any case, given the language of BAAQMD CEQA Guidelines section 3.5.1, it is not necessary to rely on alternative fuels to reduce construction emissions. Therefore, this is a supplemental measure that will further benefit the environment, but is not otherwise required by law.

For the foregoing reasons, we find that with the supplemental environmental projects that Napa 34 has agreed to implement, the Napa 34 Project will have no significant construction emissions under the terms of the BAAQMD Draft CEQA Guidance dated May 2010.

2. The Project Will Have No Significant Greenhouse Gas Impacts.

As discussed in our letter dated May 11, 2010, Napa 34 has agreed to very aggressive greenhouse gas ("GHG") reduction measures that go far beyond those imposed on most other similar projects, and which make this a model warehouse project. In particular:

a. The Project buildings are to be designed to support structural loads associated with roof-mounted solar arrays. To further reduce greenhouse gas and nitrogen oxide ("NOx") emissions, in conjunction with construction of Project buildings, Napa 34 shall explore opportunities to provide individual buildings designed to support roof-mounted solar panels that may be installed by future tenants ("Solar Panels"), and shall enable tenant use of the Solar Panels to help to meet the Project's electricity needs.

b. Napa 34 agrees to purchase and retire 800 metric tons (MT) of carbon dioxide offset credits per year for ten years (total of 8000 MT) from the Chicago Climate Exchange or comparable broker.

[1] Sacramento Metropolitan Air Quality Management District, CEQA and Land Use Mitigation, July 24, 2008; http://www.airquality.org/ceqa/index.shtml#construction, accessed July 27, 2008.

DISCUSSION: The Project as proposed will generate 1896 MT/yr of carbon dioxide emissions, but meets the 2,870.4 MT/Y CO2e efficiency threshold based on the analysis contained in the Napa 34 Initial Study/Mitigated Negative Declaration (see p. 13 of 41). The Bay Area Air Quality Management District's ("BAAQMD") proposed CEQA significance threshold for greenhouse gases is 1100 MT/yr. Therefore, carbon offset credits of 800 MT/yr will reduce the Project's carbon emissions to below the applicable draft significance threshold and will still meet the BAAQMD efficiency threshold. Installation of solar panels will reduce greenhouse gas and NOx emissions even further. Napa 34 may purchase all of part of the 8000 MT of carbon credits early, thereby maximizing the environmental benefit through early retirement of credits. With these measures, the Project will not have any significant individual and cumulative greenhouse gas emission impacts.

County staff has requested technical and/or legal justification for the 10-year term proposed for purchase of carbon credits to offset the identified (approx) 800 MT/Y CO2 emissions which this project create above and beyond the BAAQMD proposed 1,100 MT/Y standard.

a. The May 2010 BAAQMD CEQA Guidelines is a Draft Document.

As dicussed above, the May 2010 Draft BAAQMD CEQA Guidance document is a ***draft*** document. It has not been adopted in final form, and so is not yet legally binding. The final document may or may not be adopted by the BAAQMD Governing Board, and may or may not be revised. However, the operative BAAQMD CEQA Guidance Document dated December 1999 contains no significance threshold for greenhouse gas ("GHG") emissions at all. Thus, our analysis applies only to the unique circumstance in which we find ourselves where there the operative BAAQMD CEQA document is silent as to CEQA significance thresholds for GHG emissions, and the updated CEQA Guidance document is in draft but not final form. This analysis may well be different if and when BAAQMD adopts its new CEQA Guidance document in final form, depending on the terms of the final document.

b. CEQA Requires All "Feasible" Mitigation Measures.

CEQA requires only that all "feasible" mitigation measures be imposed. 14 Cal.Code Regs. §15002(a)(2). Requiring Napa 34 to purchase 10 years of GHG offsets goes far beyond what is commonly required of similar projects by either Napa County or other agencies throughout the State. It is not necessary for the lead agency to implement mitigation measures that would be economically or technologically infeasible.

c. AB 32 Will Mitigate Cumulative Greenhouse Gas Impacts After 2020.

California's major initiatives for reducing climate change or greenhouse gas (GHG) emissions are outlined in Assembly Bill 32 (signed into law 2006), a 2005 Executive Order and a 2004 ARB regulation to reduce passenger car GHG emissions. These efforts will reduce GHG emissions to 1990 levels by 2020 - a reduction of approximately 30 percent, and then an 80 percent reduction below 1990 levels by 2050. Thus, by 2020, AB 32 and other state-wide requirements will have reduced cumulative GHG emissions by 30%.

BAAQMD's threshold of 1100 metric tons per year for GHG CEQA significance applies only to cumulative GHG impacts, not project-specific impacts. The BAAQMD CEQA Guidance states:

> "If annual emissions of operational-related GHGs exceed these levels, the proposed project would result in a ***cumulatively considerable*** contribution of GHG emissions and a ***cumulatively significant impact*** to global climate change."

BAAQMD CEQA Guidelines, p. 2-4 (May 2010) (emphasis added).

Since AB 32 will address cumulative GHG emissions by 30% by 2020 and 80% by 2050, the 10-year period from 2010 to 2020 is the most critical period for the County to impose measures to mitigate cumulative GHG impacts. As discussed above, the mitigation measures imposed reduce the Napa 34 Project's cumulative GHG impacts to below the level of significance until at least 2020. After that date, AB 32 will adequately mitigate cumulative GHG impacts on a statewide basis. As such, with the imposition of the supplemental GHG measures, the Napa 34 Project will have no significant GHG impacts.

d. Water Use Reductions Will Further Reduce the Project's GHG Impacts.

In addition to the above GHG mitigations, Napa 34 has agreed to adopt measures that will significantly reduce the Project's water usage. It is well-established that water use reductions result in significant reductions in GHG impacts due to related reductions in water pumping and treatment. In particular:

- Napa 34 shall ensure that landscaping for the Project employs native, drought-tolerant plant species to the extent practicable, provided that such landscaping shall not conflict with the provisions of any mitigation and monitoring plans providing for the preservation, restoration and creation of any existing and proposed wetlands.

- Napa 34 shall install water-conserving plumbing fixtures that maximize efficiency and water conservation in Project office-buildings, including dual-flush toilets and ultra-low flush or waterless urinals as required by applicable building codes.

Ultra-low flow toilets and urinals can reduce water use by up to 68% compared to standard fixtures. (Seattle Public Utilities, Mayer, et al., Seattle Home Water Cons. Study, pp. 33, 58 (2000); Canada Mortgage & Housing Corp., Dual-Flush Toilet Proj., p. i (2002).) Drought-tolerant landscaping can reduce landscape related water usage by 50%. (http://www.eartheasy.com/grow_xeriscape.htm.) Three applications account for 88% of water used in commercial buildings – sanitary (e.g. toilets and sinks), landscaping, and heating and cooling. (U.S. General Services Administration (1999) Water Management Guide.) Thus, the water savings measures to be implemented for this Project are likely to reduce water usage by approximately 50%.

The California Energy Commission has found that the State's water-related energy use – which includes the conveyance, storage, treatment, distribution, wastewater collection, treatment, and discharge – consumes about 19 percent of the State's electricity, 30 percent of its natural gas, and 88 billion gallons of diesel fuel every year. (http://www.energy.ca.gov/2007publications/CEC-999-2007-008/CEC-999-2007-008.PDF.) Accordingly, reducing water use and improving water efficiency will help reduce energy use and associated greenhouse gas emissions.

///

CONCLUSION

With the incorporation of the supplemental mitigation measures set forth above, and the mitigation measures already included in the MND, we conclude that the project has no unmitigated significant environmental impacts.

Sincerely,

James Clark, Ph.D.

Matt Hagemann, P.G.

EXHIBIT B

STEWART WEINBERG
DAVID A. ROSENFELD
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April 20, 2010

BY ELECTRONIC MAIL and US MAIL

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RE: Comments on Mitigated Negative Declaration for Napa 34 Holdings Commerce Center Use Permit and Variation to Development Standards Application No P09-00329-UP and TPM and LLA Application No P09-00330-TPM; SCH Number: 2010032066

Honorable Members of the Planning Commission and Mr. Cahill:

I am writing on behalf of the on behalf of Carpenters Local 751, its members, and City of Napa resident, Mr. Dan Digardi (collectively, "Local 751") concerning the proposed Preliminary Mitigated Negative Declaration and its initial study and supporting documents ("MND") for Napa 34 Holdings Commerce Center Use Permit and Variation to Development Standards Application No P09-00329-UP and TPM and LLA Application No P09-00330-TPM; SCH Number: 2010032066 ("Project" or "Napa 34 Project"). Our experts have reviewed the MND and have determined that the Project will have significant adverse environmental impacts, and that an environmental impact report ("EIR") should therefore be prepared under the California Environmental Quality Act ("CEQA," Public Resources Code section 21000, et seq.) to fully analyze these impacts and propose feasible measures to mitigate those impacts.

I. INTRODUCTION.

The County proposes to approve the massive new construction Project with no EIR whatsoever. Instead, the County has concluded that the Napa 34 Project will have no adverse impacts of any sort and that a mitigated negative declaration may therefore be issued. It is simply untenable for a Project of this magnitude to be approved with a mere MND.

The Napa 34 Holdings Commerce Center involves the approval of a Use Permit to allow the construction and operation of an industrial park totaling 490,500 square feet ("sf") of new development in 8 buildings, including: 1) two 41,700 sf two story office buildings; 2) two 7,600 sf single story office buildings with ancillary warehouse spaces; 3) one 8,800 sf single story office building with ancillary warehouse space; and 4) 152,600 sf, 148,800 sf, and 81,600 sf single story warehouse/distribution buildings with ancillary office space. Approximately 73% (or 356,000 sf) of the total development floor area would be dedicated to warehousing uses, while the remaining 27% (or 134,500 sf) would be utilized as office space. In total, the Napa 34 Project will be almost as large as the tallest building in San Francisco, the Transamerica Pyramid, which totals 530,000 square feet. It is simply untenable to permit such a massive project without first preparing an environmental impact report.

By contrast, courts have required EIRs for comparatively small projects. (*Arviv Enterprises v. South Valley Area Pln. Comm.* (2002) 101 Cal. App. 4th 1333 (EIR required for 21 homes); *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597 (EIR required for 40 homes); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 329-333 (23 homes); *Oceanview Estates Homeowners Assn. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396 (EIR required for cover to protect reservoir); *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357 (EIR required for children's playground))

Indeed, the County of Napa itself has recently prepared an environmental impact report ("EIR") for the nearby Napa Pipe project, less than three miles away from the Napa 34 Project. The two projects will clearly have cumulative impacts on traffic, air quality, greenhouse gas emissions and other factors. In fact the Napa Pipe and Napa 34 Projects impact many of the same intersections, creating cumulative traffic impacts. Nevertheless, the MND for the Napa 34 Project ignores the Napa Pipe Project entirely and fails to analyze cumulative impacts at all. As a result, as discussed below, the two projects include contradictory and inconsistent mitigation measures. Since the Napa 34 Project will have cumulative impacts together with the Napa Pipe Project, and the County has acknowledged that the Napa Pipe Project has significant impacts requiring an EIR, by necessary implication, the Napa 34 Project has significant cumulative impacts requiring an EIR.

As discussed below, expert comments establish that the Napa 34 Project will have significant impacts far in excess of applicable CEQA significance thresholds in several areas, including, but not limited to the following:

- Construction Emissions: As discussed by atmospheric scientist, Dr. James Clark, PhD., the three-year construction phase of the Project will generate significant levels of pollution far above the applicable CEQA significance thresholds of the Bay Area Air Quality Management District ("BAAQMD"). Project construction will generate emissions of particulate matter ("PM"), diesel exhaust, nitrogen oxides ("NOx"), and reactive organic gases ("ROGs"). These emissions will expose workers and nearby residents to significant health risks, and the MND fails to include adequate mitigation measures to reduce such risks.

- Operational Emissions: Dr. Clark also concludes that the Project will generate significant operational emissions, which will exceed applicable significance thresholds of the BAAQMD. The Project will generate significant emissions of NOx and ROGs, which are the primary components of smog. These impacts will be even more significant with considered with the cumulative impacts of the Project together with other proposed and pending projects in the area, including the nearby Napa Pipe Project, less than three miles away. (See, Napa Pipe Draft Environmental Impact Report SCH No. 2008122111, incorporated herein by reference in its entirety).

- Greenhouse Gas Impacts: The Project will create greenhouse gas emissions in excess of significance thresholds established by the BAAMQD and the California Air Pollution Control Officers' Association ("CAPCOA"). These impacts will be even greater when combined with the cumulative emissions from many other proposed and pending projects in the area. Nevertheless, the MND fails to impose feasible mitigation measures that could significantly reduce greenhouse gases.

- Traffic: As discussed by traffic engineer Tom Brohard, P.E., the MND contains significant errors in trip generation calculations. In addition to individually significant traffic impacts, the Napa 34 Project will have significant cumulative traffic impacts together with the nearby Napa Pipe Project, which will impact many of the same intersections. Correcting these calculations shows that the Project will have significant unmitigated traffic impacts at:

    - Airport Boulevard/SR29/SR12
    - Airport Boulevard/Devlin Road
    - Soscol Ferry Road/Devlin Road
    - Soscol Ferry Road/SR29
    - Soscol Ferry Road/SR12/SR29/SR221

- Stormwater: As discussed by hydrogeologist, Matthew Hagemann, M.S., P.G., the Project will have significant impacts on stormwater run-off, with potential adverse impacts on water quality.

- Water Supply: The Project will have significant impacts on water supply according to a detailed water supply report prepared by the City of American Canyon. The City of American Canyon's water supply report concludes that, ***"the [Napa 34] project would reduce the reliability of American Canyon water service."*** (City of American Canyon, Water Supply Report, p. 5 (Oct. 14, 2009)

- Cumulative Impacts: The Project will have cumulative impacts together with the recently approved Napa Pipe Project and other projects in the area. Cumulative impacts include, but are not limited to traffic, air quality and greenhouse gas emissions. The MND ignores the Project's cumulative impacts entirely.

These comments are supported by the expert analysis of traffic engineer Tom Brohard, PE (attached as Exhibit A), and by air quality expert Dr. James Clark, Ph.D. and hydrogeologist Matthew Hagemann, PG, MS (Attached As Exhibit B). Their comments are attached hereto and are incorporated herein by reference in their entirety. We reserve our right to submit supplemental written and oral comments at any hearing held by the County of Napa and any of its agencies ("County") concerning this matter.[1]

We urge the County to reject the mitigated negative declaration and prepare an EIR for the Project to analyze its impacts and to propose feasible mitigation measures and to consider feasible alternatives. Any new CEQA document will have to be recirculated for public review since it will necessarily contain significant new information and/or new mitigation measures.

II. STANDING

Members of Local 751 live, work and recreate in the immediate vicinity of the Project site. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group or environmental group. In addition, construction workers will suffer many of the most significant impacts from the Project as currently proposed, such as from construction emissions, traffic and operational emissions. Therefore, Local 751 and its members have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the full extent feasible. Mr. Dan Digardi is a resident of Napa who wants to ensure that the Project receives full environmental review so that the Project's environmental impacts will be reduced to the maximum extent feasible, while providing the community with the greatest economic benefits.

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[1] We reserve the right to supplement these comments at later hearings and proceedings for this Project. See, *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109.

III. LEGAL STANDARD: AN EIR IS REQUIRED SINCE THERE IS A "FAIR ARGUMENT" SUPPORTED BY EXPERT EVIDENCE THAT THE PROJECT MAY HAVE ADVERSE ENVIRONMENTAL IMPACTS

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

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 927) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392. The EIR process "protects not only the environment but also informed self-government." *Pocket Protectors*, 124 Cal.App.4th 927.

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

A negative declaration is improper, and an EIR is required, whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur. Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to

support the agency's decision. CEQA Guidelines § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon v. Stanislaus* (1995) 33 Cal.App.4th 144, 150-151 (1995); *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1602. The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274. The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a ***preference for resolving doubts in favor of environmental review***." *Pocket Protectors*, 124 Cal.App. 4th at 928 (emphasis in original).

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

As discussed below, highly-qualified experts have submitted evidence herewith that clearly establishes that the Project may have significant adverse environmental impacts. An EIR is therefore required.

IV. THERE IS A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS

There is a "fair argument" that the Project may have significant adverse environmental impacts. Therefore, an EIR must be prepared to analyze and propose mitigation for those impacts. (*CBE v. SCAQMD*, 48 Cal. 4th at 319-320; *Mejia v. Los Angeles* (2005) 130 Cal.App.4th 322; *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903)

A. The Project Will Have Significant Adverse Traffic Impacts.

Traffic Engineer Tom Brohard, P.E., has submitted detailed expert analysis demonstrating that the Project will have highly significant adverse traffic impacts. His analysis demonstrates that the traffic analysis prepared for the MND is erroneous and was done using an improper methodology. Mr. Brohard also points out that the Napa 34 Project will have very significant cumulative impacts when considered together with the recently approved Napa Pipe Project. Mr. Brohard identifies the following significant traffic impacts that should be analyzed in an EIR:

1. Analysis of Near Term Conditions Is Flawed.

From the July 21, 2009 application for the Project, construction of the industrial park will be phased, with Phase 1 to be completed in 12 months and Phase 2 to be completed in 24 months. Therefore, it will be at least two more years before the Project is completed and occupied. The two analyses in the Traffic Study were done for existing conditions based on June 2009 traffic counts, and then for near term conditions, assuming completion of the Project and the approved Greenwood Business Park directly across Devlin Road opposite the Project. To properly assess near-term conditions and impacts, the baseline volumes used in the Traffic Study must be revised as follows:

a) Adjust Traffic Counts to a Thursday in August - Increase the existing AM and PM peak hour traffic counts made on Tuesday June 2, 2009, Wednesday June 3, 2009, and Thursday June 4, 2009 to reflect worst case conditions on a Thursday in August, a practice utilized by the City of Napa immediately adjacent to the study intersections.

b) Adjust Baseline Volumes for Annual Ambient Growth - Include an annual ambient growth factor to account for small projects as well as general traffic growth between the June 2009 traffic counts and project completion (at least two years from now), so add in three years of annual ambient growth to the adjusted traffic volumes for a Thursday in August.

c) Adjust Baseline Volumes to Include Trips for All Other Approved Projects - Include traffic from all other approved but not yet completed and occupied projects in the area that will contribute traffic to the study intersections.

Mr. Brohard concludes that correcting these three errors above will increase the June 2009 traffic counts to correspond to traffic volumes at Project completion in Year 2012. The resulting traffic volumes would represent a Thursday in August (utilizing the same methodology as the adjacent City of Napa), reflect traffic to and from small projects as well as annual ambient traffic growth, and account for traffic to and from other approved but not yet constructed or occupied projects (in addition the approved Greenwood Business Park). Project traffic can then be added to this adjusted baseline that better represents traffic volumes in Year 2012, and this will then enable the significant Project traffic impacts to be properly determined and analyzed.

Mr. Brohard concludes that there is at least a fair argument that the addition of project traffic to the higher baseline volumes may have an adverse impact on traffic flow (see below). These impacts should be analyzed in an EIR and additional mitigation measures adopted as required for the Project.

2. An Significant Traffic Impact Will Occur With Baseline Adjustments at Airport Boulevard/SR29/SR12.

Without making the baseline adjustments above, Table 5 on Page 13 of the Traffic Study indicates delay at Airport Boulevard/SR29/SR12 in the AM peak hour will increase from 41.4 seconds to 53.6 seconds. Mr. Brohard concludes that with the upper threshold of Level of Service (LOS) D at 55.0 seconds, there is at least a "fair argument" that the adjustments above plus Project traffic will result in LOS E conditions (an increase of only 1.5 seconds of delay) at Airport Boulevard/SR29/SR12. Resulting delay of 55.1 seconds or more will change the AM peak hour intersection operation from LOS D to LOS E, creating a significant project traffic impact that requires mitigation (see Significance Criteria on Page 8 of the Traffic Study). Mitigation at this intersection will also require approval and concurrence from Caltrans. An EIR should be prepared to analyze this issue and to propose feasible mitigation measures for the Project.

3. Inadequate Stacking On-Site at Project Driveways.

Mr. Brohard concludes that the proposed driveway throats on-site (the distance between the roadway curb line and the first internal aisle parallel to the roadway) are very short and will not accommodate the 95th% queues of traffic exiting these driveways during the PM peak hour. The driveway access to Airport Boulevard (Intersection 9) provides about 40' for stacking (scaled from the site plan) whereas the calculations in the Traffic Study Appendices show that 62' is required to accommodate the 95th% queue. Similarly, the north, middle, and south driveway accesses to Devlin Road (Intersections 6, 7, and 8) each provide about 20' for stacking

whereas calculations in the Traffic Study Appendices show that 50', 65', and 49' respectively are required for the 95th% queues.

Providing inadequate driveway throats will block the internal aisles parallel to the adjacent roadways during the PM peak hour, causing congestion, delay, and potential queuing back into Airport Boulevard and Devlin Road for traffic entering the Project. Extending the driveway throats further into the site to accommodate the 95th% queues will require redesign of the internal circulation, and will also result in the loss of on-site parking. An EIR should be prepared to analyze these issues and to propose feasible mitigation measures for the Project.

4. Analysis of Cumulative Conditions Has Not Been Completed.

The Traffic Study indicates the County of Napa has not required an analysis of cumulative conditions as an area-wide traffic study is underway to accomplish this task and to update the County of Napa Traffic Impact Fee Program.

In a September 29, 2009 letter, Caltrans requested a cumulative analysis in accordance with their Guide for the Preparation of Traffic Impact Studies. In a March 3, 2010 letter, Caltrans reiterated "Our previous comments still apply and are incorporated here by reference." The recent Caltrans letter also requested AM and PM peak hour turning movement volumes for each study intersection under Project Only Conditions, 2030 Cumulative Conditions only, and 2030 Cumulative plus Project Conditions. The County appears to have ignored Caltrans' request for a cumulative impact analysis.

Without completion of the cumulative analysis in the area-wide study, it is not possible to determine what improvement measures will be needed, how much they will cost, whether they will be included in a future capital improvement program, if they will be constructed in a timely manner, or what the corresponding fees and the Project "fair shares" will be. Mr. Brohard concludes that there is at least a fair argument that the Project may have significant cumulative traffic impacts. An EIR should be prepared to analyze these issues and to propose feasible mitigation measures for the Project.

In addition, Mr. Brohard concludes that the Napa 34 Project will have significant cumulative impacts when considered together with the nearby and recently approved Napa Pipe Project, which will also generate significant new traffic at many of the same intersections as the Napa 34 Project. Nevertheless, the MND ignore these cumulative impacts entirely, in violation of CEQA.

An CEQA document must discuss significant cumulative impacts. CEQA Guidelines section 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if "the possible effects of a project are individually limited but cumulatively considerable. . . . 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects

of probable future projects." "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines section 15355(a). "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." CEQA Guidelines section 15355(a).

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Communities for a Better Environment v. Cal. Resources Agency ("CBE v. CRA")*, (2002) 103 Cal.App.4th 98, 117. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b).

As the court stated in *CBE v. CRA,* 103 Cal. App. 4th at 114:

> Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

In *Kings County Farm Bureau v. City of Hanford,* 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The court said: "The [ ] EIR concludes the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact." The court concluded: "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin."[2] The *Kings County* case was recently reaffirmed in *CBE v. CRA,* 103

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[2] *Los Angeles Unified v. City of Los Angeles*, 58 Cal.App.4th at 1024-1026 found an EIR inadequate for concluding that a project's additional increase in noise level of another 2.8 to 3.3 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the regulatory recommended maximum of 70 dBA. The court concluded that this "ratio theory" trivialized the project's noise impact by focusing on individual inputs rather than their collective significance. The relevant issue was not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any

Cal.App.4th at 116, where the court rejected cases with a narrower construction of "cumulative impacts."

Similarly, in *Friends of Eel River v. Sonoma County Water Agency,* (2003) 108 Cal. App. 4th 859, the court recently held that the EIR for a project that would divert water from the Eel River had to consider the cumulative impacts of the project together with other past, present and reasonably foreseeable future projects that also divert water from the same river system. The court held that the EIR even had to disclose and analyze projects that were merely proposed, but not yet approved. The court stated, CEQA requires "the Agency to consider 'past, present, and probable future projects producing related or cumulative impacts . . . .' (Guidelines, § 15130, subd. (b)(1)(A).) The Agency must interpret this requirement in such a way as to 'afford the fullest possible protection of the environment.'" *Id.*, at 867, 869. The court held that the failure of the EIR to analyze the impacts of the project together with other proposed projects rendered the document invalid. "The absence of this analysis makes the EIR an inadequate informational document." *Id.,* at 872.

The court in *Citizens to Preserve the Ojai v. Bd. of Supervisors,* 176 Cal.App.3d 421 (1985), held that an EIR prepared to consider the expansion and modification of an oil refinery was inadequate because it failed to consider the cumulative air quality impacts of other oil refining and extraction activities combined with the project. The court held that the EIR's use of an Air District Air Emissions Inventory did not constitute an adequate cumulative impacts analysis. The court ordered the agency to prepare a new EIR analyzing the combined impacts of the proposed refinery expansion together with the other oil extraction projects.

Under both CEQA and the Guidelines, an EIR must be prepared when certain types of environmental impacts could result from a project. (Pub. Res. Code § 21083(a); CEQA Guidelines § 15065.) In effect, a finding by the lead agency that such conditions exist makes the project's environmental effects "significant" as a matter of law. Under the Guidelines, an agency *must* find that a project may have a significant environmental effect, and thus prepare and EIR, if, *inter alia*, the possible environmental effects of the project are cumulatively considerable.[3] (Pub. Res. Code § 21083(b)(2); CEQA Guidelines § 15065(c).)

The MND for the Napa 34 Project is similarly inadequate because it fails to analyze the cumulative impacts of the Napa 34 Project together with other nearby recently approved projects, particularly the recently approved Napa Pipe Project. Since the Napa Pipe project was found to have significant environmental impacts requiring an EIR, and since the Napa 34 Project

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additional amount of traffic noise should be considered significant given the nature of the existing traffic noise problem.

[3] "'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects as defined in Section 15130." (CEQA Guidelines § 15065(c).)

contributes to many of the same impacts as the Napa Pipe Project (including at least, traffic, air quality, and greenhouse gases), the Napa 34 Project necessarily has significant cumulative impacts requiring an EIR. We hereby incorporate the draft and final EIRs and comments on the EIRs for the Napa Pipe Project herein by reference and ask that the County include the Napa Pipe draft and final EIR in the administrative record for the Napa 34 Project. An EIR must be prepared to analyze and mitigate these cumulative impacts.

5. Mitigation Measures Are Incomplete – The mitigation measures on Pages 34 and 35 of the Use Permit are incomplete.

An agency may only rely upon a mitigated negative declaration only when it has imposed mitigation measures that will eliminate all significant impacts of the project. (Pub. Res. Code §21064.5, 21080(c)(2); 14 Cal.Code Regs. §15064(f)(2), 15070(b); see *Perley v. Bd. of Sups.* (1982) 137 Cal.App.3d 424) A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. An agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available)) This approach helps "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935) A lead agency may not conclude that an impact is significant and unavoidable without requiring the implementation of all feasible mitigation measures to reduce the impacts of a project to less than significant levels. (CEQA Guidelines §§ 15126.4, 15091)

Mr. Brohard has concluded that the following mitigation measures are inadequate to reduce the Napa 34 Project's impacts to a level of insignificance. Therefore, an EIR is required to analyze these impacts and propose feasible and adequate mitigations.

a) <u>Mitigation Measure #10 - Pay Traffic Mitigation Fees:</u> The MND relies on a County Traffic Impact Fee Program, but that Program is currently being updated and has not been completed. Payment of impact fees alone does not relieve the Project from mitigation of the significant traffic impacts that it will create in the near term and under cumulative conditions. The County may not rely on a mitigation fee program that has not been finalized to mitigate the significant impacts. This mitigation is therefore not adequate to reduce the impact to a level of insignificance and the impact therefore remains significant and must be addressed in an EIR.

Mitigation fees are not adequate mitigation unless the lead agency can show that the fees will fund a specific mitigation plan that will actually be implemented in its entirety. (*Napa Citizens for Honest Gov. v. Bd. Of Supervisors* (2001) 91 Cal.App.4th 342 (no evidence that impacts will be mitigated simply by paying a fee); *Anderson First Coal. v. City of Anderson* (2005) 130 Ca.App.4th 1173 (traffic mitigation fee is inadequate because it does not ensure that mitigation measure will

actually be implemented); *Kings Co. Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692. But see, *Save Our Peninsula Comm v. Monterey Co.* (2001) 87 Cal.App.4th 99 (mitigation fee allowed when evidence in the record demonstrates that the fee will fund a specific mitigation plan that will actually be implemented in its entirety); *California Native Plant Society v. County of El Dorado et al.* (2009) 170 Cal. App. 4th 1026 (fee program had to have gone through CEQA review for an agency to say that the payment of the fee alone is adequate CEQA mitigation); *Endangered Habitats League v. County of Orange* (2005); *Gray v. County of Madera* (2008).

In this case, the agency can not conclude that the mitigation fee will fund a specific program that will actually be implemented and that will actually fully mitigate the impact, since the mitigation program does not even exist yet. The MND therefore may not rely on the mitigation measure of uncertain efficacy.

Furthermore, a CEQA document may not rely upon a mitigation measure that will be developed after project approval. CEQA disallows deferring the formulation of mitigation measures to post-approval studies. (CEQA Guidelines § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309.) An agency may only defer the formulation of mitigation measures when it possesses "'meaningful information' reasonably justifying an expectation of compliance." (*Sundstrom* at 308; see also *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only "for kinds of impacts for which mitigation is known to be feasible").) A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available).) This approach helps "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.)

Moreover, by deferring the development of specific mitigation measures, the Applicant has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the *Sundstrom* court:

> An EIR [is] subject to review by the public and interested agencies. This requirement of "public and agency review" has been called "the strongest assurance of the adequacy of the EIR." The final EIR must respond with specificity to the "significant environmental points raised in the review and consultation process." . . . Here, the hydrological studies envisioned by the use permit would be exempt from this process of public and governmental scrutiny. (*Sundstrom*, 202 Cal.App.3d at 308.)

The traffic mitigation fee program has not even been adopted yet. The MND therefore may not rely upon this post-approval mitigation measure to mitigate the Project's significant traffic impacts. An EIR is required to describe this mitigation measure to the public and explain how and whether it will adequately mitigate the Project's traffic impacts.

b) Mitigation Measure #12: Airport Boulevard/Devlin Road Improvements: Mr. Brohard concludes that the improvements identified on Page 21 of the Traffic Study require the widening of Airport Boulevard from 72' to 86' between the outside curbs to implement the necessary westbound dual left turn lanes. Widening of the east leg of the intersection will also necessitate widening of the west leg for proper lane alignment across the intersection as well as transitions and tapers back to the existing 72' curb to curb width east and west of Devlin Road. Widening Airport Boulevard by 14' could result in the need for additional right of way, potentially on the north side of Airport Boulevard west of Devlin Road where the adjacent property has already been developed. The Traffic Study must evaluate the need for and the availability of the additional right of way to determine if this proposed mitigation measure is feasible. A CEQA document must analyze any foreseeable impacts that will be created by a mitigation measure itself. (*Perley v. Bd. of Supervisors, supra*)

c) Mitigation Measure #13 – Soscol Ferry Road/Devlin Road Traffic Signal: Mr. Brohard concludes that page 21 of the Traffic Study indicates that the peak hour traffic signal warrant is exceeded in the PM peak hour when project traffic is added. The proposed mitigation measure states "...the permittee and his/her successors in interest shall contribute to the cost of signalization at the Soscol Ferry Road/Devlin Road intersection should the County deem it necessary to install traffic signals at that intersection at some point in the future." Mr. Brohard concludes that the Project's fair share of signalization should be calculated and the funds collected upon issuance of any building permits for the Project.

d) Mitigation Measure #14 – Airport Boulevard/Devlin Road Traffic Signal: Mr. Brohard concludes that in addition to providing the northbound right turn green arrow overlap which will run concurrently with the westbound dual left turns, it will also be necessary to prohibit westbound to eastbound U-turns at this intersection to eliminate protected conflicting turning movements. Mr. Brohard concludes that this mitigation measure is therefore insufficient to reduce this impact to a level of insignificance and an EIR is therefore necessary to analyze the impact.

e) Queuing Impacts Are Not Mitigated at Soscol Ferry Road/SR29, Soscol Ferry Road/Devlin Road, and Airport Boulevard/SR29/SR12: Pages 17 and 19 of the Traffic Study state that the Project will contribute to vehicle queuing problems at three intersections: Soscol Ferry Road/SR29, Soscol Ferry Road/Devlin Road, and Airport Boulevard/SR29/SR12. The Project should be required to pay a "fair share"

to mitigate queuing impacts at each of these three intersections as identified on Pages 17 and 19 of the Traffic Study. The CEQA document does not include mitigation measures to reduce this impact to a level of insignificance. An EIR is therefore required to analyze these impacts and propose feasible mitigations.

f) Mitigation Measures are Inconsistent with the Napa Pipe Project: Mr. Brohard concludes that the mitigation measures proposed for the Napa 34 Project are inconsistent with mitigation measures proposed for the nearby and recently approved Napa Pipe Project. This renders the mitigation measures inadequate and inconsistent. Both projects will impact many of the same intersections, yet the MND for Napa 34 ignores Napa Pipe entirely. This points out precisely why a cumulative impacts analysis is required.

Mr. Brohard reviewed the October 2009 Draft EIR and the Traffic Study for the Napa Pipe Project, a proposed development less than three miles to the North of the Napa 34 Holdings Commerce Center. Three common intersections were independently evaluated in the separate traffic studies for these two projects. All three intersections are forecast to be significantly impacted by the Napa Pipe Project for "Existing plus Project" conditions. Since both projects impact these same intersections, and the Napa Pipe EIR acknowledges that the impacts will be significant, then the Napa 34 Project necessarily has cumulatively significant impacts on these same intersections.

The Draft EIR proposes near-term mitigation for the Napa Pipe Project which is inconsistent with proposed near-term mitigation for the Napa 34 Holdings Commerce Center Project as follows:

i. Soscol Ferry Road/Devlin Road – The Napa Pipe Draft EIR requires that this intersection be channelized so vehicle movements do not conflict and recommends against the installation of traffic signals. This proposed mitigation conflicts with Mitigation Measure #13 for Napa 34 Holdings Commerce Center which proposes a "fair share" of the cost of traffic signals. An EIR is therefore required to resolve these inconsistencies, analyze the impacts, and propose feasible mitigation.

ii. Soscol Ferry Road/SR12/SR29/SR221 – The Napa Pipe Draft EIR identifies construction of a flyover for southbound traffic on SR221 continuing south on SR12/SR29 (a bridge over the intersection to remove this high peak hour left turn volume from the intersection). The Draft EIR requires Napa Pipe to contribute their "fair share" of these extensive improvements as mitigation.

According to Table 5 on Page 13 of the Traffic Study, Napa 34 Holdings Commerce Center increases delay by 6 seconds in the AM peak hour (already operating at LOS E) and adds traffic in the PM peak hour (already operating at LOS F). Mr. Brohard concludes that this should have been identified as a

significant project traffic impact. In addition, Page 17 of the Traffic Study also states that the Project will contribute to vehicle queuing problems at the Soscol Ferry Road/SR12/SR29/SR221 intersection.
The Project should be required to pay a "fair share" to mitigate its significant traffic impacts and its queuing impacts at the Soscol Ferry Road/SR12/SR29/SR221 intersection. The CEQA document does not include mitigation measures to reduce these impacts to a level of insignificance. An EIR is therefore required to analyze these impacts and propose feasible mitigations.

iii. Airport Boulevard/SR12/SR29 – The Napa Pipe Draft EIR identifies construction of a grade-separated interchange at this intersection as proposed in the Napa County General Plan. The Draft EIR requires Napa Pipe to contribute their "fair share" of these extensive improvements as mitigation.

As previously discussed in this letter, there is at least a "fair argument" that the baseline adjustments plus Project traffic will result in LOS E conditions (an increase of only 1.5 seconds of delay) at Airport Boulevard/SR29/SR12. Resulting delay of 55.1 seconds or more will change the AM peak hour intersection operation from LOS D to LOS E, creating a significant project traffic impact that requires mitigation (see Significance Criteria on Page 8 of the Traffic Study). Page 19 of the Traffic Study also states that the Project will contribute to vehicle queuing problems at the Airport Boulevard/SR29/SR12 intersection. Mitigation at this intersection will also require approval and concurrence from Caltrans.

The Project should be required to pay a "fair share" to mitigate its significant traffic impacts and its queuing impacts at the Airport Boulevard/SR29/SR12 intersection. The CEQA document does not include mitigation measures to reduce these impacts to a level of insignificance. An EIR is therefore required to analyze these impacts and propose feasible mitigations.

Mr. Brohard concludes that the Napa 34 Project will clearly have additional near-term and cumulative significant traffic impacts that should be studied through an EIR process. An EIR should be prepared and circulated for public comment to propose feasible and effective mitigation measures.

B. The Project will have Significant Adverse Impacts on Air Quality.

1. Construction Phase Air Emissions will be Significant.

Atmospheric Scientist, Dr. James Clark, Ph.D., concludes that the Napa 34 Project will have highly significant air quality impacts during the construction phase. The construction phase for the Project will extend over three years. Construction workers will be among the most significantly affected by construction phase emissions, since those workers will be in close proximity to construction equipment and other sources of construction phase pollution for the entire three year construction period, making this an issue of particular concern to Local 751.

Dr. Clark prepared a detailed air quality modeling analysis using the URBEMIS 2007 version 9.2.4 model that is required to be used by the Bay Area Air Quality Management District ("BAAQMD"). Dr. Clark's modeling shows that the modeling output set forth in the MND is erroneous and dramatically understates Project emissions, and that the Project will in fact have highly significant construction phase emissions.

Dr. Clark's model shows that the Project will have highly significant emissions of Reactive Organic Gases ("ROG") and Nitrogen Oxides ("NOx") during construction, and would exceed the applicable BAAQMD thresholds of significance. Dr. Clark calculates that ROG emissions during the second year of construction would exceed the BAAQMD's CEQA significance threshold value by nearly 10 times during the summer months of construction. The Project's ROG emissions will be 507.3 lbs/day, compared to a CEQA significance threshold of 54 lbs/day set forth in the BAAQMD's December 2009 CEQA Guidelines.[4] Dr. Clark calculates that the daily emission value for NOx during the second year of construction is nearly double the BAAQMD CEQA significance threshold. The Project will generate 91 lbs/day of NOx, compared to a CEQA significance threshold of 54 lbs/day.

Air Pollutant	Project Emissions	BAAQMD Threshold	Significant?
ROG	507.3 lbs/day	54 lbs/day	Yes
NOx	91 lbs/day	54 lbs/day	Yes

The MND fails entirely to quantify the Project's construction phase emissions, from construction equipment, earth-moving, grading, and worker commutes. The construction phase of this Project is projected to last three years. This is not a short-term construction phase that would warrant a lesser degree of scrutiny. Rather, the construction phase of this Project will be akin to a permanent emission source. The MND's failure to analyze this impact renders the document patently inadequate.

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[4] The Project's ROG and NOx emissions also exceed the BAAQMD's 1999 CEQA significance thresholds of 80 ppd for each pollutant.

Furthermore, since the impact is not analyzed, the MND fails to consider many feasible mitigation measures that could drastically reduce the Project's construction impacts. The MND treats the Project's construction emissions as a short-term impact that may be ignored. Dr. Clark concludes that given the long duration of construction, it is appropriate to apply the BAAQMD's CEQA significance thresholds for operational emissions, or the new BAAQMD CEQA significance thresholds for construction emissions, set forth above.

As a second approach, the MND could have compared construction emissions to significance thresholds established by other air districts that apply specifically to construction emissions. The table below clearly demonstrates that the Project's construction emissions, even after mitigation, far exceed significance thresholds adopted by other air districts.

Construction Phase CEQA Significance Thresholds

	Emissions Significance Thresholds (ton/year)				
Air District	**ROG**	**NOx**	**CO**	**PM10**	**PM2.5**
BAAQMD construction	10 (54 ppd)	10 (54 ppd)	-	15 (80 ppd)	10 (54 ppd)
SMAQMD construction	-	11	-	-	-
SCAQMD construction	10	13	73	20	7
SLOCAPCD construction	24	10	-	7	-
AVAQMD construction	18	18	72	11	-
SJVAPCD construction	7	7	-		-
MBUAPCD construction	-	-	-	11	-
Napa 34 Project	507 ppd	91 ppd			

The construction emissions contained in the URBEMIS modeling runs exceed most construction emission significance thresholds by massive amounts. The Napa 34 Project therefore has significant construction air emissions that must be disclosed and analyzed in an EIR.

CEQA requires that an EIR must not only identify the impacts, but must also provide "information about how adverse the impacts will be." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692). The MND for this Project fails to do so.

2. The MND Fails to Impose Feasible Mitigation Measures for Construction Emissions.

There are dozens of feasible mitigation measures that could reduce the Project's construction-phase impacts. However, since the MND erroneously concludes that the Project will not have significant construction emissions, the document failed to analyze these measures. Mitigation measures can dramatically reduce emissions of NOx and diesel engine exhaust, both

of which can have serious impacts on the health of construction workers. Diesel engine exhaust is a known human carcinogen that has been linked to an increased risk of lung cancer among construction workers, an issue of particular importance to the members of Local 751.

Numerous control measures are available to reduce emissions of diesel particulate matter and other pollutants from construction equipment. Options include requiring the use of best practices in construction management and the use of newer equipment. Depending on the engine type of on-road or off-road equipment, the use of alternative fuels in combination with retrofit technologies, *e.g.*, diesel particulate filters, selective catalytic reduction, exhaust gas recirculation in new equipment can achieve emission reductions of up to 89% PM10, 90% carbon monoxide ("CO"), 93% reactive organic gases ("ROG"), and 40% nitrogen oxides ("NOx"). (California Air Resources Board, Currently Verified Technologies, http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm)

A combination of these options provides the greatest benefit and is frequently required as CEQA mitigation. For example, the Sacramento Metropolitan Air Quality Management District ("SMAQMD") requires as standard CEQA mitigation that all heavy-duty (>50 hp) off-road vehicles to be used in a construction project shall achieve a project-wide fleet-average 20 percent NOx reduction and 45 percent particulate reduction compared to the most recent CARB fleet average at time of construction. When the standard mitigation does not reduce the impact to below the threshold, the SMAQMD recommends a mitigation fee of $16,000 per ton of emissions. A combination of mitigation measures should be required for Project construction to avoid adversely impacting sensitive receptors in the vicinity and contributing to the region's existing problems with high concentrations of diesel soot and ozone.

An EIR should be prepared to consider "clean fuels," such as, emulsified diesel, biodiesel, fuel borne-catalysts, compressed natural gas, liquefied natural gas, propane, ethanol, and methanol. The EIR should also consider retrofit controls. One of the most effective ways to reduce diesel pollution from existing equipment is to combine the cleaner fuels, with retrofit technology. Retrofit technologies can be geared towards PM or NOx reduction, though many also reduce CO and hydrocarbon ("HC") emissions as well.

Retrofit technologies are available for a variety of applications, which could considerably reduce construction equipment exhaust emissions. For example, diesel oxidation catalysts, selective catalytic reduction, lean NOx catalysts, and exhaust gas recirculation have been successfully retrofitted on off-road vehicles and these technologies offer opportunities to greatly reduce PM10, CO, ROG, and NOx emissions. In addition, many projects have demonstrated the feasibility of installing verified on-road technologies on construction equipment.

Retrofits are remarkably cost-effective when compared to other means of reducing air pollution. For example, the average cost for most applications of a diesel oxidation catalyst is approximately $2,500 (excluding installation) and for a diesel particulate filter between $7,000–12,000 (excluding installation). The California Air Resources Board ("CARB") estimates that the average cost of retrofitting an engine of 275 horsepower with a catalyzed diesel particulate

filter ranges between $6,900–$9,000. By comparison, the average base price for a 200 to 300-hp wheel loader is $275,000. Retrofitting an engine with a catalyzed diesel particulate filter in this price range or with a $2,500-diesel oxidation catalyst costs only a small fraction (2.5 to 3.2% and less than 1%, respectively) of the cost of replacing the entire vehicle with one that pollutes less.

These technologies have been required as mitigation measures for other projects and should be required for this Project to reduce its significant emissions from construction.

2. Operational Phase Air Emissions will be Significant.

Dr. James Clark, Ph.D., concludes that the air quality analysis used as a basis for the MND is deficient. The analysis fails to: (1) adequately screen the project impacts; (2) incorporate the latest regulatory guidance; (3) provide adequate documentation of modeling assumptions; (4) recognize the significance of emissions of particulate matter; (5) analyze potential health risks from diesel particulate matter emissions during project construction; (6) identify feasible mitigation and; (7) identify cumulative impacts. Therefore, a DEIR should be prepared to include a thorough evaluation of all air quality issues associated with the project.

The BAAQMD has adopted screening criteria to determine if a proposed project may have significant air quality impacts for CEQA purposes. The MND ignores the BAAQMD CEQA screening criteria entirely. Dr. Clark explains that the Napa 34 Project exceeds several of the BAAQMD CEQA screening criteria, and that there is therefore a fair argument that the Project may have significant air quality impacts that must be analyzed in an EIR.

BAAQMD screening criteria identified in the BAAQMD's 1999 and 2009 CEQA Guidelines, were developed in order to provide lead agencies and project applicants with a conservative indication of whether proposed project could result in potentially significant air quality impacts[5]. In the 1999 Guidelines, BAAQMD provides a list of projects that are likely to produce potentially significant emissions of NO_x based upon the size of the project, including Office Parks.

[5] Bay Area Air Quality Management District, CEQA Guidelines December 2009, p. 3-1

Projects With Potentially Significant Emissions[6]

Land Use Category	Trip Generation Rate	Size of Project Likely to Generate 80 lb/day NOx
Office		
General Office	10.9/1,000 sq. ft.	280,000 sq. ft.
Government Office	68.9/1,000 sq. ft.	55,000 sq. ft.
Office Park	12.8/1,000 sq. ft.	210,000 sq. ft.
Medical Office	37.1/1,000 sq. ft.	110,000 sq. ft.

The 2009 Guidelines include operational and construction related screening sizes for criteria pollutant and greenhouse gas emissions form typical projects including office parks and warehouses.

Operational-Related Criteria Air Pollutant and Precursor Screening Level Sizes[7]

Land Use Type	Operational Criteria Pollutant Screening Size	Operational GHG Screening Size	Construction-Related Screening Size
Office Park	323,000 sq. ft (NOx)	50,000 sq. ft	277,000 sq. ft (ROG)
Warehouse	864,000 sq. ft (NOx)	64,000 sq. ft	259,000 sq. ft (NOx)

Based on the 1999 BAAQMD guidance, the proposed Napa 34 project, estimated to be approximately 459,000 square feet of warehouse and office space, is twice as large as the "Office Park" project listed having significant air quality impacts. Based on the 2009 BAAQMD guidance, the Napa 34 project will have significant NOx and GHG issues during construction

[6] BAAQMD. 1999. BAAQMD CEQA Guidelines. December, 1999. pg 25.
[7] BAAQMD. 2009. CEQA Guidelines. Table 3-1. December 2009, p. 3-2

and operation when compared to comparable projects that would include office parks and warehouses. When a project exceeds an applicable CEQA significance threshold, such as the BAAQMD screening thresholds, there is a fair argument that the project may have significant environmental impacts and an EIR is required. Since the Napa 34 Project exceeds the BAAQMD CEQA screening thresholds, there is a fair argument that the Project will have significant NOx and GHG impacts and an EIR is required to analyze and mitigate these impacts.

The MND failed to incorporate any analysis of this guidance. A DEIR should be prepared to include a comparison of the project to the guidance and to conduct an appropriate analysis of project impacts and identify mitigation, where warranted.

3. Greenhouse Gas Emissions will be Significant.

Dr. Clark concludes that the Project will have significant greenhouse gas ("GHG") emissions in excess of relevant CEQA significance thresholds. The MND concludes that the Napa 34 Project will generate 1,896 metric tons ("MT") per year of CO2 during the operation phase of the project. This exceeds substantially the BAAQMD's significance threshold for GHG of 1,100 MT CO2e/yr, which is a numeric emissions level above which a project's contribution to global climate change is considered to be "cumulatively considerable."

The Bay Area Air Quality Management District ("BAAQMD") has proposed a CEQA significance threshold of 1,100 metric tons per year of CO_2-equivalent[8] greenhouse gas emissions (CO_2e/year). Projects that generate this level of GHG emissions would have significant impacts under CEQA. (*See*, BAAQMD, CEQA Guidelines Update (Dec. 7, 2009).) Specifically, the BAAQMD is suggesting that development projects which will emit less than 1,100 metric tons per year of CO_2e may be considered to have a less than significant impact relative to GHG emissions (both individually and cumulatively).

In this case, the Project's 1896 MT of GHG substantially exceeds the BAAQMD CEQA significance threshold of 1100 MT. The Project therefore has significant greenhouse gas impacts requiring CEQA review.

The BAAQMD approach is consistent with that adopted by many other agencies. The San Diego Air Pollution Control District has adopted a draft CEQA significance threshold of 900

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[8] Carbon dioxide equivalency is a quantity that describes, for a given mixture and amount of greenhouse gas, the amount of CO_2 that would have the same global warming potential, when measured over a specified timescale (generally, 100 years). Carbon dioxide equivalency thus reflects the time - integrated radiative forcing of a quantity of *emissions* or rate of greenhouse gas emission - a *flow* into the atmosphere - rather than the instantaneous value of the radiative forcing of the *stock* (concentration) of greenhouse gases *in the atmosphere* described by CO_2e. For example, the global warming potential for methane over 100 years is 25 and for nitrous oxide 298. This means that emissions of 1 million metric tons of methane and nitrous oxide respectively are equivalent to emissions of 25 and 298 million metric tons of carbon dioxide.

metric tons of CO_2e per year. The Project's emissions vastly exceed that threshold. (*See also*, California Air Pollution Control Officers Association ("CAPCOA") White Paper on CEQA and Greenhouse Gases, suggesting a CEQA threshold of 900 metric tons of CO_2e per year.)[9]

Despite this clear exceedance of the applicable CEQA significance threshold, the MND attempts to use a different methodology to dismiss the impact. BAAQMD proposes an efficiency-based threshold of 4.6 MTA CO2 per person ("persons" is arrived at by adding project employment to project residential development). However, the BAAQMD draft guidelines caution:

> In applying the efficiency-based threshold of 4.6 MT/Yr CO2e (per person) the lead agency might also wish to consider the project's total emissions. Where a project meets the efficiency threshold but would still have very large greenhouse gas emissions the lead agency may wish to consider that the project's contributions to climate change might still be cumulatively considerable.

In this case, the Project's GHG emissions of 1896 MT/yr r far exceed the BAAQMD threshold of either 1100 MT/yr. Dr. Clark concludes that this is a significant impact.

Furthermore, the MND points out that the Napa County General Plan Update EIR (June 2008) concluded that development in the County would have significant and unavoidable GHG

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[9] To the extent that the County argues that the lack of regulatory guidance for GHG excuses the MND's lack of analysis, this argument is without merit. While there is currently little regulatory guidance of evaluating greenhouse gases, this does not relieve a lead agency of its statutory obligation under CEQA to determine whether or not a project's impacts are significant, and to impose feasible mitigation measures and alternatives. Significance thresholds are only "encouraged" under CEQA and are not a prerequisite to an impact analysis. (Guidelines § 15064.7.) In the absence of final thresholds and standards, lead agencies must rely on their own "careful judgment ... based to the extent possible on scientific and factual data" in determining whether a project's global warming-related impacts are significant. (Guidelines §15064(b); see also *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4th 477, 493 (2004) ("[A] lead agency must necessarily make a policy decision in distinguishing between substantial and insubstantial adverse environment impacts").) The court in *Keep Berkeley Jets Over the Bay* made clear that where there is not a "universally accepted" methodology, a lead agency must still "disclose all it can" about project's impacts and evaluate those methodologies that are available. (91 Cal. App. 4th at 1370.)

Indeed numerous agencies have analyzed greenhouse gas impacts and proposed mitigation measures for other projects, such as the Chevron Richmond Refinery expansion, and the ConocoPhillips Rodeo refinery expansion. Such analysis and mitigation is clearly feasible even in the absence of regulatory guidance. Under CEQA the lead agency must still make "a good faith effort" to fully disclose what they can about project impacts by providing data on emissions and use their own "careful judgment ... based to the extent possible on scientific and factual data" to determine whether the project's greenhouse gas impacts were significant. (Guidelines §§ 15151, 15064(b).) The MND fails to meet these standards.

impacts. (MND, p. 13) The MND then proceeds to dismiss the Napa 34 Project's GHG impacts as insignificant. This analysis is legally erroneous. Once an impact has been identified as significant in a prior CEQA document, that same impacts must be acknowledged as significant in subsequent CEQA documents – not the reverse. The courts have recently held that a lead agency may not rely on a prior CEQA document's statement of overriding considerations to avoid CEQA review for a later project. The court in *CBE v. CRA* stated:

> Under CEQA section 21081, an agency approving a project with significant environmental effects must find that each effect will be mitigated or avoided, or "that *specific* overriding economic, legal, social, technological, or other benefits of *the project* outweigh the . . . effect[] . . . ." **n65** The requirement of a statement of overriding considerations is central to CEQA's role as a public accountability statute; it requires public officials, in approving environmentally detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support. **n66** Under Guidelines section 15152(f)(3)(C) [overturned by the Court], however, an agency apparently could adopt one statement of overriding considerations for a prior, more general EIR, and then avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR and statement of overriding considerations. Even though a prior EIR's *analysis* of environmental effects may be subject to being incorporated in a later EIR for a later, more specific project, the responsible public officials must still go on the record and explain specifically why they are approving the later project despite *its* significant unavoidable impacts."

(2002) 103 Cal. App. 4th 98 at 124-125.

This is precisely the legal error that the MND is committing. It is relying on a statement of overriding considerations from a General Plan EIR to avoid imposing new mitigations or issuing a new statement of overriding considerations for the Napa 34 Project, despite its admitted significant impacts. The MND's process is inappropriate because "the responsible public officials must still go on the record and explain specifically why they are approving the later project despite *its* significant unavoidable impacts."

Next, the MND proceeds to rely on a GHG mitigation program that has not yet been developed or approved. The MND states, "Napa County is currently developing an emission reduction plan." (MND, p. 13) As discussed above, the MND may not rely on mitigation plans that have not been developed, or that will be developed after project approval. It is therefore improper for the MND to rely on this post-approval mitigation plan that may or may not ever be adopted and that may or may not adequately mitigate the Project's significant GHG impacts.

Finally, there can be no question that the Napa 34 Project's GHG impacts are cumulatively significant together with the Napa Pipe Project.

The Project therefore has significant GHG impacts requiring CEQA review and the MND does not propose adequate mitigation to reduce these impacts to a level of insignificance. An EIR is therefore required.

4. The Project's Odor Impacts will be Significant.

Dr. Clark concludes that the Napa 34 Project will have significant odor impacts. The MND failed to consider the presence of the Napa Sanitation District Soscol Wastewater Treatment Plant, located at 1515 Soscol Ferry Road. The facility is located approximately 1 mile northwest of the proposed project. According to the Napa Sanitation District, the facility is a 15 million gallon per day (mgd) treatment plant that includes preliminary treatment (screening), primary treatment (clarifiers), biological secondary treatment (340 acres of oxidation ponds and/or activated sludge facilities), secondary clarification or sedimentation, sand filtration, chlorination, sludge digestion and solids de-watering facilities.

According to BAAQMD's CEQA Guidelines, a project is presumed to have significant odor impacts if people are to be located within two-miles of a wastewater treatment facility. Odor impacts include placing worksites within the odor impact screening distance. Since the Napa 34 Project exceeds the BAAQMD CEQA significance threshold for odor, it has a significant impact that must be analyzed in an EIR.

Dr. Clark explains that odor impacts can have significant impacts on human health and well-being. Dr. Clark cites scientific literature finding that unpleasant odors can impair mood leading to increased levels of tension, depression, anger, fatigue and confusion. Conditioned aversions may play a role in perceptions and health symptoms induced by malodors. If a malodor has been previously associated with health symptoms, the odor alone may subsequently recreate these symptoms in the absence of the allergy. Ambient odors can provoke a wide distribution of reactions. Variations are most often attributed to differences in individual sensitivity. Behavioral responses for a single individual and among individuals exposed to the same odor over time can be greatly varied. Cognitive processes may be modifying the over perception of odor exposure. Some individuals may exhibit extreme sensitivity and adaptation to environmental odors does not occur.

Dr. Clark points to a 2008 study on residents living near industrial hog operations which found that odors from the facilities restricted residents' activities to an extent that may affect health. Odors were found to restrict social activities, outdoor activities, and effect sleeping patterns. Research has shown that residents in rural communities perceive environmental barriers as reasons for inactivity and inactivity can have a major impact on a person's physical health. Another study found that malodor reported in communities near swine operations originated from the operations. The study found that odor ratings were related to temperature, PM10, semi volatile PM10 and hydrogen sulfide concentration. The odds of reporting a change in daily activities due to odor increased 62% for each unit increase in average odor during a 12 hour period.

Clearly, placing the Napa 34 Project one mile from a sewage treatment plant creates a significant odor impact that must be disclosed and analyzed in an EIR.

5. Cumulative Air Emissions will be Significant.

The Napa 34 project will have significant cumulative impacts together with the nearby Napa Pipe Project. The two projects, only two miles apart, will obviously be contributing to the same air pollution, including ROG, NOx, PM, GHG and other pollutants. Since the Napa Pipe Project has admittedly significant air quality impacts, and the Napa 34 Project will be adding cumulatively to that pollution, the Napa 34 Project therefore necessarily has significant cumulative air quality impacts.

C. The Project will have Significant Adverse Impacts on Water Supply.

As discussed in comment letters from the City of American Canyon, the Project will have significant adverse water supply impacts. The City of American Canyon, which will be supplying water for the Project, has adopted a Zero Water Footprint policy to protect is water supply and reliability. However, the City has found that the Napa 34 Project does not comply with the Zero Water Footprint policy. The Project will therefore have a significant adverse environmental impact that must be analyzed in an EIR.

The Water Supply Report prepared by the City of American Canyon concludes that the Project will generate a total annual demand for water equal to 10,800 gallons per day or 12 acre feet per year (AFY). (City of American Canyon, Water Supply Report, p. 3)

The Water Supply Report (p.5) states as follows:

> PROJECT'S IMPACT ON RELIABILITY
> The Urban Water Management Plan finds that, as of 2005, the City of American Canyon would experience a shortfall in water supplies in multiple-dry-years of up to 427 acre feet and single-dry-years of up to 897 acre feet. Due to increased demand, the shortfall would worsen even as additional supplies are obtained. By the year 2015, the City of American Canyon would experience a shortfall in multiple-dry-years of up to 1,037 acre feet and in single-dry-years of up to 1,557 acre feet. By contributing to the shortfall, ***the project would reduce the reliability of American Canyon water service.***
>
> PROJECT'S WATER FOOTPRINT
> ***The project does not have a zero water footprint. Staff has determined that it will result in a loss in water service reliability.*** Therefore in accordance with Chapter 13.10 of the City Municipal Code the applicant shall pay to the City a monthly service charge in the amount of $4.25/100 cubic feet. This represents the project's costs associated with City supplying water through the City's connection to the City of Vallejo. (Emphasis added)

The City of American Canyon further explains the Project's impacts on the already dire water supply problem:

> The Urban Water Management Plan finds that, as of 2005, the City of American Canyon would experience a shortfall in water supplies in multiple-dry-years of up to 427 acre feet and single-dry-years of up to 897 acre feet. Due to increased demand, the shortfall would worsen even as additional supplies are obtained. By the year 2015, the City of American Canyon would experience a shortfall in multiple-dry-years of up to 1,037 acre feet and in single-dry-years of up to 1,557 acre feet. By contributing to the shortfall, ***the project would reduce the reliability of American Canyon water service.***
>
> (City of American Canyon, Water Supply Report, p. 5 (Oct. 14, 2009) (Emphasis added))

Since the Napa 34 Project will not comply with the American Canyon Zero Water Footprint policy, and will cause and contribute to "a loss in water service reliability," the Project will have significant adverse environmental impacts that must be analyzed and mitigated in an EIR.

As explained by the City of American Canyon, when, as here, a project has significant impacts on water supply, an EIR is required to analyze this impact and propose feasible mitigations:

> As a result *of Vineyard Area Citizens for Responsible Growth v. Rancho Cordova* (2007) 40 Cal.4lh 412, the lead agency as defined under CEQA, here the County, in its environmental review of a development project, including what is currently proposed by the Applicant, must at a minimum accomplish an environmental review under CEQA that: (a) presents sufficient facts to evaluate the pros and cons of supplying the water that the project will need; (b) presents an analysis that assumes that all phases of the project will be built and will need water, and includes an analysis to the extent reasonably possible of the consequences of the impacts of providing water to the entire project; and (c) where it is impossible to determine that anticipated future water sources will be available, some discussion of possible replacement sources or alternatives to use of anticipated water and of the environmental consequences of those impacts must be presented. *Vineyard*, 40 Cal.4th 430-434.
>
> (Letter from M. Thorne, American Canyon Public Works Director to H. Gitleman (Dec. 16, 2009), p. 2)

CEQA requires the lead agency to analyze the impacts of a project in reference to relevant planning documents, including plans related to air and water. (CEQA Guidelines, App. G, Evaluation of Environmental Impacts, Item 6.) A CEQA document must discuss any inconsistencies that exist between a proposed project and any applicable local or regional plans. (CEQA Guidelines § 15125(d).) This discussion is mandatory under CEQA. The same analysis must be conducted when a lead agency elects to use a negative declaration to evaluate the

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significant environmental impacts that may be caused by a project. (CEQA Guidelines, App. G.) A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).)

The MND is legally deficient because it fails to analyze and mitigate the Project's inconsistencies with the American Canyon Zero Water Footprint policy. Although the City of American Canyon proposes a mitigation fee for the water supply impact, such a fee does not constitute adequate mitigation, and an EIR is still required to disclose the impact and consider concrete and feasible mitigations and alternatives. Mitigation fees are not adequate mitigation unless the lead agency can show that the fees will fund a specific mitigation plan that will actually be implemented in its entirety. *Napa Citizens for Honest Gov. v. Bd. Of Supervisors* (2001) 91 CallApp.4th 342 (no evidence that impacts will be mitigated simply by paying a fee); *Anderson First Coal. v. City of Anderson* (2005) 130 Ca.App.4th 1173 (traffic mitigation fee is inadequate because it does not ensure that mitigation measure will actually be implemented); *Kings Co. Farm Bureau v. Hanfo*rd (1990) 221 Cal.App.3d 692. But see, *Save Our Peninsula Comm v. Monterey Co.* (2001) 87 Cal.App.4th 99 (mitigation fee allowed when evidence in the record demonstrates that the fee will fund a specific mitigation plan that will actually be implemented in its entirety). *California Native Plant Society v. County of El Dorado et al.* (2009) 170 Cal. App. 4th 1026, held that the fee program had to have gone through CEQA review for an agency to say that the payment of the fee alone is adequate CEQA mitigation. (See also, *Endangered Habitats League v. County of Orange* (2005); *Gray v. County of Madera* (2008)) Here, there is no evidence that the mitigation fee will fund a program that will actually be implemented and that will actually mitigate the serious water supply impact. Therefore, the mitigation fee does not reduce this impact to a level of insignificance and an EIR is required to analyze the impact.

D. The Project Will Have Significant Stormwater Impacts.

Hydrogeologist Matthew Hagemann, MS, PG, concludes that the Project will have significant adverse impacts on stormwater pollution that must be analyzed in an EIR. The MND states, on p. 24, that less than significant impacts would be associated with the following issues (VII, Hydrology and Water Quality Impacts):

- Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site?
- Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff?

However, a July 15, 2009 letter from the applicant's consultant to Napa County, states that post-development flow will exceed pre-development volumes.[10] The 2010 Stormwater Management Plan also states that post-development flow will exceed pre-development volumes.[11] The MND makes no mention that post-development stormwater runoff will exceed predevelopment flows.

A waiver request for exceeding the predevelopment flows was the subject of the July 15, 2009 letter. No documentation on the disposition of the waiver request was available in the records reviewed for the preparation of this letter. However, the 2010 Stormwater Management Plan did not include any mention that a waiver was obtained from the County, so we have assumed that a waiver was not granted.

In contrast to the findings in the MND, as cited above, Mr. Hagemann concludes that an exceedance of pre-development stormwater runoff should be considered as a significant unmitigated impact. Therefore, a DEIR should be prepared to include a thorough evaluation of all practicable measures to reduce stormwater runoff from the project site. If, after this evaluation, the runoff is still predicted to exceed pre-development volumes, a quantitative evaluation of all feasible best management practices ("BMPs") should be conducted to conform to Napa County Post-Construction Runoff Management requirements.

Additionally, Mr. Hagemann explains that because groundwater is approximately 10 feet below ground surface, the evaluation of BMPs included in a DEIR should consider protection of the underlying beneficial uses of the groundwater. Any BMPs that would discharge stormwater to the subsurface in a "bioretention strip" (as proposed in the 2010 Stormwater Management Plan, p. 9) cannot cause or contribute to an exceedance of applicable groundwater quality objectives as established in the RWQCB "Basin Plan" for the Napa area.

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[10] Letter from TLA Engineering and Planning, to Erich Kroll, Napa County Department of Public Works, July 15, 2009

[11] Napa Commerce Center Stormwater Management Plan, March 2010

V. CONCLUSION

For the foregoing reasons, Local 751 and Mr. Dan Digardi respectfully request that the County not approve the proposed Mitigated Negative Declaration, require preparation of an Environmental Impact Report for the Project, and refrain from issuing any Project approvals unless and until an EIR is circulated for public comment and certified as complete, including implementation of all feasible mitigation measures and alternatives. We request written notice of any actions, hearings or decisions related to this Project. Thank you for considering our comments.

Sincerely,

Richard Drury

Attachments:

- Comments of Thomas Brohard, PE
- Comments of Matthew Hagemann, MS, PG, and Dr. James Clark, Ph.D.

V. CONCLUSION

For the foregoing reasons, Local 751 and Mr. Dan Digardi respectfully request that the County not approve the proposed Mitigated Negative Declaration, require preparation of an Environmental Impact Report for the Project, and refrain from issuing any Project approvals unless and until an EIR is circulated for public comment and certified as complete, including implementation of all feasible mitigation measures and alternatives. We request written notice of any actions, hearings or decisions related to this Project. Thank you for considering our comments.

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- Comments of Thomas Brohard, PE
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EXHIBIT A

Tom Brohard and Associates

April 19, 2010

Mr. Richard Drury, Attorney at Law
Lozeau/Drury LLP
1516 Oak Street, Suite 216
Alameda, California 94501

SUBJECT: Review of the Mitigated Negative Declaration, Initial Study Checklist, Use Permit, and Final Traffic Impact Analysis for the Napa 34 Holdings Commerce Center in the County of Napa – Traffic Issues

Dear Mr. Drury:

Tom Brohard, P.E., has reviewed the March 17, 2010 Mitigated Negative Declaration (MND), the Initial Study Checklist, Use Permit, and related documents prepared for the proposed Napa 34 Holdings Commerce Center (Project) in the County of Napa. The Omni-Means February 2010 Final Traffic Impact Analysis (Traffic Study) for the Project has also been reviewed.

In summary, further study must be undertaken to properly identify the traffic impacts of the Project. Until the various issues and concerns raised in this letter are addressed, I disagree that the Project's traffic impacts have a less than significant effect on the environment with mitigation, and there is at least a "fair argument" that the Project may have adverse environmental impacts. An environmental impact report (EIR) should be prepared for the Project to analyze the issues outlined in this letter and to propose feasible mitigation measures.

Education and Experience

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

Project Description

Page 1 of the Notice of Intent to Adopt a Mitigated Negative Declaration describes the Napa 34 Holdings Commerce Center as:

81905 Mountain View Lane, La Quinta, California 92253-7611
Phone (760) 398-8885 Fax (760) 398-8897
Email tbrohard@earthlink.net

"An industrial park totaling approximately 490,500 square feet of new development in eight buildings... Approximately 73% percent (or +/- 356,000 square feet) of the total development floor area would be dedicated to warehousing uses, while the remaining 27 percent (or +/- 134,500 square feet) would be utilized as office space. Access would be provided from three new driveways located off an extension of Devlin Road south of the existing Devlin Road/Airport Boulevard intersection and a single right-in right-out driveway off Airport Boulevard. Roadway improvements, including road construction at Devlin Road and road widening at Airport Boulevard are also proposed. Parking for 740 vehicles is to be provided on-site, along with six loading docks."

Traffic Issues

Based on the information provided in the Initial Study Checklist, Use Permit, Traffic Study, and related documents for the Napa 34 Holdings Commerce Center, my review indicates the following traffic issues and areas of concern:

1) Analysis of Near Term Conditions Is Flawed – From the July 21, 2009 application for the Project, construction of the industrial park will be phased, with Phase 1 to be completed in 12 months and Phase 2 to be completed in 24 months. Therefore, it will be at least two more years before the Project is completed and occupied. The two analyses in the Traffic Study were done for existing conditions based on June 2009 traffic counts, and then for near term conditions, assuming completion of the Project and the approved Greenwood Business Park directly across Devlin Road opposite the Project. To properly assess near-term conditions and impacts, the baseline volumes used in the Traffic Study must be revised as follows:

   a) Adjust Traffic Counts to a Thursday in August - Increase the existing AM and PM peak hour traffic counts made on Tuesday June 2, 2009, Wednesday June 3, 2009, and Thursday June 4, 2009 to reflect worst case conditions on a Thursday in August, a practice utilized by the City of Napa immediately adjacent to the study intersections.

   b) Adjust Baseline Volumes for Annual Ambient Growth - Include an annual ambient growth factor to account for small projects as well as general traffic growth between the June 2009 traffic counts and project completion (at least two years from now), so add in three years of annual ambient growth to the adjusted traffic volumes for a Thursday in August.

   c) Adjust Baseline Volumes to Include Trips for All Other Approved Projects - Include traffic from all other approved but not yet completed and occupied projects in the area that will contribute traffic to the study intersections.

Correcting these three errors above will increase the June 2009 traffic counts to correspond to traffic volumes at Project completion in Year 2012. The resulting traffic volumes would represent a Thursday in August (utilizing the same methodology as the adjacent City of Napa), reflect traffic to and from small projects as well as annual ambient traffic growth, and account for traffic to and from other approved but not yet constructed or occupied projects (in addition the approved Greenwood Business Park). Project traffic can then be added to this adjusted baseline that better represents traffic volumes in Year 2012, and this will then enable the significant Project traffic impacts to be properly determined and analyzed. There is at least a fair argument that the addition of project traffic to the higher baseline volumes may have an adverse impact on traffic flow (see below). These impacts should be analyzed in an EIR and additional mitigation measures adopted as required for the Project.

2) An Additional Significant Impact Will Occur With Baseline Adjustments – Without making the baseline adjustments above, Table 5 on Page 13 of the Traffic Study indicates delay at Airport Boulevard/SR29/SR12 in the AM peak hour will increase from 41.4 seconds to 53.6 seconds.

   With the upper threshold of Level of Service (LOS) D at 55.0 seconds, there is at least a "fair argument" that the adjustments above plus Project traffic will result in LOS E conditions (an increase of only 1.5 seconds of delay) at Airport Boulevard/SR29/SR12. Resulting delay of 55.1 seconds or more will change the AM peak hour intersection operation from LOS D to LOS E, creating a significant project traffic impact that requires mitigation (see Significance Criteria on Page 8 of the Traffic Study). Mitigation at this intersection will also require approval and concurrence from Caltrans. An EIR should be prepared to analyze this issue and to propose feasible mitigation measures for the Project.

3) Inadequate Stacking On-Site at Project Driveways – The proposed driveway throats on-site (the distance between the roadway curb line and the first internal aisle parallel to the roadway) are very short and will not accommodate the 95th% queues of traffic exiting these driveways during the PM peak hour. The driveway access to Airport Boulevard (Intersection 9) provides about 40' for stacking (scaled from the site plan) whereas the calculations in the Traffic Study Appendices show that 62' is required to accommodate the 95th% queue. Similarly, the north, middle, and south driveway accesses to Devlin Road (Intersections 6, 7, and 8) each provide about 20' for stacking whereas calculations in the Traffic Study Appendices show that 50', 65', and 49' respectively are required for the 95th% queues.

   Providing inadequate driveway throats will block the internal aisles parallel to the adjacent roadways during the PM peak hour, causing congestion, delay, and potential queuing back into Airport Boulevard and Devlin Road for traffic

entering the Project. Extending the driveway throats further into the site to accommodate the 95th% queues will require redesign of the internal circulation, and will also result in the loss of on-site parking. An EIR should be prepared to analyze these issues and to propose feasible mitigation measures for the Project.

4) Analysis of Cumulative Conditions Has Not Been Completed – The Traffic Study indicates the County of Napa has not required an analysis of cumulative conditions as an area-wide traffic study is underway to accomplish this task and to update the County of Napa Traffic Impact Fee Program.

   In their September 29, 2009 letter, Caltrans requested a cumulative analysis in accordance with their Guide for the Preparation of Traffic Impact Studies. In their March 3, 2010 letter, Caltrans reiterated "Our previous comments still apply and are incorporated here by reference." The recent Caltrans letter also requested AM and PM peak hour turning movement volumes for each study intersection under Project Only Conditions, 2030 Cumulative Conditions only, and 2030 Cumulative plus Project Conditions.

   Without completion of the cumulative analysis in the area-wide study, it is not possible to determine what improvement measures will be needed, how much they will cost, whether they will be included in a future capital improvement program, if they will be constructed in a timely manner, or what the corresponding fees and the Project "fair shares" will be. There is at least a fair argument that the Project may have significant cumulative traffic impacts. An EIR should be prepared to analyze these issues and to propose feasible mitigation measures for the Project.

5) Mitigation Measures Are Incomplete – The mitigation measures on Pages 34 and 35 of the Use Permit are incomplete and inadequate as follows:

   a) Mitigation Measure #10 - Pay Traffic Mitigation Fees – The County Traffic Impact Fee Program is currently being updated but, as discussed above, this process has not been completed. Payment of impact fees alone does not relieve the Project from mitigation of the significant traffic impacts that it will create in the near term and under cumulative conditions. The County may not rely on a mitigation fee program that has not been finalized to mitigate the significant impacts. This mitigation is therefore not adequate to reduce the impact to a level of insignificance and the impact therefore remains significant and must be addressed in an EIR.

   b) Mitigation Measure #12 – Airport Boulevard/Devlin Road Improvements – The improvements identified on Page 21 of the Traffic Study require the widening of Airport Boulevard from 72' to 86' between the outside curbs to implement the necessary westbound dual left turn lanes. Widening of the

east leg of the intersection will also necessitate widening of the west leg for proper lane alignment across the intersection as well as transitions and tapers back to the existing 72' curb to curb width east and west of Devlin Road. Widening Airport Boulevard by 14' could result in the need for additional right of way, potentially on the north side of Airport Boulevard west of Devlin Road where the adjacent property has already been developed. The Traffic Study must evaluate the need for and the availability of the additional right of way to determine if this proposed mitigation measure is feasible.

c) Mitigation Measure #13 – Soscol Ferry Road/Devlin Road Traffic Signal – Page 21 of the Traffic Study indicates that the peak hour traffic signal warrant is exceeded in the PM peak hour when project traffic is added. The proposed mitigation measure states "...the permittee and his/her successors in interest shall contribute to the cost of signalization at the Soscol Ferry Road/Devlin Road intersection should the County deem it necessary to install traffic signals at that intersection at some point in the future." The Project's fair share of signalization should be calculated and the funds collected upon issuance of any building permits for the Project.

d) Mitigation Measure #14 – Airport Boulevard/Devlin Road Traffic Signal – In addition to providing the northbound right turn green arrow overlap which will run concurrently with the westbound dual left turns, it will also be necessary to prohibit westbound to eastbound U-turns at this intersection to eliminate protected conflicting turning movements. This mitigation measure is therefore insufficient to reduce this impact to a level of insignificance and an EIR is therefore necessary to analyze the impact.

e) Queuing Impacts Are Not Mitigated – Pages 17 and 19 of the Traffic Study state that the Project will contribute to vehicle queuing problems at three intersections: Soscol Ferry Road/SR29, Soscol Ferry Road/Devlin Road, and Airport Boulevard/SR29/SR12. The Project should be required to pay a "fair share" to mitigate queuing impacts at each of these three intersections as identified on Pages 17 and 19 of the Traffic Study. The CEQA document does not include mitigation measures to reduce this impact to a level of insignificance. An EIR is therefore required to analyze these impacts and propose feasible mitigations.

6) Mitigation Measures are Inconsistent with the Napa Pipe Project – Earlier this year, I reviewed the October 2009 Draft EIR and the Traffic Study for the Napa Pipe Project, a proposed development a short distance to the North of the Napa 34 Holdings Commerce Center. Three common intersections were independently evaluated in the separate traffic studies for these two projects. All three intersections are forecast to be significantly impacted by the Napa Pipe Project for "Existing plus Project" conditions. The Draft EIR proposes

near-term mitigation for the Napa Pipe Project which is inconsistent with proposed near-term mitigation for the Napa 34 Holdings Commerce Center Project as follows:

a) Soscol Ferry Road/Devlin Road – The Napa Pipe Draft EIR requires that this intersection be channelized so vehicle movements do not conflict and recommends against the installation of traffic signals. This proposed mitigation conflicts with Mitigation Measure #13 for Napa 34 Holdings Commerce Center which proposes a "fair share" of the cost of traffic signals. An EIR is therefore required to resolve these inconsistencies, analyze the impacts, and propose feasible mitigation.

b) Soscol Ferry Road/SR12/SR29/SR221 – The Napa Pipe Draft EIR identifies construction of a flyover for southbound traffic on SR221 continuing south on SR12/SR29 (a bridge over the intersection to remove this high peak hour left turn volume from the intersection). The Draft EIR requires Napa Pipe to contribute their "fair share" of these extensive improvements as mitigation.

According to Table 5 on Page 13 of the Traffic Study, Napa 34 Holdings Commerce Center increases delay by 6 seconds in the AM peak hour (already operating at LOS E) and adds traffic in the PM peak hour (already operating at LOS F). This should have been identified as a significant project traffic impact. In addition, Page 17 of the Traffic Study also states that the Project will contribute to vehicle queuing problems at the Soscol Ferry Road/SR12/SR29/SR221 intersection.

The Project should be required to pay a "fair share" to mitigate its significant traffic impacts and its queuing impacts at the Soscol Ferry Road/SR12/SR29/SR221 intersection. The CEQA document does not include mitigation measures to reduce these impacts to a level of insignificance. An EIR is therefore required to analyze these impacts and propose feasible mitigations.

c) Airport Boulevard/SR12/SR29 – The Napa Pipe Draft EIR identifies construction of a grade-separated interchange at this intersection as proposed in the Napa County General Plan. The Draft EIR requires Napa Pipe to contribute their "fair share" of these extensive improvements as mitigation.

As previously discussed in this letter, there is at least a "fair argument" that the baseline adjustments plus Project traffic will result in LOS E conditions (an increase of only 1.5 seconds of delay) at Airport Boulevard/SR29/SR12. Resulting delay of 55.1 seconds or more will change the AM peak hour intersection operation from LOS D to LOS E,

creating a significant project traffic impact that requires mitigation (see Significance Criteria on Page 8 of the Traffic Study). Page 19 of the Traffic Study also states that the Project will contribute to vehicle queuing problems at the Airport Boulevard/SR29/SR12 intersection. Mitigation at this intersection will also require approval and concurrence from Caltrans.

The Project should be required to pay a "fair share" to mitigate its significant traffic impacts and its queuing impacts at the Airport Boulevard/SR29/SR12 intersection. The CEQA document does not include mitigation measures to reduce these impacts to a level of insignificance. An EIR is therefore required to analyze these impacts and propose feasible mitigations.

As indicated, my review disclosed several traffic issues and concerns associated with the Napa 34 Holdings Commerce Center. The items outlined above must be carefully studied before reaching the conclusion the Project has traffic impacts that are either insignificant or can be reduced to insignificance through mitigation. The Project will clearly have additional near-term and cumulative significant traffic impacts that should be studied through an EIR process. An EIR should be prepared and circulated for public comment to propose feasible and effective mitigation measures. If you have questions regarding these comments, please call me at your convenience.

Respectfully submitted,

Tom Brohard and Associates

Tom Brohard

Tom Brohard, PE
Principal

Enclosure

REGISTERED PROFESSIONAL ENGINEER TOM BROHARD NO. 24577 EXP. 12/31/11 CIVIL STATE OF CALIFORNIA

REGISTERED PROFESSIONAL ENGINEER TOM BROHARD NO. 724 EXP. 3/31/12 TRAFFIC STATE OF CALIFORNIA

Tom Brohard, PE

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

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

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

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

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

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

- Oversaw preparation and adoption of the Circulation Element Update of the General Plan including development of Year 2035 buildout traffic volumes, revised and simplified arterial roadway cross sections, and reduction in acceptable Level of Service criteria under certain constraints

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

- Oversaw preparation of fact sheets/design exceptions to reduce shoulder widths on Monroe Street over I-10 as well as striping plans to install left turn lanes on Monroe Street at the I-10 Interchange under a Caltrans encroachment permit

- Oversaw preparation of traffic impact analyses for Project Study Reports evaluating different alternatives for buildout improvement of the I-10/Monroe Street and the I-10/Golf Center Parkway Interchanges

- Oversaw preparation of plans, specifications, and contract documents and provided assistance during construction of 22 new traffic signal installations

- Oversaw preparation of plans and provided assistance during construction for the conversion of two traffic signals from fully protected left turn phasing to protected-permissive left turn phasing with flashing yellow arrows

- Reviewed and approved over 450 work area traffic control plans as well as signing and striping plans for all City and developer funded roadway improvement projects

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

- Prepared over 350 work orders directing City forces to install, modify, and/or remove traffic signs, pavement and curb markings, and roadway striping

- Oversaw preparation of engineering and traffic surveys to establish enforceable speed limits on over 125 street segments

- Reviewed and approved traffic impact studies prepared for more than 16 major development projects

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