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Responsibility

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

SUPPORTERS ALLIANCE FOR
ENVIRONMENTAL RESPONSIBILITY, a
California non-profit corporation,

Petitioner,

v.

CITY OF CHULA VISTA, a municipality; CITY
COUNCIL OF THE CITY OF CHULA VISTA,
a municipal governing body,

Respondents,

BALDWIN & SONS, LLC, a California limited
liability company,

Real Party in Interest.

Case No.: 37-2019-00037002-CU-TT-CTL

Filed Under the California Environmental Quality
Act ("CEQA")

VERIFIED PETITION FOR WRIT OF
MANDATE

(CEQA, Pub. Res. Code § 21000, et seq.; Code
of Civil Procedure §§ 1094.5, 1085)

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Superior Court of California,
County of San Diego
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Clerk of the Superior Court
By Regina Chanez, Deputy Clerk

Petitioner Supporters Alliance for Environmental Responsibility (“Petitioner” or “SAFER”) petitions this court for a Writ of Mandate directed to Respondents City of Chula Vista and City Council of the City of Chula Vista (“Respondents” or the “City”) and Real Party in Interest Baldwin & Sons, LLC (“Real Party” or “Applicant”), and by this verified petition, alleges as follows:

1. Petitioner brings this action to challenge the unlawful actions of Respondents in approving the addition of 300 dwelling units to the northeastern portion of the Otay Ranch Planning Area 12 and related approvals (the “Project”) without preparing an Environmental Impact Report (“EIR”), in violation of the California Environmental Quality Act (“CEQA”), Public Resources Code § 21000 *et seq.*, and the CEQA Guidelines, title 14, California Code of Regulations, § 15000 *et seq.* Instead, the City approved the Project based on a third addendum to an EIR prepared in 2003 for the Otay Ranch Freeway Commercial Sectional Planning Area (“SPA”) Plan – Planning Area 12 (“PA-12”), a Plan which included no residential units whatsoever.

2. The specific actions challenged are the City’s: (1) adoption of a resolution considering a third addendum to the 2003 Otay Ranch Freeway Commercial SPA Plan – PA-12 (the “Third Addendum”); approving an amendment to the Otay Ranch General Development Plan to reflect land use changes for approximately 36 acres within the Otay Ranch Freeway Commercial PA-12 Planned Community, including associated text, maps and tables; (2) approval of amendment to the Otay Ranch Freeway Commercial SPA Plan, Design Plan, and associated regulatory documents; and approval of amendment to the Otay Ranch Freeway Commercial North Master Precise Plan; (3) adoption of ordinance approving amendment to Otay Ranch Freeway Commercial SPA Planned Community District Regulations for the Northerly FC-2 Portion; (4) adoption of ordinance approving a development agreement amendment between the City Of Chula Vista, Village II Town Center, LLC and Sunranch Capital Partners, LLC for the Freeway Commercial North Portion of Otay Ranch Planning Area 12; (5) adoption of resolution approving a First Amendment to the Agreement for the Provision of Community Purpose Facility Acreage for Otay Ranch Village Two between the City Of Chula Vista and Otay Project, L.P; (6) adoption of resolution approving Tentative Subdivision Map CVT 19-0001 for Otay Ranch PA-12 Freeway Commercial North; and (7) adoption of resolution approving Design Review Permit DR17-0037 to construct a mixed-use project consisting of a 578-unit apartment complex, 15,000

1 square feet of retail use, two integrated parking structures on two lots consisting of 10.4 acres located in
2 the Otay Ranch Freeway Commercial North, Neighborhood PA-12.

3 3. Located in Chula Vista, California, the Project proposes to build up to 300 additional
4 multi-family residential units with the Otay Ranch PA-12 Freeway Commercial North site.

5 4. Otay Ranch is situated within the East Planning Area of the City of Chula Vista. The
6 East Planning Area is bordered by Interstate 805 (I-805) to the west, San Miguel Mountain and State
7 Route 54 to the north, the Otay Reservoir and the Jamul foothills to the east, and the Otay River Valley
8 to the south.

9 5. In 2003, the City of Chula Vista adopted an EIR for the Sectional Planning Area Plan for
10 Planning Area 12 Freeway Commercial (“FC”) portion of the Otay Ranch General Development Plan
11 (“GDP”). The 2003 EIR addressed the potential environmental impacts of an SPA Plan and a Tentative
12 Tract Map (“TM”) for the PA-12 FC site of the Otay Ranch GDP. According to the 2003 EIR, the
13 proposed 132.9-acre project site was identified in the Otay Ranch GDP for freeway-oriented
14 commercial uses that were anticipated to occur with that particular portion of PA-12. Approximately
15 120.5 acres of the 132.9-acre site would be utilized for commercial purposes, with the remaining 12.4
16 acres to be used for circulation (the “2003 Project”). The 2003 EIR stated that “[n]o residential or
17 industrial uses are proposed in Planning Area 12.” 2003 EIR, p. 2-1.

18 6. The PA-12 FC Property consists of two parcels, FC-1 and FC-2. FC-1 has been fully
19 developed as the Otay Ranch Town Center, a commercial shopping center.

20 7. In May 2015, the City approved General Plan and Otay Ranch GDP Amendments, as
21 well as entitlements, for the proposed modifications through approval of a First Addendum to the 2003
22 EIR. In September 2016, a Second Addendum to the FEIR was prepared for the SPA Plan
23 Amendments and a Tentative Map that implements the General Plan and Otay Ranch GDP. The First
24 and Second Addenda to the FEIR ostensibly modified the project to allow for the construction of 600
25 multifamily residential units, 15,000 square-feet of commercial space in a mixed use format, and 2.0
26 acres of public parkland.

27 8. The current proposed Project seeks to add 300 residential units to the northeastern
28 portion of PA-12, which is referred to as Freeway Commercial North, or FC-2. The Project currently

1 proposed, at full buildout, would increase the total number of dwelling units in the FC-2 site to 900,
2 from the initially proposed zero.

3 9. Rather than analyze the Project's significant environmental impacts in an EIR, as
4 required by CEQA, the City prepared a CEQA addendum for the Project, based on the 2003 EIR for the
5 SPA Plan for PA-12 FC that was certified 16 years ago, and which included no residential uses at all
6 for the area.

7 10. The Project and the environmental setting have changed dramatically over the last 16
8 years. The Project, coupled with the additional projects at FC-2 included in the First and Second
9 Addenda to the 2003 EIR, now includes 900 residential units, where the 2003 Project did not include
10 any residential component at all. The 2003 EIR did not analyze the impacts of 900 residential units at
11 the site and therefore no longer has relevance. A new EIR must be prepared for this Project. Petitioner
12 and others submitted evidence from several qualified experts presenting a fair argument that the
13 proposed Project may have significant impacts on air quality, human health, biological resources, and
14 public services, and that the Addendum's greenhouse gas and traffic analyses are not supported by
15 substantial evidence.

16 11. Even if the 2003 EIR did retain some relevance, which it does not, the City was still
17 required to prepare an EIR for the Project rather than an addendum because the residential component
18 of the Project was not analyzed in the 2003 EIR, and it will result in a new significant impacts to
19 residential indoor air quality, public services such as police, fire, school, sewer, and other impacts.

20 12. Respondents prejudicially abused their discretion by adopting the Third Addendum and
21 failing to prepare an EIR. Alternatively, Respondents prejudicially abused their discretion by relying on
22 a Third Addendum and making findings that are not supported by substantial evidence. Accordingly,
23 resolutions and ordinances approving the Third Addendum and approving the Project should be set aside
24 and the City should be required to prepare an EIR and fully comply with CEQA prior to considering
25 whether to approve the Project.

26 **PARTIES**

27 13. Petitioner SAFER is a California nonprofit public benefit corporation with members who
28 live and/or work in the County of San Diego. The primary objective and purpose of SAFER is to

1 contribute to the preservation and enhancement of the environment; to advocate for programs, policies,
2 and development projects that promote not only good jobs but also a healthy natural environment and
3 working environment, including but not limited to advocating for changes to proposed projects and
4 policies that, if adopted, would reduce air, soil and water pollution, minimize harm to wildlife, conserve
5 wild places, reduce traffic congestion, reduce global warming impacts, and assure compliance with
6 applicable land use ordinances; to work to attain the widest range of beneficial uses of the environment
7 without degradation, risk to health or safety, or other undesirable and unintended consequences; to
8 promote environmentally sustainable businesses and development projects, including providing
9 comments raising environmental concerns and benefits on proposed development projects; to advocate
10 for changes to proposed development projects that will help to achieve a balance between employment,
11 the human population, and resource use which will permit high standards of living and a wide sharing of
12 life's amenities by the general public; to take steps to preserve important historic, cultural, and natural
13 aspects of our national heritage, and maintain, wherever possible, an environment which supports
14 diversity and variety of individual choice; and to carry on other charitable and educational activities
15 associated with this goal as allowed by law. SAFER's members who live and/or work near the Project
16 have several legally cognizable interests in the Project and will be negatively affected by the Project's
17 adverse environmental impacts and improper approval. The interests of Petitioner and its members are
18 unique and will be directly impacted by the Project. Petitioner brings this action on behalf of itself, its
19 members, and in the public interest. Petitioner and its members have a direct and beneficial interest in
20 Respondents' compliance with laws bearing upon approval of the Project. These interests will be
21 directly and adversely affected by the Project, which violates provisions of law as set forth in this
22 Petition and would cause substantial harm to the natural environment and the quality of life in the
23 surrounding community. The maintenance and prosecution of this action will confer a substantial
24 benefit on the public by protecting the public from the procedural, environmental, and other harms
25 alleged herein.

26 14. Respondent City of Chula Vista is a municipal corporation in whose jurisdiction the
27 Project will be located. Respondent City of Chula Vista is the "lead agency" for the Project for
28 purposes of Public Resources Code § 21067, and has principal responsibility for conducting

1 environmental review for the Project and taking other actions necessary to comply with CEQA.

2 15. Respondent the City Council of the City of Chula Vista (“City Council”) serves as the
3 elected governing body of the City of Chula Vista. Respondent City Council is ultimately responsible
4 for reviewing and approving or denying the Third Addendum and the Project. The City Council voted
5 on June 18, 2019, to approve the Project, including consideration of the Third Addendum.

6 16. Real Party in Interest Baldwin & Sons, LLC is a California Limited Liability Company
7 (LLC) with a principal place of business located at 20 Corporate Plaza Drive, Newport Beach,
8 California 92660, and a local address at 610 West Ash, Suite 1500, San Diego, CA 92101. Baldwin &
9 Sons, LLC is listed on the Notice of Determination as the Project applicant.

10 **JURISDICTION AND VENUE**

11 17. This Court has jurisdiction over the matters alleged in this Petition pursuant to Code of
12 Civil Procedure sections 1085 and 1094.5, and Public Resources Code sections 21167, 21168 and
13 21168.5.

14 18. Venue is proper in the County of San Diego (“County”) Superior Court in accordance
15 with Code of Civil Procedure section 395 because the Project at issue is located in the County.

16 19. Venue is proper in this Court under California Code of Civil Procedure sections 394
17 (actions against a city, county, or local agency) and 395 (actions generally) because Respondents include
18 a city and local agencies based in the County and because the cause of action alleged in this Petition
19 arose in the County and the Project will occur within the County.

20 20. On July 12, 2019, Petitioner served a notice of their intent to file this lawsuit, in
21 accordance with Public Resources Code section 21167.5. (See Exhibit 1: Notice of Intent to File
22 Petition Pursuant to the California Environmental Quality Act.)

23 21. Pursuant to Public Resources Code, section 21167.6, subdivision (b)(2), Petitioner elects
24 to prepare the record of proceedings in this action. (See Exhibit 2: Petitioner’s Notice of Intent to
25 Prepare Record.)

26 22. Petitioner will comply with the requirements of Public Resources Code section 21167.7
27 by sending a copy of this Petition and Complaint to the California Attorney General.

28 23. Petitioner has performed or will perform all conditions precedent to the filing of the

1 instant action and have exhausted any and all available administrative remedies to the extent required by
2 law.

3 24. Petitioner and its members live and/or work near the Project site and in the County.
4 They have been and will continue to be harmed by Respondents' failure to provide environmental
5 documents that accurately and fully inform interested persons of the Project's true impacts, and
6 mitigate those impacts. Such documents would lead to better environmental decision-making regarding
7 the Project, and would enable all residents, land owners, and business owners in the affected region to
8 better understand the true environmental impacts of the Project.

9 25. Petitioner has no plain, speedy, or adequate remedy in the course of ordinary law unless
10 this Court grants the requested writ of mandate to require Respondents to set aside their approval of the
11 Project. In the absence of such remedies, Respondents' decisions will remain in effect in violation of
12 State law and Petitioner will be irreparably harmed. No monetary damages or legal remedy could fully
13 and adequately compensate Petitioner for that harm.

14 **PRIVATE ATTORNEY GENERAL DOCTRINE**

15 26. Petitioner brings this action as a private attorney general pursuant to Code of Civil
16 Procedure section 1021.5, and any other applicable legal theory, to enforce important rights affecting
17 the public interest.

18 27. Issuance of the relief requested in this Petition will confer a significant benefit on the
19 general public by requiring Respondents to carry out its duties under CEQA and other applicable laws
20 before approving the Project.

21 28. Issuance of the relief requested in this Petition will also result in the enforcement of
22 important rights affecting the public interest by compelling Respondents to engage in a legally adequate
23 analysis of the Project, and to ensure that the public has a meaningful opportunity to review and
24 comment on the impacts and mitigation measures for the Project.

25 29. The necessity and financial burden of enforcement make an award of attorneys' fees
26 appropriate in this case. Without this Petition, Respondents and Real Party will proceed with a plan and
27 development that will cause significant, unmitigated environmental impacts that might otherwise have
28 been reduced or avoided through legally adequate environmental review and the adoption of feasible

1 mitigation measures.

2 **PROCEDURAL FACTS**

3 30. In May 2019, the City released a CEQA addendum (the “Third Addendum”) to the 2003
4 EIR along with a few of technical studies on the Project’s environmental impacts. The City determined
5 that a third addendum to the 2003 EIR was appropriate under CEQA to evaluate and disclose the
6 Project’s environmental impacts.

7 31. On May 21, 2019, Petitioner submitted a written comment to the City of Chula Vista
8 Planning Commission stating that the City was required under CEQA to prepare an EIR rather than an
9 addendum.

10 32. On June 18, 2019, Petitioner submitted supplemental written comments to the City,
11 including expert comments by environmental consulting firm SWAPE, wildlife ecologist Shawn
12 Smallwood, traffic engineer Daniel Smith, as well a supplemental comment from Certified Industrial
13 Hygienist and Professional Mechanical Engineer Francis Offermann, further explaining why an EIR was
14 necessary to fully analyze and mitigate the Project’s significant environmental impacts.

15 33. The City Council held a hearing on the matter on June 18, 2019, during which petitioner
16 provided oral comments. That same day, the City Council adopted a resolution considering the Third
17 Addendum to the 2003 EIR; approved amendments to the General Development Plan and Section
18 Planning Area Plan; approved PC District Regulations and Development Agreement; adopted a
19 resolution approving a tentative subdivision map; and adopted a resolution approving a design review
20 permit. A Notice of Determination (“NOD”) for those actions was posted on June 19, 2019.

21 34. Petitioner filed this Petition prior to the expiration of any applicable statute of limitations.

22 **LEGAL BACKGROUND**

23 35. CEQA has two primary purposes. First, CEQA is designed to inform decision makers
24 and the public about a project’s environmental effects. (14 Cal. Code Regs. §15002(a)(1).) Second,
25 CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring
26 “environmentally superior” alternatives and all feasible mitigation measures. (14 Cal. Code Regs. §
27 15002(a)(2) and (3).)

28 36. CEQA requires that an agency analyze the potential environmental impacts of its

1 proposed actions in an EIR except in certain limited circumstances. (*See* Pub. Res. Code, § 21100.)
2 The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield*
3 (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th
4 903, 927.) The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its
5 responsible officials to environmental changes before they have reached the ecological points of no
6 return.” (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also functions as a “document of
7 accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact,
8 analyzed and considered the ecological implications of its action.” (*Laurel Heights Improvements*
9 *Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) The EIR process “protects not
10 only the environment but also informed self-government.” (*Pocket Protectors*, 124 Cal.App.4th at
11 927.)

12 37. An EIR is required if “there is substantial evidence, in light of the whole record before
13 the lead agency, that the project may have a significant effect on the environment.” (Pub. Resources
14 Code, § 21080(d); *see also Pocket Protectors*, 124 Cal.App.4th at 927.) This evidentiary standard is
15 generally referred to as the “fair argument” standard.

16 38. “Significant environmental effect” is defined very broadly as “a substantial or
17 potentially substantial adverse change in the environment.” (Pub. Resources Code, § 21068; *see also*
18 CEQA Guidelines, § 15382.) An effect on the environment need not be “momentous” to meet the
19 CEQA test for significance; it is enough that the impacts are “not trivial.” (*No Oil, Inc. v. City of Los*
20 *Angeles* (1974) 13 Cal.3d 68, 83.)

21 39. CEQA contains a strong presumption in favor of requiring a lead agency to prepare an
22 EIR. This presumption is reflected in the fair argument standard. Under that standard, a lead agency
23 must prepare an EIR whenever substantial evidence in the whole record before the agency supports a
24 fair argument that a project may have a significant effect on the environment. (Pub. Res. Code §
25 21082.2; *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1993) 6 Cal. 4th
26 1112, 1123; *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d at 75, 82.)

27 40. When changes are proposed to an already approved project, CEQA provides certain
28 methods to streamline subsequent environmental review. Rather than prepare and circulate a new EIR,

1 section 15164(a) of the CEQA Guidelines states that “the lead agency or a responsible agency shall
2 prepare an addendum to a previously certified EIR if some changes or additions [to the previous EIR]
3 are necessary, but none of the conditions described in section 15162 calling for preparation of a
4 subsequent EIR have occurred.”

5 41. CEQA Guidelines section 15162 provides that a subsequent or supplemental
6 environmental impact report is required if any one of the following occurs: (1) substantial changes are
7 proposed in the project that will require major revisions of the EIR, (2) there are substantial changes to
8 the project’s circumstances that will require major revisions to the EIR, or (3) new information
9 becomes available. (14 C.C.R. § 15162; Pub. Res. Code § 21166.)

10 42. “[A]n addendum is prepared where ‘(2) Only minor technical changes or additions are
11 necessary to make the EIR under consideration adequate under CEQA; and (3) The changes to the EIR
12 made by the addendum do not raise important new issues about the significant effects on the
13 environment.’ ([CEQA Guideline] 15164, subd. (a).)” (*Save Our Heritage Org. v. City of San Diego*,
14 (2018) 28 Cal. App. 5th 656, 664–65 (quoting *Fund for Environmental Defense v. County of Orange*
15 (1988) 204 Cal.App.3d 1538, 1553).)

16 43. Subsequent CEQA review provisions, whether for addenda or supplemental or
17 subsequent EIRs, “can apply only if the project has been subject to initial review; they can have no
18 application if the agency has proposed a new project that has not previously been subject to review.”
19 (*Friends of College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.5th 937, 950 (“*San Mateo*
20 *Gardens*”).)

21 44. “A decision to proceed under CEQA’s subsequent review provisions must thus
22 necessarily rest on a determination — whether implicit or explicit — that the original environmental
23 document retains some informational value.” (*Id.* at 951.) Only if the original environmental
24 document retains some informational value despite the proposed project changes, changes in
25 circumstances or new substantial information does the agency proceed to decide under CEQA's
26 subsequent review provisions whether such changes or substantial new information will require major
27 revisions to the original environmental document because of the involvement of new, previously
28 unconsidered significant environmental effects. (*Id.* at 952.)

1 45. “If no EIR has been prepared for a nonexempt project, but substantial evidence in the
2 record supports a fair argument that the project may result in significant adverse impacts, the proper
3 remedy is to order preparation of an EIR.” (*Communities for a Better Env’t v. South Coast Air Quality*
4 *Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 (citing, *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d at 75,
5 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–
6 505).)

7 46. Under the “fair argument” standard applicable to environmental review under Pub. Res.
8 Code § 21151, an EIR is required if any substantial evidence in the record indicates that a project may
9 have an adverse environmental effect—even if contrary evidence exists to support the agency’s
10 decision. (14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon*
11 *Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found.,*
12 *Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.)

13 47. Where an original environmental document does retain some informational value, then
14 the agency must prepare a subsequent or supplemental EIR if the changes are “[s]ubstantial” and
15 require “major revisions” of the previous EIR. (*San Mateo Gardens*, 1 Cal.5th at 943.) “[W]hen there
16 is a change in plans, circumstances, or available information after a project has received initial
17 approval, the agency’s environmental review obligations “turn[] on the value of the new information to
18 the still pending decisionmaking process.” (*Id.* at 951–52.) The agency must “decide under CEQA’s
19 subsequent review provisions whether project changes will require major revisions to the original
20 environmental document because of the involvement of new, previously unconsidered significant
21 environmental effects.” (*Id.*, 1 Cal.5th at 952.)

22 **FACTUAL ALLEGATIONS**

23 **The 2003 EIR Has No Informational Value on the Residential Aspect of the Project**

24 48. The project analyzed in the 2003 EIR did not include any residential units. In contrast,
25 the Project includes 300 new units of residential housing, and 600 additional units that were included in
26 the first and second addenda to the 2003 EIR but not considered or analyzed in the 2003 EIR. Since the
27 2003 Project contained no residential element, none of the 2003 EIR’s discussion provides any
28 information that would assist the City in determining the potential environmental impacts of the

proposed 300 additional residential units or the total additional 900 residential units. The project considered in the 2003 EIR has no relevance to the environmental impact of the construction and occupancy of 300 residential housing units.

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There is Substantial Evidence Supporting a Fair Argument that the Project Will Result in Significant Environmental Impacts.

49. **Construction-Related Air Quality Impact.** The environmental consulting firm Soil/Water/Air Protection Enterprise (“SWAPE”) concluded that the City’s air quality analysis is not supported by substantial evidence because the City failed to properly calculate the Project’s construction-related criteria air pollutant emissions. SWAPE commented that the Third Addendum relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.1 (“CalEEMod”) and that several of the values that were input into this model are not consistent with the information that was include with the Project’s documents. These omissions result in a significant underestimation of the emissions associated with the Project. SWAPE compared the CalEEMod modeling for the 2003 EIR to the CalEEMod for the proposed Project and found that the proposed Project is modeled assuming substantially less hauling trips during the grading phase of construction than the 2003 Project, despite both projects requiring the same amount of material import and the Project Applicant comparing the Project’s 2019 emissions to 2003 emissions to determinate significant impacts. SWAPE prepared an updated CalEEMod model of the proposed Project with corrected input parameters. They found that the Project’s construction-related NOx emissions exceed the 250 pounds per day (lbs/day) threshold set forth by the San Diego Air Pollution Control District (“SDAPCD”). They also found that these emissions are more significant than those associated with the 2003 Project.

50. **Impact to Human Health.** SWAPE also introduced substantial evidence of a fair argument that refutes the City’s conclusion that the Project will not have a significant new or substantially more significant impact on human health. The development of new sensitive receptors near and at the Project site is a substantial change of circumstances from the 2003 Project. Neither the 2003 EIR nor the Third Addendum included a health risk assessment (“HRA”) to evaluate the health

1 risk of diesel particulate matter (“DPM”) to nearby sensitive receptors during construction and
2 operation of the Project. To evaluate cancer risks to these receptors, SWAPE conducted a screening-
3 level HRA and found that the child, infant, and lifetime cancer risks all exceed the SDAPCD’s
4 threshold of 10 in one million. SWAPE proposed a number of feasible mitigation measures for
5 construction emissions and operational emissions, respectively.

6 **51. Impact to Biological Resources.** Wildlife ecologist Shawn Smallwood introduced
7 substantial evidence of a fair argument that the Project will result in significant impacts to biological
8 resources. The Third Addendum contains no analysis of the Project’s potential to result in window
9 collision fatalities for birds at the Project site. Dr. Smallwood predicted that the proposed Project
10 would result in 6,033 bird-window collision fatalities per year. Also, neither the Third Addendum nor
11 the 2003 EIR analyzes the potential adverse impact on wildlife due to increased traffic from the Project.
12 Dr. Smallwood noted that vehicle collision can significantly impact all kinds of wildlife and presented a
13 number of relevant studies of traffic caused wildlife mortality and described their relevance to the
14 Project site. Finally, Dr. Smallwood observed that the Third Addendum failed to analyze cumulative
15 impacts related to bird-window collisions and wildlife road mortality. Dr. Smallwood recommended
16 several feasible mitigation measures to reduce the Project’s impacts related to bird-window collisions
17 and wildlife road mortality.

18 **52. Indoor Air Quality Impact.** Petitioner submitted the expert comments of Francis
19 Offermann, Certified Industrial Hygienist and Professional Mechanical Engineer. Mr. Offermann
20 explained that many composite wood products typically used in home and apartment building
21 construction contain formaldehyde-based glues which off-gas formaldehyde—a known human
22 carcinogen—over a very long time period. Neither the 2003 EIR nor the Third Addendum contained
23 any discussion of the Project’s emissions of formaldehyde to air and resulting health risks to future
24 residents and users of the Project. Mr. Offermann estimated that the future residents of the Project
25 would be exposed to a cancer risk from formaldehyde of approximately 125 per million. Mr.
26 Offermann’s cancer risk analysis assumes that all building materials used by the Project would be
27 compliant with the California Air Resources Board’s formaldehyde airborne toxics control measure.
28 Such a cancer risk is more than 12 times the SDAPCD’s CEQA significance threshold of 10 per million

1 for airborne cancer risk. Mr. Offermann described at length a methodology for estimating the Project's
2 formaldehyde emissions in order for the City to conduct an in-depth health risk assessment to disclose
3 and evaluate the impact of formaldehyde. Mr. Offermann suggested several feasible mitigation
4 measures, such as requiring the use of no-added-formaldehyde composite wood products, which are
5 readily available, and requiring air ventilation systems which would reduce formaldehyde levels. Since
6 the Third Addendum did not analyze this impact of formaldehyde at all, the City did not consider any
7 of Mr. Offermann's suggested mitigation measures or any other mitigation measures.

8 **53. Public Service Impacts.** Petitioner submitted written comments pointing out that the
9 Project will have significantly greater and different public service impacts than the commercial project
10 analyzed in the 2003 EIR. The current residential Project will have significant impacts to sewer/waste
11 water, police, fire, schools, parks and other public services, which would either not exist at all for a
12 commercial project, or would be dramatically greater for a residential Project. The Court of Appeal has
13 held that a supplemental EIR is required to analyze and mitigate such public service impacts when a
14 commercial project is transformed to a residential project. (*Mani Brothers Real Estate Group v. City of*
15 *Los Angeles* (2007) 153 Cal.App.4th 1385, 1405.)

16 **Substantial Changes Since the 2003 EIR Will Result in New and Significant Environmental**
17 **Impacts**

18 **54. Traffic Impacts.** The City's conclusion that the Project will have no new or more
19 significant traffic impacts is not supported by substantial evidence. The analysis performed under the
20 2003 EIR assumed that State Route 125 ("SR 125") would be developed to 10 lanes north of Olympic
21 Parkway and to 8 lanes south of Olympic Parkway. However, SR 125 remains just 4 lanes with no
22 signs of future widening. Traffic engineer Daniel Smith noted the San Diego Association of
23 Governments does not have any plans to widen SR 125 until 2050, and then only to 8 lanes. Mr. Smith
24 found that the FEIR was prepared under transportation system assumptions that are no longer relevant
25 to the current situation. This is a substantial change with respect to the 2003 EIR and triggers the
26 preparation of a subsequent EIR.

27 **55. Impacts on Indoor Air Quality for Future Residents of the Project.** The inclusion of
28 300 new residential units as part of the Project is a substantial change from the 2003 Project. The

expert opinion of Mr. Offermann constitutes substantial evidence that the residential component of the Project will result in a significant air quality impact to residential occupants of the Project. This impact is significant and new. It could not have been known in 2003 because there was no residential component of the Project at that time. Accordingly, the City violated CEQA by not preparing an EIR to analyze and mitigate this new significant impact.

56. **Biological Impacts.** There is new information with respect to the Third Addendum that was not available nor analyzed at the time of the 2003 EIR. First, Dr. Smallwood concluded that there have been 26 species of vertebrate wildlife known to occur in the Project area that since 2003 have been assigned special status signifying greater conservation concern. Many of these 26 species are the types of birds that typically collide with windows of houses and building façades during migration or dispersal. Second, Dr. Smallwood observed that since the 2003 FEIR there has been a proliferation of structural glass in building construction and an increase in window-to-wall ratios. The increased use of glass in new structures increases the bird-window collision hazard of developments. Third, in 2003 there was very sparse research in 2003 regarding wildlife-automobile collision on roadways. Dr. Smallwood described additional research that has occurred since the 2003 EIR which shows the proposed Project could result in significant mortality to wildlife. Finally, Dr. Smallwood noted that the standard protocol for detection surveys for burrowing owls was released in 2012, many years after the 2003 EIR.

The Addendum's Conclusions are Not Supported by Substantial Evidence

57. **Greenhouse Gas Impact.** Petitioners also note that the Third Addendum fails to evaluate or mention the greenhouse gas ("GHG") emissions associated with the Project. SWAPE observed that the 2017 Memorandum on the Air Quality and GHG Impacts for PA-12 relies on incorrect methodology, and cannot be used to determine Project impacts.

The Project Description is Insufficient

58. **Inadequate Description to Evaluate Environmental Impacts.** The Third Addendum fails to disclose an estimate of how many people will live the in 300 proposed units. It does not disclose how many bedrooms each unit will be. The number of bedrooms per unit will have a direct impact on the number of people inhabiting the 300 new units, and the environmental impacts of those

units. Many environmental impacts are dependent on the number of residents, including GHG emissions, energy use, traffic, public services, among others. Without even an estimate of the proposed residential population, the Project's description is incomplete.

59. **Improper Piecemealing.** The Third Addendum does not consider the whole action. Instead, it considers potential impacts associated with the development of 300 residential units but it fails to consider the commercial and residential development in FC-2 associated with the first two addenda to the 2003 EIR. The courts have rejected precisely this type of "piecemealing" or failure to consider the cumulative impacts of the Project as a whole. (See, *Arviv Ent. v. South Valley Area Planning Comm'n.* (2002) 101 Cal.App.4th 1333.)

60. **Significant Change in Project Description.** While CEQA allows an addendum to an EIR, it does not have any provision allowing an addendum to an addendum to an addendum. Even if this were allowed, the current Third Addendum increases the number of residential units by 300 over the level in the prior addenda.

FIRST CAUSE OF ACTION

Violation of CEQA (Public Resources Code, § 21000 et seq.) (Code of Civil Procedure § 1085 or in the alternative §1094.5)

61. Petitioner hereby realleges and incorporates by reference the preceding paragraphs, in their entirety, as if fully set forth herein.

62. Respondents failed to comply with CEQA by failing to prepare an EIR for the Project despite the 2003 EIR having no relevance to this Project, and despite substantial evidence in the record of a fair argument that the Project may have one or more significant environmental impacts, including but not limited to the following:

- A. There is substantial evidence supporting a fair argument that the Project's construction-related air pollutant emissions were underestimated. Expert evidence demonstrates that the City improperly modeled the construction emissions improperly and that the Project's NOx emissions exceed the applicable threshold of significance.
- B. There is substantial evidence supporting a fair argument that the Project's emissions

1 of DPM will significantly impact human health. Expert evidence demonstrates that
2 the child, infant, and lifetime cancer risks all exceed the applicable threshold of
3 significance.

4 C. There is substantial evidence supporting a fair argument that the Project will result in
5 significant impact to biological resources. Expert evidence demonstrates that the
6 Project will likely result in significant loss of wildlife and failed to analyze and
7 mitigate impacts to wildlife.

8 D. There is substantial evidence supporting a fair argument that the Project will have a
9 significant indoor air quality impact. Expert evidence demonstrates that the Project
10 may have significant indoor air quality impacts, exceeding applicable CEQA
11 significance thresholds.

12 E. There is substantial evidence supporting a fair argument that the Project will have
13 significant impacts on public services, such as sewage, police, fire, parks, and
14 schools, which were not analyzed in the 2003 EIR for an entirely commercial project
15 with no residential component.

16 63. Respondents abused their discretion and failed to proceed in a manner required by law
17 by failing to disclose these potentially significant environmental impacts and by failing to propose
18 feasible mitigation measures and alternatives to reduce those impacts.

19 64. Alternatively, even if the 2003 EIR has some relevance to the Project, Respondents still
20 violated CEQA because there is substantial evidence in the record that there are substantial changes to
21 the 2003 Project since the 2003 EIR that will result in new and significant environmental impacts,
22 included but not limited to the following:

23 A. There is a substantial change to the traffic analysis affecting the Project since the
24 Third Addendum relies on a traffic analysis from the 2003 EIR that is now longer
25 relevant since the assumptions in that analysis were never realized.

26 B. The addition of residential units constitutes a substantial change to the Project, and
27 will require major revisions to the 2003 EIR due to the involvement of the new
28 significant indoor air quality impact that will result.

1 C. There is a substantial change with respect to information pertaining to biological
2 resources that was not available or analyzed at the time of the 2003 EIR.

3 D. The substantial change from an entirely commercial project to a residential Project
4 will require major revisions to the 2003 EIR since residential uses result in greater
5 public service impacts than commercial uses, such as impacts to sewage, police, fire,
6 parks, and schools.

7
8 65. The City must prepare an EIR for the Project to analyze these new environmental
9 impacts and to propose all feasible mitigation measures and alternatives to reduce these impacts.

10 66. In addition, Respondents prejudicially abused their discretion because their decision and
11 the Third Addendum are not supported by substantial evidence, as the Third Addendum fails to
12 evaluate or mention GHG emissions and purportedly relies on an air quality analysis that relies on
13 incorrect methodology.

14 67. Respondents violated CEQA because the Third Addendum contains an insufficient
15 project description, including but not limited to the following:

16 A. The Third Addendum fails to disclose an estimate of the amount of people
17 anticipated to occupy residential units at the Project.

18 B. The Third Addendum improperly piecemeals the Project from the whole action
19 considered in the 2003 EIR. The City has piecemealed a 900 unit residential
20 development by segmenting it into three different actions, discussed in three separate
21 addenda, in violation of CEQA.

22 68. As a result of the foregoing defects, Respondents prejudicially abused their discretion by
23 approving the Project in a manner that does not comply with the requirements of CEQA and Petitioner
24 is entitled to issuance of a writ of mandate setting aside all approvals that were issued in reliance on the
25 Addendum.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Petitioner respectfully requests the following relief and entry of judgment as
28 follows:

1 1. For a peremptory writ of mandate directing Respondents to set aside their approvals of
2 the Project, including but not limited to the resolutions considering the Third Addendum to the 2003
3 EIR; approving amendments to the General Development Plan and Section Planning Area Plan;
4 approving PC District Regulations and Development Agreement; approving a tentative subdivision
5 map; and approving a design review permit unless and until Respondents have prepared, circulated, and
6 considered a legally adequate EIR prior to any subsequent approval action;

7 2. For a peremptory writ of mandate directing Respondents and Real Party in Interest to
8 suspend all activity in furtherance of the Project unless and until Respondents take all necessary steps
9 to bring their actions into compliance with CEQA;

10 3. For an award of costs of suit;

11 4. For an award of attorneys' fees pursuant to Code of Civil Procedure §1021.5 and any
12 other applicable provisions of law; and

13 5. For such other and further relief as the Court deems just and proper.
14

15 Dated: July 17, 2019

LOZEAU DRURY LLP

16
17
18 By: 

Douglas J. Chermak

Richard Drury

Attorneys for Petitioner and Plaintiff

SUPPORTERS ALLIANCE FOR

ENVIRONMENTAL RESPONSIBILITY
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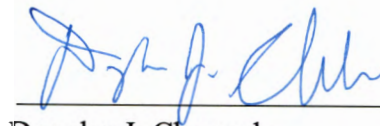
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VERIFICATION

I, Douglas J. Chermak, am an attorney for Petitioner in this action. I am verifying this Petition pursuant to California Code of Civil Procedure section 446. Petitioner is absent from the County of Alameda, in which I have my office. I have read the foregoing petition and complaint. I am informed and believe that the matters in it are true and on that ground allege that the matters stated in the complaint are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: July 17, 2019



Douglas J. Chermak
Attorneys for Petitioner

EXHIBIT 1



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Oakland, CA 94612

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doug@lozeaudrury.com

U.S. Mail and E-mail

July 12, 2019

Chula Vista City Council
c/o Mayor Mary Casillas Salas
276 Fourth Avenue
Chula Vista, CA 91910
msalas@chulavistaca.gov

Kerry K. Bigelow
City Clerk
276 Fourth Avenue, Bldg. A
Chula Vista, CA 91910
cityclerk@chulavistaca.gov

Kelly Broughton
Director of Development Services
City of Chula Vista
Public Services Building
Chula Vista Civic Center
276 Fourth Avenue
Chula Vista, CA 91910
kbroughton@chulavistaca.gov

**Re: Notice of Intent to File Suit Under the California Environmental Quality Act
Regarding Otay Ranch Freeway Commercial Sectional Planning Area Plan
Planning Area 12 Project (SCH NO. 1989010154); MPA17-0012; MPA-17-0011;
CVT-19-0001; DR 17-0037; IS17-0005**

Dear Mayor Salas, Ms. Bigelow, and Mr. Broughton:

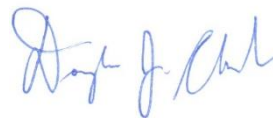
I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the City's approval of the Otay Ranch Freeway Commercial Sectional Planning Area Plan Planning Area 12 Project ("Project") and accompanying CEQA addendum.

Please take notice, pursuant to Public Resources Code ("PRC") §21167.5, that SAFER intends to file a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Petition"), under the provisions of the California Environmental Quality Act ("CEQA"), PRC §21000 *et seq.*, against Respondents and Defendants City of Chula Vista and City Council of the City of Chula Vista ("Respondents") in the Superior Court for the County of San Diego, challenging the June 18, 2019 decision of Respondent City Council of the City of Chula Vista to approve the Project and the accompanying Third Addendum.

The Petition being filed will request that the Court grant the following relief:

1. Issue a peremptory writ of mandate directing Respondents to set aside the approval of the Project, the CEQA Addendum prepared for the Project; the amendments to the General Development Plan, the Section Planning Area Plan, approving PC District Regulations and Development Agreement; the tentative subdivision map, and the design review permit unless and until Respondents have prepared, circulated, and considered a legally adequate EIR prior to any subsequent approval action;
2. Issue a peremptory writ of mandate directing Respondents and Real Party in Interest to suspend all activity in furtherance of the Project unless and until Respondents take all necessary steps to bring their actions into compliance with CEQA;
3. Issue a preliminary and permanent injunction staying the effect of Respondents' approval of the Project;
4. Issue a declaratory judgment declaring Respondents' approval of the Project to be null and void and contrary to law;
5. Award costs of suit;
6. Award attorneys' fees pursuant to Code of Civil Procedure §1021.5 and any other applicable provisions of law; and
7. Grant such other and further relief as the Court deems just and proper.

Sincerely,



Douglas J. Chermak
Lozeau | Drury LLP

PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1939 Harrison Street, Suite 150, Oakland, CA 94612. On July 12, 2019, I served a copy of the following documents:

• **NOTICE OF INTENT TO FILE CEQA SUIT**

- ☒ By emailing the document(s) listed above to the email addresses set forth below.
- ☒ By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth below.

Chula Vista City Council
c/o Mayor Mary Casillas Salas
276 Fourth Avenue
Chula Vista, CA 91910
msalas@chulavistaca.gov

Kerry K. Bigelow
City Clerk
276 Fourth Avenue, Bldg. A
Chula Vista, CA 91910
cityclerk@chulavistaca.gov

Kelly Broughton
Director of Development Services
City of Chula Vista
Public Services Building
Chula Vista Civic Center
276 Fourth Avenue
Chula Vista, CA 91910
kbroughton@chulavistaca.gov

I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed July 12, 2019 at Oakland, California.



Toyer Grear

EXHIBIT 2

RICHARD T. DRURY (SBN 163559)
DOUGLAS CHERMAK (SBN 233382)
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Attorneys for Petitioner and Plaintiff
Supporters Alliance for Environmental
Responsibility

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

SUPPORTERS ALLIANCE FOR
ENVIRONMENTAL RESPONSIBILITY, a
California non-profit corporation,

Petitioner and Plaintiff,

v.

CITY OF CHULA VISTA, a municipality; CITY
COUNCIL OF THE CITY OF CHULA VISTA,
a municipal governing body,

Respondents and Defendants,

BALDWIN & SONS, LLC, a California limited
liability company,

Real Party in Interest.

CASE NO.:

**PETITIONER'S NOTICE OF INTENT TO
PREPARE ADMINISTRATIVE RECORD**

**(Code Civ. Proc., §§ 1085, 1094.5;
Pub. Resources Code, §§ 21000 et seq. (CEQA))**

Pursuant to Public Resources Code § 21167.6(b)(2), Petitioner and Plaintiff Supporters Alliance for Environmental Responsibility ("Petitioner") hereby notifies all parties that Petitioner elects to prepare the administrative record relating to the above-captioned action challenging the June 18, 2019 decision of Respondent City Council of the City of Chula Vista to approve the Otay Ranch Freeway Commercial Sectional Planning Area Plan Planning Area 12 Project ("Project") based on a Third Addendum addendum to the 2013 Otay Ranch Freeway Commercial Sectional Planning Area Plan Planning Area 12 EIR. Respondents and Real Party in Interest are directed not to prepare the administrative record for this action and not to expend any resources to prepare the administrative record.

Dated: July 17, 2019

LOZEAU DRURY LLP

By: 

Douglas J. Chermak

Attorneys for Petitioner

Supporters Alliance for Environmental Responsibility