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*Comment Received From: Miller Starr Regalia*  
*Submitted On: 2/18/2020*  
*Docket Number: 19-BSTD-06*

## **Objection to Reach Code Approval - Part 1 of 5**

Letter to California Energy Commission with attachments re Town of Windsor Ordinance No. 2019-338.  
Part 1 of 5 .pdf

*Additional submitted attachment is included below.*



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February 18, 2020

**Via Email**

Docket Unit  
California Energy Commission  
Docket No. 19-BSTD-06  
1516 9th Street, MS-4  
Sacramento, CA 95814  
Email: [docket@energy.ca.gov](mailto:docket@energy.ca.gov)

Re: Town of Windsor 2019 Ordinance No. 2019-338, Docket No. 19-BSTD-06

Dear California Energy Commission:

This firm represents William Gallaher with respect to the Town of Windsor's adoption of an All Electric Reach Code/Natural Gas Ban ("Reach Code") which is now before the Commission at docket no. 19-BSTD-06. Our client is extremely concerned with the potentially adverse planning and environmental and health and safety effects that may occur from adoption and implementation of the Reach Code.

In short, the Reach Code as proposed cannot satisfy the requirements of Public Resources Code section 25402.1, subdivision (h)(2) or section 10-106 of the state Building Energy Efficiency standards, and therefore its adoption cannot be ratified by the Commission. Moreover, the Town's adoption of the Reach Code via claimed exemptions under the California Environmental Quality Act ("CEQA," Public Resources Code section 21000 et seq.) was contrary to the law. Under cover of this letter I am forwarding, and incorporate herein by reference, our correspondence with the Town as to this issue, as well as the two petitions filed in the Superior Court for the County of Sonoma challenging the Reach Code's adoption.

Moreover, it is clear that any finding or determination the Commission makes to approve or ratify the Reach Code will also be a discretionary action requiring review under CEQA. Because the adoption of the Reach Code may have significant environmental impacts that the Town has not analyzed via an initial study and environmental impact report, the Commission cannot itself rely on any CEQA exemption to approve it. (See *Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* (2006) 141 Cal.App.4th 677, 702.)

For all of these reasons, the Commission cannot make the requisite findings under Public Resources Code section 25402.1, subdivision (h)(2) or section 10-106 of the

state Building Energy Efficiency standards, nor make the requisite findings under CEQA absent the preparation of an EIR. Thank you for your attention to this matter.

Very truly yours,

MILLER STARR REGALIA



Matthew C. Henderson

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September 4, 2019

Town of Windsor Town Council  
Town Civic Center  
9291 Old Redwood Highway, Bldg. 400  
Windsor, CA 95492  
TownCouncil@TownofWindsor.com

Re: Proposal by Town of Windsor to Adopt All-Electric Residential Reach  
Code/Natural Gas Ban

Dear Town Councilmembers:

This firm represents William Gallaher in conjunction with the above-referenced matter. Our client is extremely concerned with the potentially adverse planning, and environmental and health and safety effects that may occur from adoption and implementation of the All Electric Reach Code/Natural Gas Ban currently being considered for adoption as a local ordinance by the Town of Windsor ("Town").<sup>1</sup> Based on an Agenda Report prepared by Interim Town Manager Ken MacNab for the Town's April 17, 2019 Town Council meeting, the Town is exploring possible incorporation of all-electric reach code provisions into its 2019 California Building Code Update, assertedly in order to achieve energy and cost savings and reductions in local GHG emissions. The Town has also placed a proposed reach code ordinance on the Town Council agenda for the September 4, 2019 meeting (agenda item no. 10.1) with an accompanying staff report ("Staff Report").

We write to emphasize that the Town cannot lawfully enact this ordinance as it now stands, for several reasons. First, the ordinance is premised on information not made available in sufficient advance of the meeting for meaningful public review or comment. Moreover, that information consists of a "2019 Cost-effectiveness Study: Low-Rise Residential New Construction" dated July 17, 2019 ("Study"), which is insufficient to support the proposed findings in support of the ordinance.

Second, the Town must comply with the California Environmental Quality Act ("CEQA"; Pub. Resources Code, § 21000 et seq.), which requires it in this case to prepare and certify a robust and legally-compliant Environmental Impact Report

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<sup>1</sup> A "reach" code is so called because it "reaches" beyond the State's Title 24 energy efficiency requirements by enacting different or more stringent regulations on energy efficiency related aspects of new residential and/or commercial construction.

("EIR") that fully analyzes and discloses all of the project's potentially significant environmental impacts and potentially feasible mitigation measures and project alternatives that could reduce such impacts to a less-than-significant level.

The April 17 Agenda Report acknowledges that "[f]uture actions related to the potential adoption of an all-electric reach code will be subject to Environmental Review, at which time the appropriate environmental documents, prepared in accordance with the requirements of the California Environmental Quality Act (CEQA), will be presented to the Council for consideration prior to any action being taken." (April 17 Agenda Report, p. 3.) The Staff Report for the September 4 meeting then concludes that the ordinance is exempt from CEQA review under section 15061 and 15308 of the CEQA Guidelines. Adoption of an all-electric reach code is clearly a discretionary "project" subject to CEQA; that substantial evidence supports a "fair argument" that this project may have one or more significant adverse environmental effects; and no exemption from CEQA applies; therefore, that an EIR must be prepared, certified and considered before such adoption may occur.

#### **I. INSUFFICIENCY OF THE COST EFFECTIVENESS ANALYSIS**

As the Staff Report recognizes, the requirements of section 10-106 of the state Building Energy Efficiency standards include the mandate that the Town adopt "[a] determination that the [reach code] standards are cost effective," which require "findings and supporting analyses on the energy savings and cost-effectiveness of the proposed energy standards." (Cal. Code Regs., tit. 24, § 10-106.) The only material submitted in support of the proposed ordinance is the Study. This is insufficient, for several reasons.

First, the Study was only provided to the public on August 29, 2019, less than a week before the ordinance goes before you for a decision. This does not allow for informed comment by the public or informed decisionmaking by the Town Council. It is manifestly unfair to provide the public and interested stakeholders less than one week to read, digest, and comment upon a technical document such as the Study. Basic fairness requires the Town to withdraw the proposed ordinance and give the public time to fully digest the analysis proffered in its support.

Second, it is not clear that the Study satisfies the mandates of section 10-106. It purports to analyze the cost effectiveness of a reach code for the entire state. (Study, p. 1 & Ex. A.) Section 10-106 requires that a local agency make its own "findings and supporting analyses of the energy savings and cost effectiveness of the proposed energy standards." (Cal. Code Regs., tit. 24, § 10-106, subd. (b)(2).) Relying on a general statewide study does not satisfy this standard.

It is also not clear from the Study whether or not it accounts for tiered electricity pricing and how that would apply to all-electric construction under the proposed ordinance. It is also unclear as to whether all-electric construction would lead to

residential units that cannot meet the requirements of the Building Energy Efficiency Standards in Part 6 of Title 24 of the California Code of Regulations, which would preclude building altogether.

Accordingly, the proposed ordinance is not supported by the requisite cost effectiveness analysis, and therefore does not satisfy the mandate of section 10-106. The Town therefore cannot enact the reach code.

## II. CEQA REQUIREMENTS

Under CEQA's well-established standards, an agency is required to prepare an Environmental Impact Report ("EIR"), rather than a Negative Declaration, whenever substantial evidence in the record supports a "fair argument" that a project *may* have a significant effect on the environment. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Quail Botanical Gardens Found. Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002.) Courts apply the "fair argument" test as a standard of judicial review for agency decisions to adopt a Negative Declaration. (See, e.g., *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1399; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Quail Botanical Gardens Found. Inc., supra*, 29 Cal.App.4th at 1602.) The "fair argument" standard of review applies to mitigated negative declarations. (*Sierra Club v. California Dept. of Forestry and Fire Protection* (2007) 150 Cal.App.4th 370, 382; *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1331-1332; see also Pub. Resources Code, §21064.5 [defining "mitigated negative declaration"].)

In other words, if a non-exempt project *may* cause a significant effect on the environment, the lead agency *must* prepare an EIR. (Pub. Resources Code, §§ 21100, 21151; Cal. Code Regs., tit. 14, § 15064, subd. (a)(1)(f)(1).) An EIR may be avoided only if the lead agency properly finds no substantial evidence in the initial study or elsewhere in the record that the project may significantly affect the environment. A project "may" have a significant effect on the environment if there is a "reasonable possibility" that it will result in a significant impact. (*No Oil, Inc., supra*, 13 Cal.3d at 83, n.16; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309.) A "significant effect upon the environment" is defined as "a substantial or potentially substantial adverse change in the environment." (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) If *any* aspect of the project may result in a significant environmental impact, an EIR must be prepared even if the overall effect of the project is beneficial. (Cal. Code Regs., tit. 14, § 15063, subd. (b)(1); *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.)

As is evident from the above-cited legal authorities, CEQA sets a very "low threshold" for requiring preparation of an EIR (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Bowman v. City of Berkeley* (2004)

122 Cal.App.4th 572, 580; see also *Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d at p. 310), such that if any substantial evidence supports the requisite “fair argument” that a project may have a significant environmental effect, the lead agency must prepare an EIR – even if it is also presented with other substantial evidence indicating that the project will have no significant effect. (*No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d at p. 85; *Brentwood Association for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 503-504; *Friends of “B” Street*, *supra*, 106 Cal.App.3d at 1002; Cal. Code Regs., tit. 14, § 15064, subd. (f)(1).) Under the “fair argument” test, the lead agency may not weigh the competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environment impact, but must direct the preparation of an EIR to resolve the issue. (See, e.g., *Friends of “B” Street*, *supra*, 106 Cal.App.3d at 1002; *Architectural Heritage Association v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1109, 1122.)

“Substantial evidence” is evidence that has ponderable legal significance, i.e., evidence that is reasonable, credible and of solid value (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 152; *Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 47; *Pennell v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 837), and has been defined in the CEQA context as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (Cal. Code Regs., tit. 14, § 15384(a); see also, Pub. Resources Code, §§ 21080(e), 21082.2(c); Cal. Code Regs., tit. 14, § 15064, subd. (f)(5).) “Substantial evidence” is defined by the CEQA Guidelines to include, inter alia, “expert opinion supported by facts.” (Cal. Code Regs., tit. 14, § 15384, subd. (a); see *id.* at § 15064, subd. (f)(5).) Opinion evidence submitted by a qualified expert, showing that significant impacts may occur from a project, is normally conclusive, and requires preparation of an EIR under the “fair argument” standard. (See, e.g., *City of Livermore v. LAFCO* (1986) 184 Cal.App.3d 531, 541.) “Statements by members of the public may [also] constitute substantial evidence that a project may have a significant effect on the environment.” (1 Kostka & Zischke, *Practice Under the California Environmental Quality Act* (Cont.Ed.Bar 2d ed. 2015), § 6.42, pp. 6-46.1 to 6-47, and cases cited; see also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 [“Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument.”].)

III. **SUBSTANTIAL EVIDENCE SUPPORTS A “FAIR ARGUMENT” THAT AN ALL-ELECTRIC REACH CODE IS A DISCRETIONARY PROJECT THAT MAY HAVE SIGNIFICANT UNMITIGATED ADVERSE ENVIRONMENTAL IMPACTS IN A NUMBER OF AREAS, THUS REQUIRING PREPARATION OF AN EIR**

A. **The Proposed Ordinance Is a CEQA “Project.”**

There can be absolutely no doubt that a proposed local ordinance adopting a reach code, such as the one being proposed for consideration by the Town, is a “project” that is subject to CEQA review. CEQA broadly defines “projects” to include any activities directly undertaken by public agencies which have the potential to ultimately culminate in physical change to the environment. (*City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal.App.3d 531, 537; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-278, & fn. 16.) The Supreme Court and Courts of Appeal “ha[ve] given the term “project” a broad interpretation and application to maximize protection of the environment.” (*Tuolumne County Citizens For Responsible Growth, Inc. v. City of Sonoma* (2007) 155 Cal.App.4th 1214, 1222-1223, and cases cited; see *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 278; *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143.)

The courts’ broad definition of a CEQA “project” is compelled by the plain language of the CEQA statutes and Guidelines. Thus: ““Project” means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (1) An activity directly undertaken by any public agency.” (Pub. Resources Code, § 21065, subd. (a).) “[T]his division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances . . . .” (Pub. Resources Code, § 21080(a).) While a reach code is not a classic “zoning ordinance,” it operates like a zoning ordinance because it “ha[s] the effect of ‘[r]egulat[ing] the use of buildings, structures, and land’” (*People v. Optimal Global Healing, Inc.* (2015) 241 Cal.App.4th Supp. 1, 8), and as a local law regulating those areas it shares, for purposes of CEQA, the key attribute of zoning ordinances. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 750 [“The purpose of a zoning law is to regulate the use of land.”].)

Zoning ordinances and local ordinances akin to them are *categorically* CEQA “projects.” The CEQA Guidelines, in relevant part, define “project” as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (1) An activity directly undertaken by any public agency including but not limited to... enactment and amendment of zoning ordinances....” (Cal. Code Regs., tit. 14, § 15378, subd. (a)(1).) Indeed, under CEQA’s broad definition of a “project,” ordinances, laws and regulations

affecting the use of land or structures have consistently been held to be CEQA "projects" over the course of many decades. (See, e.g., *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1169 ["Ordinances passed by cities are clearly activities undertaken by a public agency and thus "projects" under CEQA."], citing 60 Ops.Cal.Atty.Gen. 335, 338 (1977); *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1558 [treating County ordinance restricting sewage sludge application on County lands as project under CEQA and further holding "CEQA requires the preparation of an EIR whenever substantial evidence supports a fair argument that an ordinance will cause potentially significant environmental impacts"]; *id.* at p. 1578 ["Amendment or adoption of an ordinance is a legislative act subject to review under section 21168.5"], citations omitted; *Plastic Pipe & Fittings Assn. v. California Building Standards Com.* (2004) 124 Cal.App.4th 1390, 1412 ["A regulation fitting the description of a discretionary project is a discretionary project under CEQA."]; *Rosenthal v. Board of Supervisors* (1975) 44 Cal.App.3d 815, 823 ["In view of the fact that city ordinances were the subject matter in the *No Oil* case, it appears that it was held impliedly therein that adopting an ordinance was a project within the meaning of the Environmental Quality Act"], citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68 [impliedly holding adoption of zoning ordinance permitting drilling of oil test wells was project within meaning of CEQA].)

**B. The Proposed Project Is Not Exempt.**

There can further be no doubt that a project proposing adoption of an all-electric reach code is not subject to any exemption from CEQA. Yet the staff report for the proposed ordinance cites two CEQA exemptions – the so-called "common sense" exemption, and the class 8 exemption for actions that are protective of the environment. Neither applies here.

CEQA's "common sense" exemption may properly be invoked *only* when the lead agency can declare "with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3).) "In the case of the commonsense exemption, the agency has the burden to "provide the support for its decision before the burden shifts to the challenger. Imposing the burden on members of the public in the first instance to prove a possibility for substantial adverse environmental impact would threaten CEQA's fundamental purpose of ensuring that government officials 'make decisions with environmental consequences in mind.'" (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 172, 186, citing *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116, quoting *Bozung, supra*, 13 Cal.3d at 283.) "A remote or outlandish possibility of an environmental impact will not remove a project from the common sense exemption, but if legitimate reasonable questions can be raised about whether a project might have a significant impact, the agency cannot find with certainty the project is exempt." (*Id.* at p. 194, citing *Davidon Homes, supra*, 54 Cal.App.4th at pp. 117-118.)

"[T]he primary duty to comply with CEQA's requirements must be placed on the public agency. 'To make faithful execution of the duty contingent upon the vigilance and diligence of particular environmental plaintiffs would encourage attempts by agencies to evade their important responsibilities. It is up to the agency, not the public, to ensure compliance with [CEQA] in the first instance.'" (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 939, citing *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 205.) "CEQA places the burden of environmental investigation on government rather than the public." (*Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1347 ["CEQA contemplates serious and not superficial or pro forma consideration of the potential environmental consequences of a project."].)

" [A] party challenging what is essentially a claim of the commonsense exemption under Guidelines section 15061, subdivision (b)(3), unlike a party asserting an exception to a categorical exemption, need only make a "slight" showing of a reasonable possibility of a significant environmental impact. (*Davidon Homes, supra*, 54 Cal.App.4th at p. 117.) It is the lead agency that has the burden of establishing the commonsense exemption, i.e., that there is *no* possibility the project may cause significant environmental impacts. "[T]he agency's exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision." (*California Farm Bureau Federation, supra*, 143 Cal.App.4th at 195-196, citing *Davidon Homes, supra*, 54 Cal.App.4th at 117, *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 171.)<sup>2</sup>

With respect to the class 8 exemption under section 15308 of the Guidelines, such can only be used for an action that constitutes a preservation of the environment. (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 707.) Here, the proposed reach code cannot be said to rise to this standard as it merely substitutes one source of energy for another, without any sufficient analysis as to whether that substitution will actually yield any benefit to the environment.

In this context the case of *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644 is instructive. There, the Bay Area Air Quality Management District sought to use the class 8 exemption for regulations reducing the solvent in architectural coatings. The Court of Appeal held that in spite

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<sup>2</sup> A lead agency intending to invoke the common sense exemption thus has the burden to consider the record and facts in the case before it prior to doing so. (*Muzzy Ranch, supra*, 41 Cal.4th at 386 ["Insofar as it failed to consider the record in determining that adopting the TALUP fell within the common sense exemption, the Commission erred."].) "An agency obviously cannot declare "with certainty that there is no possibility that the activity in question may have a significant effect on the environment" (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3)) if it has not considered the facts of the matter." (*Id.* at p. 387, citing *Davidon Homes, supra*, 54 Cal.App.4th at 117.)

of the fact that the regulations imposed more stringent standards there was not sufficient evidence in the record justifying the conclusion that it would actually protect the environment. The exact same analysis applies here, for the reasons discussed throughout this letter. There is simply no basis for the Town to conclude that the reach code will not have a potentially significant impact on the environment. Thus, reliance on the class 8 exemption is not warranted. (See *International Longshoremen's & Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal. App.3d 265.)

Finally, note also in this context that section 10-106 of the Building Energy Efficiency Standards upon which the Town relies requires the submission of materials in support of an application for a reach code. The specific submittals required do not extend to a notice of claimed exemption but a "negative declaration or environmental impact report, required pursuant to the California Environmental Quality Act, Public Resources Code Section 21000 et seq." (Cal. Code Regs., tit. 24, § 10-106, subd. (b)(4).) The provision clearly does not contemplate the use of an exemption because a reach code will invariably require environmental analysis under CEQA. Thus, the reliance on an exemption here is plainly in error.

**C. The City Must Conduct an Initial Study and Prepare an EIR Prior to Considering Adoption of an All-Electric Reach Code Ordinance.**

Because proposed adoption of an all-electric reach code is a project that is subject to CEQA, and does not qualify for any exemption from CEQA review, the Town is required to conduct an initial study to determine whether it may have any significant environmental effects; if the initial study shows the project does not qualify for a negative declaration, the Town must prepare an EIR. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380-381.) The Town's good faith performance of such a study here will show that adoption of an all-electric reach code may have significant and adverse environmental effects in numerous areas, including, but not limited to, aesthetics, recreation, utilities/service systems, GHG emissions, land use/planning, population/housing, air quality, wildfire, public safety, energy, hazards and hazardous materials, and public services. A few of these numerous areas of potentially significant impact are discussed in further detail below.

- **Hazards/Public Safety.** Ironically, an all-electric reach code ordinance is being considered at a time when the supply of electrical power to the Town and surrounding communities may be less reliable and subject to more and longer planned outages than ever before. (See attached August 15, 2019 Press Democrat article, "PG&E Map Sheds Light On Planned Power Outages In Sonoma County.")<sup>3</sup> As noted in the article, the "unprecedented" planned power outages are

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<sup>3</sup> See <https://www.pressdemocrat.com/news/9898428-181/pge-map-sheds-light-on>.

expected to “cover all of Cloverdale, Cotati, Healdsburg, Sebastopol and Windsor” and critics of the planned outages have “point[ed] to impacts on public safety, businesses and disabled people who rely on access to electricity.” The article states “[a] prolonged, widespread outage... could have the potential to be very disruptive, officials acknowledged, posing problems ranging from cell phone service to storage of food.” An announcement of the Petaluma Fire Department is quoted as stating: “ATM machines won’t work, gas stations won’t be able to pump gas, traffic signals will be out, garage doors will need to be opened manually.... Are you ready?” Without adequate battery storage of electricity, or an alternative power source, such as natural gas which powers backup generators and other appliances, “all-electric” homes and businesses will be subject to hazards and risks to public safety during outages when heat, lighting, water, refrigeration, food, and air conditioning may be unavailable.

Given the risk of blackouts, some residents will rely on propane or gasoline generators or other combustible sources of power which are more prone to accident or spillage than fixed natural gas lines. There is no discussion of the risks or impacts associated with such increased usage, including air quality, GHG, and fire impacts.

Note also that the 2018 Camp Fire, the deadliest in California history, was apparently caused by electrical transmission lines.<sup>4</sup> There is no analysis whatsoever in the Staff Report or any supporting materials as to any potential increase in fire risk from expanded electrical service facilities which the reach code would necessitate. Instead, the Staff Report claims, without supporting evidence, that “natural gas infrastructure is a potentially significant source of fire.” (Staff Report, p. 4.) Suffice it to say the Town cannot accuse natural gas of providing a wildfire risk without supporting evidence while ignoring the fact that electricity lines gave rise to the most lethal California wildfire ever less than a year ago.

- **Utilities/Service Systems/Wildfire.** The CEQA Guidelines Appendix G checklist – a template for the initial study the Town is required to conduct under CEQA – requires evaluation of the question of whether the project would “[r]equire or result in the relocation or construction of new or expanded ... electric power, natural gas, or telecommunications facilities, the construction of which could cause significant environmental effects?” Projects requiring significant new construction to rely solely on electricity as a power source clearly have the potential to result in the installation,

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<sup>4</sup> See, e.g., [https://www.fire.ca.gov/media/5038/campfire\\_cause.pdf](https://www.fire.ca.gov/media/5038/campfire_cause.pdf).

upgrading, and/or maintenance of associated infrastructure (e.g., roads, fuel breaks, power lines), and where such occurs in or near areas of high fire hazard the resulting environmental impacts must also be studied. (See Appendix G, Section XX WILDFIRE [listing potential impacts such as impairment of adopted emergency response and evacuation plans, exacerbation of wildfire risks, and other human safety and environmental risks and impacts].) And, as noted above, the most deadly fire in California history was started not by natural gas facilities, but by electrical lines. Moreover, also as noted above, increased generator use may give rise to its own increased risk of fire.

Similarly, the Staff Report and Study do not analyze whether the existing electrical grid is sufficient to satisfy the demand of all new construction under a 100% electricity standard. Given PG&E's warnings about potential blackouts, the grid's ability to handle this new demand is questionable at best. Moreover, the Staff Report and Study do not sufficiently discuss the sources of the additional electricity required under the proposed reach code, nor the impacts related to those sources. Natural gas powered plants will naturally obviate most if not all of the supposed benefit of gas-free construction. Wind and solar have well-known impacts relating to wildlife, aesthetics, etc.<sup>5</sup> And hydroelectric power comes with its own suite of impacts as well, including harm to anadromous fish and other species<sup>6</sup> and the risk of failure and flood (as with the Oroville Dam crisis of 2017). In fact, hydroelectric facilities in California and the west are being removed, making this source of power uncertain for future electricity needs.<sup>7</sup>

- **GHG/Air Quality.** While the cursory four-page April 17 Agenda Report appears to proceed on the assumption that GHGs are the *only* concern and impact at issue, such a facile assumption is clearly incorrect. An all-electric reach code would eliminate gas-powered

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<sup>5</sup> See [https://www.ucsusa.org/clean\\_energy/our-energy-choices/renewable-energy/environmental-impacts-solar-power.html](https://www.ucsusa.org/clean_energy/our-energy-choices/renewable-energy/environmental-impacts-solar-power.html);  
[https://www.ucsusa.org/clean\\_energy/our-energy-choices/renewable-energy/environmental-impacts-solar-power.html](https://www.ucsusa.org/clean_energy/our-energy-choices/renewable-energy/environmental-impacts-solar-power.html).

<sup>6</sup> See <https://www.fs.fed.us/psw/publications/lind/lind6.pdf>;  
[https://www.researchgate.net/profile/Liba\\_Pejchar/publication/11779066\\_A\\_River\\_Might\\_Run\\_Through\\_It\\_Again\\_Criteria\\_for\\_Consideration\\_of\\_Dam\\_Removal\\_and\\_Interim\\_Lessons\\_From\\_California/links/004635277e83e0f755000000/A-River-Might-Run-Through-It-Again-Criteria-for-Consideration-of-Dam-Removal-and-Interim-Lessons-From-California.pdf](https://www.researchgate.net/profile/Liba_Pejchar/publication/11779066_A_River_Might_Run_Through_It_Again_Criteria_for_Consideration_of_Dam_Removal_and_Interim_Lessons_From_California/links/004635277e83e0f755000000/A-River-Might-Run-Through-It-Again-Criteria-for-Consideration-of-Dam-Removal-and-Interim-Lessons-From-California.pdf).

<sup>7</sup> See <http://www.klamathrenewal.org/>.

heaters, stoves, water heaters, built-in outdoor barbeques, gas burning fireplaces, fire pits, and, as noted above, gas-powered backup generators to protect against losses, disruptions and safety problems from blackouts of a fragile and overburdened electrical grid. Alternative fuel sources – such as wood, gasoline or charcoal – exist for many of these amenities, and could be substituted for the cleaner-burning natural gas that the proposal would eliminate, leading to greater GHG emissions and air quality impacts. Such unintended, but clearly reasonably foreseeable, adverse environmental consequences must be fully evaluated under CEQA. (See, e.g., *Rodeo Citizens Association v. County of Contra Costa* (2018) 22 Cal.App.5th 214 [recognizing that to extent captured butane and propane were used to displace use of other fuels such as coal, home heating fuel, fuel oil, diesel, kerosene, gasoline and ethanol, they would also displace GHG emissions otherwise resulting from use of those alternate fuels].) For example, propane barbeques produce only one-third of the GHG emissions of charcoal barbeques (*id.* at p. 226), and natural gas is similarly a much cleaner burning fuel than charcoal, wood or gasoline. Moreover, the increased use of gasoline or propane generators may also give rise to air quality and/or GHG impacts that are completely unanalyzed in the Staff Report.

- **Population and Housing/Human Impacts.** Projects that would displace substantial numbers of people or housing, or render housing unaffordable, may have significant adverse impacts on the environment and human beings that require CEQA analysis and mitigation. (See CEQA Guidelines, Appdx. G, Section XIV.) To the extent an all-electric reach code could, for example, substantially increase the cost of new multi-family apartment dwelling construction and/or retrofitting, it could lead to increased rents, unaffordable housing, and tenant displacement from the same, with resulting adverse human impacts. Alternatively, renters or home buyers may prefer residences with traditional gas appliances and therefore show a greater propensity to move outside of the Town and commute. Tenant displacement, in and of itself, has been recognized as a significant adverse environmental impact subject to CEQA analysis and mitigation. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425 [holding CEQA mitigation measures designed to mitigate tenant displacement impacts of project, contained in a vesting tentative map, were enforceable and did not conflict with Ellis Act].) Public entities possess the power under

existing law “to mitigate adverse impacts on displaced tenants.” (*San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 484, citing *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 892; see Gov. Code, § 7060.1.) As explained by the *Lincoln Place* Court of Appeal, “CEQA... is made relevant... by the Ellis Act’s explicit exceptions for a public agency’s power to regulate, among other things,... the mitigation of adverse impacts on persons displaced by reason of the withdrawal of rental accommodations. *Such items are the common focus and byproducts of the CEQA process...*” (*Lincoln Place Tenants Assn., supra*, 155 Cal.App.4th at 451, *emph. added.*) Indeed, the Supreme Court has recently reaffirmed “that CEQA addresses human health and safety” and “that public health and safety are of great importance in the statutory scheme.” (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 386, citations omitted.) CEQA’s “express language... requires a finding of a “significant effect on the environment” ([Pub. Resources Code,] § 21083(b)(3)) whenever the “environmental effects of a project will cause substantial effects *on human beings*, either directly or indirectly.” (*Id.* at p. 386, *emphasis in original.*)

- **Land Use/Planning.** Given the foregoing, the Staff Report’s analysis of the consistency of the proposed ordinance with the Town’s General Plan is absurdly abbreviated, consisting of less than two pages and citing a mere five goals and policies out of the more than 250 pages that make up the General Plan.<sup>8</sup> (Staff Report, pp. 4-5.) While the Town has discretion in interpreting and applying its General Plan, it cannot do so in a way that frustrates the purpose of the General Plan. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378-381.) The analysis in the Staff Report is far too brief to fully address the proposed ordinance’s consistency with the General Plan and its overall purpose. Accordingly, further analysis of this issue is required.

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<sup>8</sup> See [https://www.townofwindsor.com/DocumentCenter/View/21498/Final-Town-of-Windsor-2040-General-Plan\\_2018-06-04](https://www.townofwindsor.com/DocumentCenter/View/21498/Final-Town-of-Windsor-2040-General-Plan_2018-06-04).

**IV. CONCLUSION**

While Mr. Gallaher reserves all rights to submit further comments, arguments, and evidence, it is evident for the reasons set forth above that (1) the Town cannot lawfully make the findings required to enact the proposed reach code ordinance, and (2) a full and robust EIR that complies with CEQA must be prepared and certified before any ordinance adopting an all-electric reach code can be considered by the Town for approval.

Very truly yours,

MILLER STARR REGALIA



Matthew C. Henderson

MCH:dlf  
encls.

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September 11, 2019

**VIA E-MAIL AND U.S. MAIL**

Kenneth MacNab  
Town Manager  
Town of Windsor  
9291 Old Redwood Highway  
Windsor, CA 95492  
kmacnab@townofwindsor.com

Re: Town of Windsor Proposed Adoption of All-Electric Residential Reach Cod

Dear Mr. MacNab:

As you know, this firm represents William Gallaher in conjunction with the above-referenced matter. I write concerning two issues with respect to the Town's contemplated adoption of the all-electric residential "reach" code, which the Town Council first acted upon at its September 4, 2019 hearing.

Prior to that hearing, at which I personally appeared to object to the project on Mr. Gallaher's behalf, I submitted a 13-page letter (with an enclosed August 15, 2019 Press Democrat article) to the Town on behalf of my client, recognizing that such was too late to be included in the agenda packet.<sup>1</sup> As you will no doubt recall, however, I asked on the record at the hearing for confirmation that the letter had been received by the Town and would be included as part of the record with respect to the Council's action, and staff confirmed that it had been received and would be so included. However, after checking the online portal for the Town Council agenda of September 4, 2019, I noted that three other letters are now included with respect to the ordinance (item 10.1), but not my letter. Accordingly, I would appreciate further written confirmation that my letter is part of the record with respect to the ordinance.

In addition, please treat this letter as a formal request to send to my attention copies of any notice the Town issues with respect to CEQA compliance for the adoption of

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<sup>1</sup> Note, however, that CEQA expressly provides that the submission of objections and alleged grounds of an agency's noncompliance with CEQA may properly be submitted, for purposes of exhausting issues and obtaining standing to litigate, at any time "prior to the close of the public hearing on the project." (Pub. Resources Code, § 21177, subds. (a), (b).) The letter was clearly timely for this purpose.

the ordinance, as is required by Public Resources Code sections 21092.2 and 21167, CEQA Guidelines section 15062, or otherwise.

Thank you for your attention to these matters, I very much appreciate it. Please do not hesitate to contact me should you have any questions or concerns about the foregoing.

Very truly yours,

MILLER STARR REGALIA



Matthew C. Henderson

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October 15, 2019

**VIA E-MAIL AND U.S. MAIL**

Kenneth MacNab  
Town Manager  
Town of Windsor  
9291 Old Redwood Highway  
Windsor, CA 95492  
kmacnab@townofwindsor.com

Re: Town of Windsor Proposed Adoption of All-Electric Residential Reach Code  
(October 16, 2019 Town Council Meeting Agenda Item No. 11.2)

Dear Mr. MacNab:

As you know, this office represents William Gallaher with respect to the above-referenced matter. Thank you for providing courtesy notice of the second reading of the Town Council's proposed ordinance enacting the all-electric reach code.

I will not here recite the multiple bases of my client's opposition to the ordinance which I have previously provided in correspondence and comment at a prior Town Council meeting. However, I will note for the record that the timing of the Town's action on the proposed ordinance is curious given the highly publicized PG&E power outages that affected much of Northern California, including parts of the Town, only last week.

The PG&E shutdowns highlight a number of issues that the proposed ordinance presents that have yet to be addressed. Given the highly publicized nature of the outages, future homebuyers will naturally be more wary of purchasing all-electric homes. Will this cause such homes to sell for lower prices, thereby discouraging developers from building them? Will that cause the price of existing homes in Windsor to increase? Will it also encourage development in other areas without an all-electric reach code, thereby negating the code's purpose, increasing commute distances, and giving rise to traffic, air quality, and greenhouse gas impacts? Will the owners of all-electric homes be more likely to use generators, creating additional fire risks as well as air quality and greenhouse gas impacts? Will homes built under the reach code be equipped with storage batteries, which entail their own environmental impacts? As one of the attached articles notes, even homes equipped with solar power systems are affected by power outages, and battery systems "generally have up to two hours of backup power." How may this affect

those relying on electrical power for heat in cold weather, particularly the elderly and sick? And note that deliberate shutdowns by PG&E are not the only source of outages; winter storms, earthquakes, fallen trees, wildfires, and even increased demand for electricity may also cause them as the attached document shows. The risk of power outages for all-electric homes is real, and entails any number of potential effects as discussed here and in my prior correspondence.

These questions are not academic, and the cursory analysis in the staff report does not address them. I have attached a number of recent articles on the PG&E shutdown which touch on these and other issues. Given the existence of these issues, it is plain that enactment of the ordinance is not exempt under CEQA. Accordingly, the Town must at the very least prepare an initial study before it can enact the ordinance.

Thank you for your and the Town's attention to this matter. Please do not hesitate to contact me should you have any questions or concerns about the foregoing.

Very truly yours,

MILLER STARR REGALIA



Matthew C. Henderson

MCH:klw  
Enclosures

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11 Attorneys for Petitioner and Plaintiff  
12 WILLIAM P. GALLAHER

**ENDORSED  
FILED**

**NOV 19 2019**

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SONOMA**

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SONOMA**

WILLIAM P. GALLAHER, an individual,

Petitioner and Plaintiff,

v.

TOWN OF WINDSOR, TOWN COUNCIL  
OF THE TOWN OF WINDSOR, and DOES 1  
through 25, inclusive,

Respondents and Defendants.

Case No. **SCV 265553**

**VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

[CCP §§ 1060, 1085, 1094.5; Pub. Resources  
Code, § 21000 et seq; Cal. Code Regs., tit. 14,  
§ 15000 et seq.; Cal. Code Regs., tit. 24, pt. 6,  
§ 10-106]

**CEOA ACTION**

Petitioner and Plaintiff William P. Gallaher, an individual ("Petitioner"), alleges as  
follows:

**GENERAL ALLEGATIONS**

1. Petitioner is an individual, over the age of eighteen who regularly conducts business  
in the Town of Windsor.
2. Respondent and Defendant Town of Windsor ("Town") is and at all relevant times  
was a political and legal subdivision of the State of California, duly organized and existing under  
and pursuant to the laws of the State of California.

1           3.       Respondent and Defendant Town Council of the Town of Windsor (“Council”) is,  
2 and at all relevant times was, inter alia, the duly organized legislative body of the Town existing  
3 under and by virtue of the laws of the State of California. The Council is, and at relevant times  
4 was, the local body charged with proposing, drafting, amending and passing legislation governing  
5 land use and the Town’s municipal affairs, subject to, and in a manner complying with, all  
6 applicable federal, state, and local law.

7           4.       Petitioner is unaware of the true names or capacities of the parties fictitiously sued  
8 herein as DOES 1 through 25, inclusive, and will amend this complaint to set forth their true names  
9 and capacities when the same have been ascertained. Petitioner is informed and believes, and based  
10 thereon alleges, that some fictitiously named Respondents were the agents and employees of the  
11 other fictitiously named, or actually named, Respondents and, acting within the course of scope of  
12 such employment or agency, took some part in the acts or omissions hereinafter set forth, or are the  
13 principals and took some part in such acts or omissions, by reason of which said fictitiously-named  
14 Respondents are liable to Petitioner for the relief prayed for herein.

15           5.       Respondents and Defendants identified in paragraphs 2 through 4 above, inclusive,  
16 are sometimes referred to collectively herein as “Respondents.”

17           6.       This action challenges the approval by the Town of a so-called “reach code” via  
18 “An Ordinance of the Town of Windsor Amending Windsor Municipal Code Title VII, ‘Building  
19 and Housing,’ to Add Chapter 7, ‘All-Electric Residential Reach Code’” (“Reach Code”), which  
20 ordinance was passed by the Council on second reading on October 16, 2019.

21           7.       A “reach code” is so called because it “reaches” beyond the ordinary standards of a  
22 building or energy code to impose greater restrictions on building and development. Reach codes  
23 in California are optional and can only be enacted if specific procedures are followed. Here, the  
24 Reach Code forbids the inclusion of natural gas or propane plumbing in new low-rise residential  
25 construction in the Town.

26           8.       Despite the fact that enactment of the Reach Code constituted a discretionary  
27 project affecting the use and occupancy of land and structures in the Town, and having the  
28 potential for reasonably foreseeable and potentially significant adverse physical changes in the

1 environment, the Town enacted the Reach Code without undertaking environmental review as  
2 required by, and therefore in violation of, the California Environmental Quality Act (“CEQA”;  
3 Pub. Resources Code § 21000 et seq.) and its implementing CEQA Guidelines (Cal. Code Regs.,  
4 tit. 14, § 15000 et seq.).

5         9.       The enactment of a reach code is governed by section 10-106 of the 2019 Building  
6 Energy Efficiency Standards for Residential and Nonresidential Buildings, title 24, part 6 of the  
7 California Code of Regulations (“Reach Code Law”). Before enacting the Reach Code, the Reach  
8 Code Law required that the Town adopt “[a] determination that the standards are cost effective.”  
9 (Cal. Code Regs., tit. 24, pt. 6, § 10-106, subd. (a)(1).) The Town’s determination was based on a  
10 document entitled “2019 Cost-effectiveness Study: Low-Rise Residential New Construction”  
11 dated July 17, 2019 (“Study”), whose material conclusions are contradicted by a separate study  
12 entitled “Residential Building Electrification in California.” The Reach Code Law also requires  
13 the submittal of an application to the Executive Director of the California State Energy Resources  
14 Conservation and Development Commission that includes “[a]ny findings, determinations,  
15 declarations or reports, ***including any negative declaration or environmental impact report,***  
16 ***required pursuant to the California Environmental Quality Act***, Pub. Resources Code Section  
17 21000 et seq.” (Cal. Code Regs., tit. 24, pt. 6, § 10-106, subd. (b)(4), emphasis added.)

18         10.       On November 6, 2019, the Town Council introduced and held a first reading of an  
19 ordinance adopting the 2019 edition of the California Building Standards Code, including the  
20 Reach Code. As of the date of this petition the Town Council has not yet held the second reading  
21 of that ordinance. Any further action to implement or adopt the Reach Code is invalid and illegal  
22 for the reasons set forth herein. Petitioner may amend this petition and complaint at such time as  
23 the Town takes such further action.

24         11.       Petitioner is beneficially interested in the Town’s full compliance with the law  
25 regarding the Town’s approval of the Reach Code, including adhering to the requirements of  
26 CEQA. Petitioner has personal, professional, environmental and other interests which will be  
27 severely injured by Respondents’ failure to comply with CEQA and the Reach Code Law.  
28 Petitioner lives close by the Town and regularly does business there, including developing projects

1 that would be subject to the Reach Code. Moreover, the Reach Code's impacts are necessarily  
2 regional in nature, thereby impacting residents throughout Sonoma County.

3 12. Petitioner is within the class of persons beneficially interested in and aggrieved by  
4 the Town's failure to comply with CEQA and approval of the Reach Code. Petitioner has  
5 expressed his concerns and objections to the approval of the Reach Code at meetings and in  
6 correspondence to the Town. Before approving the Reach Code, the City owed a mandatory duty to  
7 comply with the legal duties which Petitioner alleges were violated. Petitioner has the right to  
8 enforce the mandatory duties which the CEQA imposes on the Town.

9 13. The Town is the lead agency for purposes of CEQA compliance.

10 14. Petitioner has exhausted all available administrative remedies in that the Town's  
11 approval of the Reach Code is final and not subject to further administrative appeal procedures.

12 15. Petitioner objected to the approval of the Reach Code orally and in writing during  
13 the public comment period and prior to the close of the public hearing on the Reach Code, and  
14 before the Town's filing of a Notice of Exemption for the approval on October 21, 2019. All  
15 alleged grounds for non-compliance with CEQA and the Reach Code Law were presented to the  
16 Town during the public-comment period prior to the close of the public hearing on the Reach Code  
17 and the Town's issuance of the Notice of Exemption.

18 16. The Town filed a Notice of Exemption for the Reach Code with the Office of the  
19 County Clerk for the County of Sonoma on or about October 21, 2019. Petitioner will timely file  
20 this Petition for Writ of Mandate on before November 25, 2019, a date not more than thirty-five  
21 (35) days after the filing of the Notice of Exemption as required by Public Resources Code section  
22 21167, subdivision (d).

23 17. Petitioner has caused a Notice of Intent to File Suit to be served on the Town as  
24 required by Public Resources Code section 21167.5. A true and correct copy of the Notice of Intent  
25 to File Suit is attached hereto as Exhibit A.

26 18. Petitioner will have caused a copy of this pleading to be served on the Office of the  
27  
28

1 Attorney General for the State of California not more than ten (10) days after the commencement of  
2 this proceeding, as required by Public Resources Code section 21167.7 and Code of Civil Procedure  
3 section 388.

4 19. Petitioner brings this action as a private attorney general to vindicate his own legal  
5 and constitutional rights and those of residents of the Town and all others who may be impacted by  
6 the Reach Code. Petitioner seeks, on his own behalf and the behalf of said others, that Respondents  
7 obey the clear law, conduct required environmental reviews of their discretionary actions, require  
8 appropriate and feasible mitigation for their significant impacts, and not act in unlawful, bad faith,  
9 arbitrary, capricious, and confiscatory fashion in noticing, analyzing, enacting and enforcing local  
10 land use legislation.

11 20. For these reasons, and others set forth in this Petition and Complaint, the Town's  
12 actions described herein and the Reach Code are unlawful, invalid, and unenforceable. Petitioner  
13 therefore requests this Court issue a writ of mandate invalidating the Reach Code and declaring it,  
14 and any actions undertaken thereunder or pursuant thereto, unlawful, null, and void. Petitioner also  
15 seeks declaratory relief regarding the parties' respective legal rights and obligations and temporary,  
16 preliminary and permanent injunctive relief prohibiting enforcement of the Reach Code in any  
17 manner.

18 21. An actual and substantial controversy exists between Petitioner, on the one hand, and  
19 Respondents, on the other hand, relating to the legal rights of the respective parties. The  
20 controversy is well-defined and imminent in nature, such that the need for, and appropriateness of,  
21 judicial determinations at this time is warranted.

22 **FIRST CAUSE OF ACTION**

23 (Writ of Mandamus – Violations of CEQA –

24 Code Civ. Proc., §§ 1085, 1094.5; Pub. Resources Code, § 21168.5 –

25 Against All Respondents)

26 22. The allegations of paragraphs 1 through 21, above, are hereby incorporated herein by  
27 reference as though set forth in full.

1           23.     The ordinance adopting the Reach Code is a “project” that is subject to CEQA  
2 review. The CEQA Guidelines, in relevant part, define “project” as “the whole of an action, which  
3 has a potential for resulting in either a direct physical change in the environment, or a reasonably  
4 foreseeable indirect physical change in the environment, and that is any of the following: (1) An  
5 activity directly undertaken by any public agency including but not limited to... enactment and  
6 amendment of zoning ordinances....” (Cal. Code Regs., tit. 14, § 15378, subd. (a)(1).) Indeed,  
7 under CEQA’s broad definition of a “project,” municipal ordinances, laws and regulations affecting  
8 the use of land or structures have consistently been held to be CEQA “projects” over the course of  
9 many decades.

10           24.     The Notice of Exemption for the Reach Code cites two exemptions: the class 8  
11 exemption under section 15308 of the Guidelines, and the “common sense” exemption under  
12 section 15061, subdivision (b)(3).

13           25.     CEQA’s co-called “common sense” exemption may properly be invoked only when  
14 the lead agency can declare “with certainty that there is no possibility that the activity in question  
15 may have a significant effect on the environment.” (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3).)  
16 Thus, it is the Town’s burden to provide support for application of the common sense exemption,  
17 not Petitioner’s burden to disprove its applicability. Any legitimate reasonable question about  
18 whether a project might have a significant impact means the project cannot be exempt under the  
19 “common sense” exemption. The Town was required to consider factual evidence and data relating  
20 to possible environmental impacts of the Reach Code, and that consideration must be supported by  
21 evidence in the administrative record.

22           26.     With respect to the class 8 exemption, such can only be used for an action that  
23 constitutes a preservation of the environment. The Reach Code cannot be said to rise to this  
24 standard as it merely substitutes one source of energy for another, without any sufficient analysis as  
25 to whether that substitution will actually yield any benefit to the environment. (*Dunn-Edwards*  
26 *Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644; *International*  
27 *Longshoremen’s & Warehousemen’s Union v. Board of Supervisors* (1981) 116 Cal. App.3d 265.)  
28 The Town cannot undertake a “net benefit” environmental analysis – i.e., reasoning that the

1 project's environmental benefits in one area outweigh its significant adverse effects in another area  
2 or areas of environmental impact – as such is not permitted under CEQA. (*County Sanitation Dist.*  
3 *No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1577, 1580.) “There may be environmental  
4 costs to an environmentally beneficial project, which must be considered and assessed.”  
5 (*California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143  
6 Cal.App.4th 173, 178.)

7 27. Neither the common sense nor the class 8 exemption applies here. The Reach Code  
8 may have a number of significant impacts on the environment, none of which the Town has  
9 analyzed. These include the following:

- 10 a) **Hazards/Public Safety.** The Reach Code was passed at a time when the supply of  
11 electrical power to the Town and surrounding communities may be less reliable and  
12 subject to more and longer planned outages than ever before. In October of 2019 the  
13 Town and surrounding area were subject to prolonged electricity blackouts and  
14 wildfires which may have been caused by electrical infrastructure. But the Town  
15 failed to analyze how all-electric residential construction would exacerbate these  
16 impacts. Without adequate battery storage of electricity, or an alternative power  
17 source, such as natural gas which powers backup generators cook-stoves and grills,  
18 and other appliances, “all-electric” homes and businesses will be subject to hazards  
19 and risks to public safety during outages when heat, life-saving medical equipment,  
20 lighting, water, refrigeration, food, and air conditioning may be unavailable. Given  
21 the risk of blackouts, some residents will rely on propane or gasoline generators or  
22 other combustible sources of power, which are more prone to accident or spillage  
23 than fixed natural gas lines. There has been no study or analysis of the risks or  
24 impacts associated with such increased usage, including air quality, GHG, and fire  
25 impacts.
- 26 b) The 2018 Camp Fire, the deadliest in California history, was apparently caused by  
27 electrical transmission lines. There is no analysis whatsoever in the administrative  
28 record as to any potential increase in fire risk from expanded electrical service

1 facilities which the Reach Code would necessitate. Instead, the Town claims,  
2 without supporting evidence, that “natural gas infrastructure is a potentially  
3 significant source of fire.” The Town cannot assert (without supporting evidence)  
4 that natural gas presents a wildfire risk while ignoring the fact that electric  
5 transmission lines gave rise to the most lethal California wildfire ever less than a  
6 year ago.

7 c) **Utilities/Service Systems/Wildfire**. The CEQA Guidelines Appendix G checklist –  
8 a template for the initial study the Town is required to conduct under CEQA –  
9 requires evaluation of the question of whether the project would “[r]equire or result  
10 in the relocation or construction of new or expanded ... electric power, natural gas,  
11 or telecommunications facilities, the construction of which could cause significant  
12 environmental effects?” Projects requiring significant new construction to rely  
13 solely on electricity as a power source clearly have the potential to result in the  
14 installation, upgrading, and/or maintenance of associated infrastructure (e.g., roads,  
15 fuel breaks, power lines), and where such occurs in or near areas of high fire hazard  
16 the resulting environmental impacts must also be studied. (See Appendix G, Section  
17 XX WILDFIRE [listing potential impacts such as impairment of adopted emergency  
18 response and evacuation plans, exacerbation of wildfire risks, and other human  
19 safety and environmental risks and impacts].) And, as noted above, the most deadly  
20 fire in California history was started not by natural gas facilities, but by electrical  
21 lines. Moreover, also as noted above, increased generator use may give rise to its  
22 own increased risk of fire.

23 d) Similarly, the administrative record does not analyze whether the existing electrical  
24 grid is sufficient to satisfy the demand of all new construction under a 100%  
25 electricity standard. Given PG&E’s warnings about potential blackouts, the grid’s  
26 ability to handle this new demand is questionable at best. Moreover, the Town did  
27 not sufficiently discuss the sources of the additional electricity required under the  
28 reach Code, nor the impacts related to those sources. Electric power generation

1 powered plants fueled by natural gas or other non-renewable energy sources will  
2 obviously negate the supposed benefit of gas-free construction. Wind and solar  
3 sources also have their own well-known adverse impacts relating to wildlife,  
4 aesthetics, etc. They are also subject to supply issues depending on weather and  
5 other conditions. And hydroelectric power comes with its own suite of adverse  
6 impacts as well, including harm to anadromous fish and other species and the risk of  
7 failure and flood (as with the Oroville Dam crisis of 2017). In fact, hydroelectric  
8 facilities in California and the west are being removed, making this source of power  
9 uncertain for future electricity needs.

10 e) **GHG/Air Quality**. In passing the Reach Code the Town assumed that GHGs are  
11 the only environmental concern and impact at issue; such a facile assumption is  
12 clearly incorrect. The Reach Code would eliminate gas-powered heaters, stoves,  
13 water heaters, built-in outdoor barbeques, gas burning fireplaces, fire pits, and, as  
14 noted above, gas-powered backup generators to protect against losses, disruptions  
15 and safety problems from blackouts of a fragile and overburdened electrical grid.  
16 Alternative fuel sources – such as wood, gasoline or charcoal – exist for many of  
17 these amenities, and could be substituted for the cleaner-burning natural gas that the  
18 proposal would eliminate, leading to greater GHG emissions and air quality impacts.  
19 Such unintended, but clearly reasonably foreseeable, adverse environmental  
20 consequences must be fully evaluated under CEQA. (See, e.g., *Rodeo Citizens*  
21 *Association v. County of Contra Costa* (2018) 22 Cal.App.5th 214 [recognizing that  
22 to extent captured butane and propane were used to displace use of other fuels such  
23 as coal, home heating fuel, fuel oil, diesel, kerosene, gasoline and ethanol, they  
24 would also displace GHG emissions otherwise resulting from use of those alternate  
25 fuels].) For example, propane barbeques produce only one-third of the GHG  
26 emissions of charcoal barbeques (*id.* at p. 226), and natural gas is similarly a much  
27 cleaner burning fuel than charcoal, wood or gasoline. Moreover, the increased use  
28

1 of gasoline, diesel, or propane generators may also give rise to air quality and/or  
2 GHG impacts that are completely unanalyzed in the administrative record.

3 f) **Population and Housing/Human Impacts.** Projects that would displace substantial  
4 numbers of people or housing, or render housing unaffordable, may have significant  
5 adverse impacts on the environment and human beings that require CEQA analysis  
6 and mitigation. (See CEQA Guidelines, Appdx. G, Section XIV.) To the extent the  
7 Reach Code could, for example, substantially increase the cost of new multi-family  
8 apartment dwelling construction and/or retrofitting, it could lead to increased rents,  
9 unaffordable housing, and tenant displacement from the same, with resulting adverse  
10 human impacts. Alternatively, renters or home buyers may prefer residences with  
11 traditional gas appliances and therefore show a greater propensity to move outside of  
12 the Town and commute. This may also impact the supply of housing in the Town.  
13 Residential displacement, in and of itself, has been recognized as a significant  
14 adverse environmental impact subject to CEQA analysis and mitigation. (*Lincoln*  
15 *Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425 [holding  
16 CEQA mitigation measures designed to mitigate tenant displacement impacts of  
17 project, contained in a vesting tentative map, were enforceable and did not conflict  
18 with Ellis Act].) Public entities possess the power under existing law “to mitigate  
19 adverse impacts on displaced tenants.” (*San Francisco Apartment Assn. v. City and*  
20 *County of San Francisco* (2016) 3 Cal.App.5th 463, 484, citing *Pieri v. City and*  
21 *County of San Francisco* (2006) 137 Cal.App.4th 886, 892; see Gov. Code,  
22 § 7060.1.) As explained by the *Lincoln Place* Court of Appeal, “CEQA... is made  
23 relevant... by the Ellis Act’s explicit exceptions for a public agency’s power to  
24 regulate, among other things,... the mitigation of adverse impacts on persons  
25 displaced by reason of the withdrawal of rental accommodations. *Such items are the*  
26 *common focus and byproducts of the CEQA process....*” (*Lincoln Place Tenants*  
27 *Assn., supra*, 155 Cal.App.4th at 451, *emph. added.*) Indeed, the Supreme Court has  
28 recently reaffirmed “that CEQA addresses human health and safety” and “that public

1 health and safety are of great importance in the statutory scheme.” (*California*  
2 *Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th  
3 369, 386, citations omitted.) CEQA’s “express language... requires a finding of a  
4 “significant effect on the environment” ([Pub. Resources Code,] § 21083(b)(3))  
5 whenever the “environmental effects of a project will cause substantial effects *on*  
6 *human beings*, either directly or indirectly.”“ (*Id.* at p. 386, emphasis in original.)

7 g) **Land Use/Planning.** Given the foregoing, the Town failed to adequately analyze  
8 the Reach Code’s consistency with its General Plan. While the Town has discretion  
9 in interpreting and applying its General Plan, it cannot do so in a way that frustrates  
10 the purpose of the General Plan. (*Napa Citizens for Honest Government v. Napa*  
11 *County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378-381.) The analysis in  
12 the administrative record is far too brief to fully address the proposed ordinance’s  
13 consistency with the General Plan and its overall purpose.

14 28. Given the foregoing, the Reach Code may have any number of potentially significant  
15 impacts on the environment, which makes the Town’s reliance on the common sense and class 8  
16 exemptions improper.

17 29. Even if the Reach Code were subject to a categorical exemption, it is clear that the  
18 unusual circumstances exception would apply, rendering the exemptions inapplicable. (Cal Code  
19 Regs., tit. 14, § 15300.2, subd. (c).) Substantial evidence supports a finding that the project  
20 presents unusual circumstances giving rise to the impacts discussed herein. These unusual  
21 circumstances include, but are not limited to, the following: PG&E’s express planned electricity  
22 service interruptions and/or blackouts that will potentially last for days in this and other Sonoma  
23 County areas, creating very serious health and safety problems if power is actually out that long and  
24 not resumed from a non-grid source; the jurisdiction and cumulative study area jurisdictions are in  
25 very high fire danger areas, increasing both the likelihood and seriousness of electricity blackouts;  
26 there are well-known serious traffic problems on Highway 101 making even longer commutes to  
27 Santa Rosa from northern cities by displaced homebuyers and renters who want a choice other than  
28 all-electric more environmentally harmful. Accordingly, even assuming arguendo a categorical

1 exemption applies, there is more than a fair argument that the adoption of the ordinance may have  
2 significant adverse environmental effects due to unusual circumstances which require actual  
3 analysis in a legally adequate initial study pursuant to CEQA.

4 30. The Town's reliance on exemptions also overlooks the Reach Code's potential for  
5 contributing to significant and adverse cumulative impacts. (Cal Code Regs., tit. 14, § 15300.2,  
6 subd. (b).) If other jurisdictions in Sonoma County or Northern California more broadly enact  
7 similar ordinances, the increase in the demand for electricity will be potentially much greater than  
8 that from the Town's alone, and so would the related impacts.

9 31. Section 10-106 of the Building Energy Efficiency Standards upon which the Town  
10 relied to enact the Reach Code requires the submission of materials in support of an application for  
11 a reach code. The specific submittals required do not extend to a notice of claimed exemption but a  
12 "negative declaration or environmental impact report, required pursuant to the California  
13 Environmental Quality Act, Public Resources Code Section 21000 et seq." (Cal. Code Regs., tit.  
14 24, § 10-106, subd. (b)(4).) The provision clearly does not contemplate the use of an exemption  
15 because the Reach Code will invariably require at least an initial stud and appropriate  
16 environmental analysis under CEQA. Thus, the reliance on an exemption here is in error under the  
17 very authority upon which the Town has relied to enact it.

18 32. The Town's purported reliance on an initial study and negative declaration  
19 ("IS/ND") for the statewide 2019 Energy Code is also unavailing. The Town is, in effect,  
20 attempting to "tier" environmental analysis on a negative declaration, which is not permitted under  
21 CEQA. A lead agency can only tier off of an existing EIR, not a negative declaration. (Pub.  
22 Resources Code, §§ 21068.5, 21093, 21094; 14 Cal. Code Regs., tit. 14, §§ 15152, 15168.) Indeed,  
23 the fact that the California Energy Commission conducted an initial study for the 2019 Building  
24 Energy Efficiency Standards demonstrates that the Reach Code is not exempt from CEQA review.  
25 Thus, the Town's citation to the IS/ND to justify their reliance on CEQA exemptions is self-  
26 defeating as a matter of law. Moreover, even where an EIR has been previously prepared, in order  
27 to lawfully tier off of that EIR "an initial study shall be prepared to assist the lead agency in making  
28 the determinations required by this section. The initial study shall analyze whether the later

1 project may cause significant effects on the environment that were not examined in the prior  
2 [EIR].” (Pub. Resources Code, § 21094, subd. (c).) As the State’s IS/ND did not evaluate any of  
3 the local conditions pertaining to the Town’s adoption of the Reach Code (including, but not limited  
4 to, its impacts on housing, traffic, PG&E shutoffs, increased wildfire risk, public safety, the use of  
5 generators, etc.), there is no way for the Town to lawfully rely upon the IS/ND. Indeed, the  
6 provisions of the Reach Code are not even addressed in the IS/ND. It also engages in a “net  
7 benefit” analysis contrary to the authority addressed above. (IS/ND, § III, p. A-3.) Finally,  
8 adoption of the Reach Code is a discretionary act not specific to the Town, and the IS/ND does not  
9 break out its provisions or impacts, so it provides no basis to conclude as to whether the Reach  
10 Code results in lesser or greater environmental impacts that may or may not be “balanced out” by  
11 the far more numerous provisions in the remainder of the Energy Code.

12 33. Accordingly, there was no basis in law or fact for the Town to conclude that  
13 adoption of the Reach Code was exempt under CEQA.

14 34. Under CEQA, a lead agency prejudicially abuses its discretion when it (1) fails to  
15 proceed in the manner required by law; or (2) its decision is not supported by the evidence. (Pub.  
16 Resources Code, § 21168.5.) By deeming the Reach Code exempt from CEQA review,  
17 Respondents abused their discretion in failing to comply with CEQA and failing to proceed in the  
18 manner required by law. As a result of Respondents’ violations of CEQA, Petitioner and other  
19 members of the public have been harmed in that they were not fully informed about the significant  
20 environmental impacts of the Reach Code prior to Respondents’ enactment of the same.  
21 Petitioner, as well as members of the general public, will suffer irreparable harm if the relief  
22 requested herein is not granted, as the Reach Code will be implemented in the absence of a full  
23 and adequate environmental review under CEQA. For the foregoing reasons, inter alia, Petitioner  
24 seeks an immediate stay of the Reach Code.

25 35. Petitioner has exhausted all administrative remedies made available to him to  
26 address Respondents’ unlawful conduct to the extent required and not excused, and any further  
27 attempts would in any event have been an idle and futile exercise even if available. Petitioner has  
28 no plain, speedy, and adequate remedy in the ordinary course of law to challenge the Reach Code,

1 and a writ of ordinary mandamus under Code of Civil Procedure section 1085 or 1094.5 is the  
2 prescribed remedy for violations of this type. Petitioner is herewith or shortly will be filing and  
3 serving on Respondents his election to prepare the supplemental administrative record pursuant to  
4 Public Resources Code section 21167, subdivision (b)(2), and all other applicable laws. Petitioner  
5 has also performed all other conditions precedent to issuance of a writ of mandate, including service  
6 of written notice of the commencement of this action on Respondents in accordance with the  
7 requirements of Public Resources Code section 21167.5, and mail service of the petition on the  
8 California Attorney General no more than ten (10) days after its filing (see Code Civ. Proc., § 388).

9 36. The adoption of the Reach Code, and the Town's subsequent passage of an  
10 ordinance amending its Municipal Code to incorporate the Reach Code, are in violation of CEQA  
11 and the CEQA Guidelines.

12 WHEREFORE, Petitioner prays for judgment as hereinafter set forth.

13  
14 **SECOND CAUSE OF ACTION**

15 (Writ of Mandamus – Violations of Cal. Code Regs., tit. 24, pt. 6, § 10-106 –  
16 Code Civ. Proc., §§ 1085, 1094.5 –  
17 Against All Respondents)

18 37. The allegations of paragraphs 1 through 36, above, are hereby incorporated by  
19 reference as though set forth in full.

20 38. Section 10-106 of the Reach Code Law requires that a jurisdiction enacting a reach  
21 code satisfy certain substantive and procedural requirements. As noted above, the Town was  
22 required to make “[a] determination that the standards are cost effective.” (Cal. Code Regs., tit. 24,  
23 pt. 6, § 10-106, subd. (a)(1).) The Town relied upon the Study to make this determination.  
24 However, the Study is materially contradicted by a separate study entitled “Residential Building  
25 Electrification in California.” The Town could therefore not make the proper determination under  
26 the Reach Code Law to pass the Reach Code.

27 39. The Reach Code Law also requires the submittal of an application to the Executive  
28 Director of the California State Energy Resources Conservation and Development Commission that

1 includes “[a]ny findings, determinations, declarations or reports, *including any negative*  
2 *declaration or environmental impact report, required pursuant to the California Environmental*  
3 *Quality Act*, Pub. Resources Code Section 21000 et seq.” (Cal. Code Regs., tit. 24, pt. 6, § 10-106,  
4 subd. (b)(4), emphasis added.) As noted above, the Town did not prepare a negative declaration or  
5 EIR in support of the Reach Code. Accordingly, it cannot make the requisite submittal under the  
6 Reach Code Law.

7 WHEREFORE, Petitioner prays for judgment as hereinafter set forth.

8 **THIRD CAUSE OF ACTION**

9 (Declaratory and Injunctive Relief

10 - Against All Respondents)

11 40. The allegations of paragraphs 1 through 39, above, are hereby incorporated by  
12 reference as though set forth in full.

13 41. An actual controversy has arisen and now exists between Petitioner and the  
14 Respondents. Petitioner contends that the Reach Code is invalid due to Respondents’ failure to  
15 follow CEQA and/or the Reach Code Law. Petitioner is informed and believes, and on that basis  
16 alleges, that Respondents contend that the Reach Code is valid and enforceable and was properly  
17 enacted.

18 42. Petitioner desires a judicial determination of the validity of the Reach Code. In  
19 particular, Petitioner desires a declaration that the Reach Code is invalid and unenforceable due to  
20 Respondents’ failure to follow CEQA and the Reach Code Law.

21 43. Such a declaration is necessary and appropriate at this time in order that Petitioner  
22 and similarly situated persons understand their rights and obligations with respect to the Reach  
23 Code.

24 44. Petitioner also seeks to enjoin Respondents from applying or enforcing the Reach  
25 Code, and to require that Respondents rescind their approval of the Reach Code.

1 WHEREFORE, Petitioner prays for judgment as follows:

2 A. On the First Cause of Action

3 1. For a stay, temporary restraining order, and preliminary injunction directed to  
4 Respondents' and Defendants' unlawful enactment and enforcement of the Reach Code without  
5 required CEQA review, analysis and mitigation as required by law, and for a peremptory writ of  
6 ordinary mandamus invalidating, voiding, and setting aside the Reach Code and any actions taken  
7 under or pursuant to them;

8 2. For monetary damages incidental to mandamus relief per Code of Civil  
9 Procedure section 1095 according to proof; and

10 3. For attorneys' fees pursuant to Code of Civil Procedure section 1021.5,  
11 Government Code section 800, and all applicable law.

12 B. On the Second Cause of Action

13 4. For a stay, temporary restraining order, and preliminary injunction directed to  
14 Respondents' and Defendants' unlawful enactment and enforcement of Reach Code, and for a  
15 peremptory writ of ordinary mandamus invalidating, voiding, and setting aside the Reach Code and  
16 any actions taken under or pursuant to it; and

17 5. For attorneys' fees pursuant to Code of Civil Procedure section 1021.5,  
18 Government Code section 800, and all applicable law.

19 C. On the Third Cause of Action

20 1. For a stay, temporary restraining order, and preliminary injunction directed to  
21 Defendants' unlawful enactment and enforcement of the Reach Code, and preventing the Reach  
22 Code from being enforced;

23 2. For a declaration that the Reach Code is invalid; and

24 3. For a permanent injunction preventing enforcement of the Reach Code.

25 D. On All Causes of Action

26 1. For costs and reasonable attorneys' fees as provided by law, including but  
27 not limited to attorneys' fees provided by Code of Civil Procedure section 1021.5; and  
28

1                   2.       For such other and further relief as the Court may deem just and proper.  
2

3 Dated: November 19, 2019

MILLER STARR REGALIA

4  
5 By:

  
MATTHEW C. HENDERSON

Attorneys for Petitioner and Plaintiff

WILLIAM P. GALLAHER  
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**VERIFICATION**

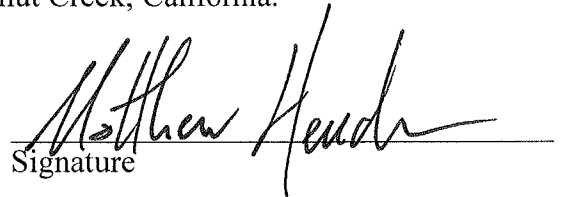
I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and know its contents.

I am one of the attorneys for William P. Gallaher, a party to this action. Such party is absent from the county where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

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

Executed on November 19, 2019, at Walnut Creek, California.

Matthew C. Henderson  
\_\_\_\_\_  
Print Name of Signatory

  
\_\_\_\_\_  
Signature

## **EXHIBIT A**

1 ARTHUR F. COON (Bar No. 124206)  
2 MATTHEW C. HENDERSON (Bar No. 229259)  
3 MILLER STARR REGALIA  
4 A Professional Law Corporation  
5 1331 N. California Blvd., Fifth Floor  
6 Walnut Creek, California 94596  
7 Telephone: 925 935 9400  
8 Facsimile: 925 933 4126  
9 Email: arthur.coon@msrlegal.com  
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11 Attorneys for Petitioner and Plaintiff  
12 WILLIAM P. GALLAHER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SONOMA

WILLIAM P. GALLAHER, an individual,

Petitioner and Plaintiff,

v.

TOWN OF WINDSOR, TOWN COUNCIL  
OF THE TOWN OF WINDSOR, and DOES 1  
through 25, inclusive,

Respondents and Defendants.

Case No.

NOTICE OF INTENT TO COMMENCE  
CEQA ACTION

[Pub. Resources Code, § 21167.5]

**CEQA Case**

**TO: TOWN OF WINDSOR and TOWN COUNCIL OF THE TOWN OF  
WINDSOR**

**PLEASE TAKE NOTICE** that, pursuant to Public Resources Code section  
21167.5, Petitioner and Plaintiff WILLIAM P. GALLAHER will commence a civil action under  
the California Environmental Quality Act ("CEQA"; Pub. Resources Code, § 21000 et seq.)  
against the Town of Windsor and Town Council of the Town of Windsor (collectively  
"Respondents") challenging the approval, implementation and enforcement by Respondents of  
"An Ordinance of the Town of Windsor Amending Windsor Municipal Code Title VII, 'Building  
and Housing,' to Add Chapter 7, 'All-Electric Residential Reach Code'" ("Reach Code") without  
undertaking environmental review of such action as required by CEQA, and in violation of other


1 requirements of law, and all related actions of Respondents in furtherance of implementation and  
2 enforcement of the Reach Code.

3 The action will be filed in the Sonoma County Superior Court, on or about  
4 November 18, 2019.

5  
6 Dated: November 15, 2019

MILLER STARR REGALIA

7  
8 By:



9 MATTHEW C. HENDERSON

10 Attorneys for Petitioner

11 WILLIAM P. GALLAHER  
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6 Attorneys for Petitioner and Plaintiff  
7 WILLIAM P. GALLAHER

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9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SONOMA

12 WILLIAM P. GALLAHER, an individual,

13 Petitioner and Plaintiff,

14 v.

15 TOWN OF WINDSOR, TOWN COUNCIL  
16 OF THE TOWN OF WINDSOR, and DOES 1  
17 through 25, inclusive,

18 Respondents and Defendants.

Case No.

PETITION FOR WRIT OF MANDATE AND  
COMPLAINT FOR DECLARATORY AND  
19 INJUNCTIVE RELIEF

[CCP §§ 1060, 1085, 1094.5; Pub. Resources  
Code, § 21000 et seq; Cal. Code Regs., tit. 14,  
§ 15000 et seq.; Cal. Code Regs., tit. 24, pt. 6,  
§ 10-106]

**CEOA ACTION**

20 Petitioner and Plaintiff William P. Gallaher, an individual ("Petitioner"), alleges as  
21 follows:

22 **GENERAL ALLEGATIONS**

23 1. Petitioner is an individual, over the age of eighteen who regularly conducts business  
24 in the Town of Windsor.

25 2. Respondent and Defendant Town of Windsor ("Town") is and at all relevant times  
26 was a political and legal subdivision of the State of California, duly organized and existing under  
27 and pursuant to the laws of the State of California.  
28

1           3.       Respondent and Defendant Town Council of the Town of Windsor (“Council”) is,  
2 and at all relevant times was, inter alia, the duly organized legislative body of the Town existing  
3 under and by virtue of the laws of the State of California. The Council is, and at relevant times  
4 was, the local body charged with proposing, drafting, amending and passing legislation governing  
5 land use and the Town’s municipal affairs, subject to, and in a manner complying with, all  
6 applicable federal, state, and local law.

7           4.       Petitioner is unaware of the true names or capacities of the parties fictitiously sued  
8 herein as DOES 1 through 25, inclusive, and will amend this complaint to set forth their true names  
9 and capacities when the same have been ascertained. Petitioner is informed and believes, and based  
10 thereon alleges, that some fictitiously named Respondents were the agents and employees of the  
11 other fictitiously named, or actually named, Respondents and, acting within the course of scope of  
12 such employment or agency, took some part in the acts or omissions hereinafter set forth, or are the  
13 principals and took some part in such acts or omissions, by reason of which said fictitiously-named  
14 Respondents are liable to Petitioner for the relief prayed for herein.

15           5.       Respondents and Defendants identified in paragraphs 2 through 4 above, inclusive,  
16 are sometimes referred to collectively herein as “Respondents.”

17           6.       This action challenges the approval by the Town of a so-called “reach code” via  
18 “An Ordinance of the Town of Windsor Amending Windsor Municipal Code Title VII, ‘Building  
19 and Housing,’ to Add Chapter 7, ‘All-Electric Residential Reach Code’” (“Reach Code”), which  
20 ordinance was passed by the Council on second reading on October 16, 2019.

21           7.       A “reach code” is so called because it “reaches” beyond the ordinary standards of a  
22 building or energy code to impose greater restrictions on building and development. Reach codes  
23 in California are optional and can only be enacted if specific procedures are followed. Here, the  
24 Reach Code forbids the inclusion of natural gas or propane plumbing in new low-rise residential  
25 construction in the Town.

26           8.       Despite the fact that enactment of the Reach Code constituted a discretionary  
27 project affecting the use and occupancy of land and structures in the Town, and having the  
28 potential for reasonably foreseeable and potentially significant adverse physical changes in the

1 environment, the Town enacted the Reach Code without undertaking environmental review as  
2 required by, and therefore in violation of, the California Environmental Quality Act ("CEQA";  
3 Pub. Resources Code § 21000 et seq.) and its implementing CEQA Guidelines (Cal. Code Regs.,  
4 tit. 14, § 15000 et seq.).

5         9.       The enactment of a reach code is governed by section 10-106 of the 2019 Building  
6 Energy Efficiency Standards for Residential and Nonresidential Buildings, title 24, part 6 of the  
7 California Code of Regulations ("Reach Code Law"). Before enacting the Reach Code, the Reach  
8 Code Law required that the Town adopt "[a] determination that the standards are cost effective."  
9 (Cal. Code Regs., tit. 24, pt. 6, § 10-106, subd. (a)(1).) The Town's determination was based on a  
10 document entitled "2019 Cost-effectiveness Study: Low-Rise Residential New Construction"  
11 dated July 17, 2019 ("Study"), whose material conclusions are contradicted by a separate study  
12 entitled "Residential Building Electrification in California." The Reach Code Law also requires  
13 the submittal of an application to the Executive Director of the California State Energy Resources  
14 Conservation and Development Commission that includes "[a]ny findings, determinations,  
15 declarations or reports, *including any negative declaration or environmental impact report,*  
16 *required pursuant to the California Environmental Quality Act*, Pub. Resources Code Section  
17 21000 et seq." (Cal. Code Regs., tit. 24, pt. 6, § 10-106, subd. (b)(4), emphasis added.)

18         10.       On November 6, 2019, the Town Council introduced and held a first reading of an  
19 ordinance adopting the 2019 edition of the California Building Standards Code, including the  
20 Reach Code. As of the date of this petition the Town Council has not yet held the second reading  
21 of that ordinance. Any further action to implement or adopt the Reach Code is invalid and illegal  
22 for the reasons set forth herein. Petitioner may amend this petition and complaint at such time as  
23 the Town takes such further action.

24         11.       Petitioner is beneficially interested in the Town's full compliance with the law  
25 regarding the Town's approval of the Reach Code, including adhering to the requirements of  
26 CEQA. Petitioner has personal, professional, environmental and other interests which will be  
27 severely injured by Respondents' failure to comply with CEQA and the Reach Code Law.  
28 Petitioner lives close by the Town and regularly does business there, including developing projects

1 that would be subject to the Reach Code. Moreover, the Reach Code's impacts are necessarily  
2 regional in nature, thereby impacting residents throughout Sonoma County.

3 12. Petitioner is within the class of persons beneficially interested in and aggrieved by  
4 the Town's failure to comply with CEQA and approval of the Reach Code. Petitioner has  
5 expressed his concerns and objections to the approval of the Reach Code at meetings and in  
6 correspondence to the Town. Before approving the Reach Code, the City owed a mandatory duty to  
7 comply with the legal duties which Petitioner alleges were violated. Petitioner has the right to  
8 enforce the mandatory duties which the CEQA imposes on the Town.

9 13. The Town is the lead agency for purposes of CEQA compliance.

10 14. Petitioner has exhausted all available administrative remedies in that the Town's  
11 approval of the Reach Code is final and not subject to further administrative appeal procedures.

12 15. Petitioner objected to the approval of the Reach Code orally and in writing during  
13 the public comment period and prior to the close of the public hearing on the Reach Code, and  
14 before the Town's filing of a Notice of Exemption for the approval on October 21, 2019. All  
15 alleged grounds for non-compliance with CEQA and the Reach Code Law were presented to the  
16 Town during the public-comment period prior to the close of the public hearing on the Reach Code  
17 and the Town's issuance of the Notice of Exemption.

18 16. The Town filed a Notice of Exemption for the Reach Code with the Office of the  
19 County Clerk for the County of Sonoma on or about October 21, 2019. Petitioner will timely file  
20 this Petition for Writ of Mandate on before November 25, 2019, a date not more than thirty-five  
21 (35) days after the filing of the Notice of Exemption as required by Public Resources Code section  
22 21167, subdivision (d).

23 17. Petitioner has caused a Notice of Intent to File Suit to be served on the Town as  
24 required by Public Resources Code section 21167.5. A true and correct copy of the Notice of Intent  
25 to File Suit is attached hereto as Exhibit A.

26 18. Petitioner will have caused a copy of this pleading to be served on the Office of the  
27  
28

1 Attorney General for the State of California not more than ten (10) days after the commencement of  
2 this proceeding, as required by Public Resources Code section 21167.7 and Code of Civil Procedure  
3 section 388.

4 19. Petitioner brings this action as a private attorney general to vindicate his own legal  
5 and constitutional rights and those of residents of the Town and all others who may be impacted by  
6 the Reach Code. Petitioner seeks, on his own behalf and the behalf of said others, that Respondents  
7 obey the clear law, conduct required environmental reviews of their discretionary actions, require  
8 appropriate and feasible mitigation for their significant impacts, and not act in unlawful, bad faith,  
9 arbitrary, capricious, and confiscatory fashion in noticing, analyzing, enacting and enforcing local  
10 land use legislation.

11 20. For these reasons, and others set forth in this Petition and Complaint, the Town's  
12 actions described herein and the Reach Code are unlawful, invalid, and unenforceable. Petitioner  
13 therefore requests this Court issue a writ of mandate invalidating the Reach Code and declaring it,  
14 and any actions undertaken thereunder or pursuant thereto, unlawful, null, and void. Petitioner also  
15 seeks declaratory relief regarding the parties' respective legal rights and obligations and temporary,  
16 preliminary and permanent injunctive relief prohibiting enforcement of the Reach Code in any  
17 manner.

18 21. An actual and substantial controversy exists between Petitioner, on the one hand, and  
19 Respondents, on the other hand, relating to the legal rights of the respective parties. The  
20 controversy is well-defined and imminent in nature, such that the need for, and appropriateness of,  
21 judicial determinations at this time is warranted.

22 **FIRST CAUSE OF ACTION**

23 (Writ of Mandamus – Violations of CEQA –

24 Code Civ. Proc., §§ 1085, 1094.5; Pub. Resources Code, § 21168.5 –

25 Against All Respondents)

26 22. The allegations of paragraphs 1 through 21, above, are hereby incorporated herein by  
27 reference as though set forth in full.  
28

1           23.     The ordinance adopting the Reach Code is a “project” that is subject to CEQA  
2 review. The CEQA Guidelines, in relevant part, define “project” as “the whole of an action, which  
3 has a potential for resulting in either a direct physical change in the environment, or a reasonably  
4 foreseeable indirect physical change in the environment, and that is any of the following: (1) An  
5 activity directly undertaken by any public agency including but not limited to... enactment and  
6 amendment of zoning ordinances....” (Cal. Code Regs., tit. 14, § 15378, subd. (a)(1).) Indeed,  
7 under CEQA’s broad definition of a “project,” municipal ordinances, laws and regulations affecting  
8 the use of land or structures have consistently been held to be CEQA “projects” over the course of  
9 many decades.

10           24.     The Notice of Exemption for the Reach Code cites two exemptions: the class 8  
11 exemption under section 15308 of the Guidelines, and the “common sense” exemption under  
12 section 15061, subdivision (b)(3).

13           25.     CEQA’s co-called “common sense” exemption may properly be invoked only when  
14 the lead agency can declare “with certainty that there is no possibility that the activity in question  
15 may have a significant effect on the environment.” (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3).)  
16 Thus, it is the Town’s burden to provide support for application of the common sense exemption,  
17 not Petitioner’s burden to disprove its applicability. Any legitimate reasonable question about  
18 whether a project might have a significant impact means the project cannot be exempt under the  
19 “common sense” exemption. The Town was required to consider factual evidence and data relating  
20 to possible environmental impacts of the Reach Code, and that consideration must be supported by  
21 evidence in the administrative record.

22           26.     With respect to the class 8 exemption, such can only be used for an action that  
23 constitutes a preservation of the environment. The Reach Code cannot be said to rise to this  
24 standard as it merely substitutes one source of energy for another, without any sufficient analysis as  
25 to whether that substitution will actually yield any benefit to the environment. (*Dunn-Edwards*  
26 *Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644; *International*  
27 *Longshoremen’s & Warehousemen’s Union v. Board of Supervisors* (1981) 116 Cal. App.3d 265.)  
28 The Town cannot undertake a “net benefit” environmental analysis – i.e., reasoning that the

1 project's environmental benefits in one area outweigh its significant adverse effects in another area  
2 or areas of environmental impact – as such is not permitted under CEQA. (*County Sanitation Dist.*  
3 *No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1577, 1580.) “There may be environmental  
4 costs to an environmentally beneficial project, which must be considered and assessed.”  
5 (*California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143  
6 Cal.App.4th 173, 178.)

7       27. Neither the common sense nor the class 8 exemption applies here. The Reach Code  
8 may have a number of significant impacts on the environment, none of which the Town has  
9 analyzed. These include the following:

10       a) **Hazards/Public Safety.** The Reach Code was passed at a time when the supply of  
11 electrical power to the Town and surrounding communities may be less reliable and  
12 subject to more and longer planned outages than ever before. In October of 2019 the  
13 Town and surrounding area were subject to prolonged electricity blackouts and  
14 wildfires which may have been caused by electrical infrastructure. But the Town  
15 failed to analyze how all-electric residential construction would exacerbate these  
16 impacts. Without adequate battery storage of electricity, or an alternative power  
17 source, such as natural gas which powers backup generators cook-stoves and grills,  
18 and other appliances, “all-electric” homes and businesses will be subject to hazards  
19 and risks to public safety during outages when heat, life-saving medical equipment,  
20 lighting, water, refrigeration, food, and air conditioning may be unavailable. Given  
21 the risk of blackouts, some residents will rely on propane or gasoline generators or  
22 other combustible sources of power, which are more prone to accident or spillage  
23 than fixed natural gas lines. There has been no study or analysis of the risks or  
24 impacts associated with such increased usage, including air quality, GHG, and fire  
25 impacts.

26       b) The 2018 Camp Fire, the deadliest in California history, was apparently caused by  
27 electrical transmission lines. There is no analysis whatsoever in the administrative  
28 record as to any potential increase in fire risk from expanded electrical service

1 facilities which the Reach Code would necessitate. Instead, the Town claims,  
2 without supporting evidence, that “natural gas infrastructure is a potentially  
3 significant source of fire.” The Town cannot assert (without supporting evidence)  
4 that natural gas presents a wildfire risk while ignoring the fact that electric  
5 transmission lines gave rise to the most lethal California wildfire ever less than a  
6 year ago.

7 c) **Utilities/Service Systems/Wildfire**. The CEQA Guidelines Appendix G checklist –  
8 a template for the initial study the Town is required to conduct under CEQA –  
9 requires evaluation of the question of whether the project would “[r]equire or result  
10 in the relocation or construction of new or expanded ... electric power, natural gas,  
11 or telecommunications facilities, the construction of which could cause significant  
12 environmental effects?” Projects requiring significant new construction to rely  
13 solely on electricity as a power source clearly have the potential to result in the  
14 installation, upgrading, and/or maintenance of associated infrastructure (e.g., roads,  
15 fuel breaks, power lines), and where such occurs in or near areas of high fire hazard  
16 the resulting environmental impacts must also be studied. (See Appendix G, Section  
17 XX WILDFIRE [listing potential impacts such as impairment of adopted emergency  
18 response and evacuation plans, exacerbation of wildfire risks, and other human  
19 safety and environmental risks and impacts].) And, as noted above, the most deadly  
20 fire in California history was started not by natural gas facilities, but by electrical  
21 lines. Moreover, also as noted above, increased generator use may give rise to its  
22 own increased risk of fire.

23 d) Similarly, the administrative record does not analyze whether the existing electrical  
24 grid is sufficient to satisfy the demand of all new construction under a 100%  
25 electricity standard. Given PG&E’s warnings about potential blackouts, the grid’s  
26 ability to handle this new demand is questionable at best. Moreover, the Town did  
27 not sufficiently discuss the sources of the additional electricity required under the  
28 reach Code, nor the impacts related to those sources. Electric power generation

1 powered plants fueled by natural gas or other non-renewable energy sources will  
2 obviously negate the supposed benefit of gas-free construction. Wind and solar  
3 sources also have their own well-known adverse impacts relating to wildlife,  
4 aesthetics, etc. They are also subject to supply issues depending on weather and  
5 other conditions. And hydroelectric power comes with its own suite of adverse  
6 impacts as well, including harm to anadromous fish and other species and the risk of  
7 failure and flood (as with the Oroville Dam crisis of 2017). In fact, hydroelectric  
8 facilities in California and the west are being removed, making this source of power  
9 uncertain for future electricity needs.

10 e) **GHG/Air Quality**. In passing the Reach Code the Town assumed that GHGs are  
11 the only environmental concern and impact at issue; such a facile assumption is  
12 clearly incorrect. The Reach Code would eliminate gas-powered heaters, stoves,  
13 water heaters, built-in outdoor barbeques, gas burning fireplaces, fire pits, and, as  
14 noted above, gas-powered backup generators to protect against losses, disruptions  
15 and safety problems from blackouts of a fragile and overburdened electrical grid.  
16 Alternative fuel sources – such as wood, gasoline or charcoal – exist for many of  
17 these amenities, and could be substituted for the cleaner-burning natural gas that the  
18 proposal would eliminate, leading to greater GHG emissions and air quality impacts.  
19 Such unintended, but clearly reasonably foreseeable, adverse environmental  
20 consequences must be fully evaluated under CEQA. (See, e.g., *Rodeo Citizens*  
21 *Association v. County of Contra Costa* (2018) 22 Cal.App.5th 214 [recognizing that  
22 to extent captured butane and propane were used to displace use of other fuels such  
23 as coal, home heating fuel, fuel oil, diesel, kerosene, gasoline and ethanol, they  
24 would also displace GHG emissions otherwise resulting from use of those alternate  
25 fuels].) For example, propane barbeques produce only one-third of the GHG  
26 emissions of charcoal barbeques (*id.* at p. 226), and natural gas is similarly a much  
27 cleaner burning fuel than charcoal, wood or gasoline. Moreover, the increased use  
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1 of gasoline, diesel, or propane generators may also give rise to air quality and/or  
2 GHG impacts that are completely unanalyzed in the administrative record.

3 f) **Population and Housing/Human Impacts.** Projects that would displace substantial  
4 numbers of people or housing, or render housing unaffordable, may have significant  
5 adverse impacts on the environment and human beings that require CEQA analysis  
6 and mitigation. (See CEQA Guidelines, Appdx. G, Section XIV.) To the extent the  
7 Reach Code could, for example, substantially increase the cost of new multi-family  
8 apartment dwelling construction and/or retrofitting, it could lead to increased rents,  
9 unaffordable housing, and tenant displacement from the same, with resulting adverse  
10 human impacts. Alternatively, renters or home buyers may prefer residences with  
11 traditional gas appliances and therefore show a greater propensity to move outside of  
12 the Town and commute. This may also impact the supply of housing in the Town.  
13 Residential displacement, in and of itself, has been recognized as a significant  
14 adverse environmental impact subject to CEQA analysis and mitigation. (*Lincoln*  
15 *Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425 [holding  
16 CEQA mitigation measures designed to mitigate tenant displacement impacts of  
17 project, contained in a vesting tentative map, were enforceable and did not conflict  
18 with Ellis Act].) Public entities possess the power under existing law “to mitigate  
19 adverse impacts on displaced tenants.” (*San Francisco Apartment Assn. v. City and*  
20 *County of San Francisco* (2016) 3 Cal.App.5th 463, 484, citing *Pieri v. City and*  
21 *County of San Francisco* (2006) 137 Cal.App.4th 886, 892; see Gov. Code,  
22 § 7060.1.) As explained by the *Lincoln Place* Court of Appeal, “CEQA... is made  
23 relevant... by the Ellis Act’s explicit exceptions for a public agency’s power to  
24 regulate, among other things,... the mitigation of adverse impacts on persons  
25 displaced by reason of the withdrawal of rental accommodations. *Such items are the*  
26 *common focus and byproducts of the CEQA process....*” (*Lincoln Place Tenants*  
27 *Assn., supra*, 155 Cal.App.4th at 451, *emph. added.*) Indeed, the Supreme Court has  
28 recently reaffirmed “that CEQA addresses human health and safety” and “that public

1 health and safety are of great importance in the statutory scheme.” (*California*  
2 *Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th  
3 369, 386, citations omitted.) CEQA’s “express language... requires a finding of a  
4 “significant effect on the environment” ([Pub. Resources Code,] § 21083(b)(3))  
5 whenever the “environmental effects of a project will cause substantial effects *on*  
6 *human beings*, either directly or indirectly.”” (*Id.* at p. 386, emphasis in original.)

7 g) **Land Use/Planning.** Given the foregoing, the Town failed to adequately analyze  
8 the Reach Code’s consistency with its General Plan. While the Town has discretion  
9 in interpreting and applying its General Plan, it cannot do so in a way that frustrates  
10 the purpose of the General Plan. (*Napa Citizens for Honest Government v. Napa*  
11 *County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378-381.) The analysis in  
12 the administrative record is far too brief to fully address the proposed ordinance’s  
13 consistency with the General Plan and its overall purpose.

14 28. Given the foregoing, the Reach Code may have any number of potentially significant  
15 impacts on the environment, which makes the Town’s reliance on the common sense and class 8  
16 exemptions improper.

17 29. Even if the Reach Code were subject to a categorical exemption, it is clear that the  
18 unusual circumstances exception would apply, rendering the exemptions inapplicable. (Cal Code  
19 Regs., tit. 14, § 15300.2, subd. (c).) Substantial evidence supports a finding that the project  
20 presents unusual circumstances giving rise to the impacts discussed herein. These unusual  
21 circumstances include, but are not limited to, the following: PG&E’s express planned electricity  
22 service interruptions and/or blackouts that will potentially last for days in this and other Sonoma  
23 County areas, creating very serious health and safety problems if power is actually out that long and  
24 not resumed from a non-grid source; the jurisdiction and cumulative study area jurisdictions are in  
25 very high fire danger areas, increasing both the likelihood and seriousness of electricity blackouts;  
26 there are well-known serious traffic problems on Highway 101 making even longer commutes to  
27 Santa Rosa from northern cities by displaced homebuyers and renters who want a choice other than  
28 all-electric more environmentally harmful. Accordingly, even assuming *arguendo* a categorical

1 exemption applies, there is more than a fair argument that the adoption of the ordinance may have  
2 significant adverse environmental effects due to unusual circumstances which require actual  
3 analysis in a legally adequate initial study pursuant to CEQA.

4 30. The Town's reliance on exemptions also overlooks the Reach Code's potential for  
5 contributing to significant and adverse cumulative impacts. (Cal Code Regs., tit. 14, § 15300.2,  
6 subd. (b).) If other jurisdictions in Sonoma County or Northern California more broadly enact  
7 similar ordinances, the increase in the demand for electricity will be potentially much greater than  
8 that from the Town's alone, and so would the related impacts.

9 31. Section 10-106 of the Building Energy Efficiency Standards upon which the Town  
10 relied to enact the Reach Code requires the submission of materials in support of an application for  
11 a reach code. The specific submittals required do not extend to a notice of claimed exemption but a  
12 "negative declaration or environmental impact report, required pursuant to the California  
13 Environmental Quality Act, Public Resources Code Section 21000 et seq." (Cal. Code Regs., tit.  
14 24, § 10-106, subd. (b)(4).) The provision clearly does not contemplate the use of an exemption  
15 because the Reach Code will invariably require at least an initial stud and appropriate  
16 environmental analysis under CEQA. Thus, the reliance on an exemption here is in error under the  
17 very authority upon which the Town has relied to enact it.

18 32. The Town's purported reliance on an initial study and negative declaration  
19 ("IS/ND") for the statewide 2019 Energy Code is also unavailing. The Town is, in effect,  
20 attempting to "tier" environmental analysis on a negative declaration, which is not permitted under  
21 CEQA. A lead agency can only tier off of an existing EIR, not a negative declaration. (Pub.  
22 Resources Code, §§ 21068.5, 21093, 21094; 14 Cal. Code Regs., tit. 14, §§ 15152, 15168.) Indeed,  
23 the fact that the California Energy Commission conducted an initial study for the 2019 Building  
24 Energy Efficiency Standards demonstrates that the Reach Code is not exempt from CEQA review.  
25 Thus, the Town's citation to the IS/ND to justify their reliance on CEQA exemptions is self-  
26 defeating as a matter of law. Moreover, even where an EIR has been previously prepared, in order  
27 to lawfully tier off of that EIR "an initial study shall be prepared to assist the lead agency in making  
28 the determinations required by this section. The initial study shall analyze whether the later

1 project may cause significant effects on the environment that were not examined in the prior  
2 [EIR].” (Pub. Resources Code, § 21094, subd. (c).) As the State’s IS/ND did not evaluate any of  
3 the local conditions pertaining to the Town’s adoption of the Reach Code (including, but not limited  
4 to, its impacts on housing, traffic, PG&E shutoffs, increased wildfire risk, public safety, the use of  
5 generators, etc.), there is no way for the Town to lawfully rely upon the IS/ND. Indeed, the  
6 provisions of the Reach Code are not even addressed in the IS/ND. It also engages in a “net  
7 benefit” analysis contrary to the authority addressed above. (IS/ND, § III, p. A-3.) Finally,  
8 adoption of the Reach Code is a discretionary act not specific to the Town, and the IS/ND does not  
9 break out its provisions or impacts, so it provides no basis to conclude as to whether the Reach  
10 Code results in lesser or greater environmental impacts that may or may not be “balanced out” by  
11 the far more numerous provisions in the remainder of the Energy Code.

12 33. Accordingly, there was no basis in law or fact for the Town to conclude that  
13 adoption of the Reach Code was exempt under CEQA.

14 34. Under CEQA, a lead agency prejudicially abuses its discretion when it (1) fails to  
15 proceed in the manner required by law; or (2) its decision is not supported by the evidence. (Pub.  
16 Resources Code, § 21168.5.) By deeming the Reach Code exempt from CEQA review,  
17 Respondents abused their discretion in failing to comply with CEQA and failing to proceed in the  
18 manner required by law. As a result of Respondents’ violations of CEQA, Petitioner and other  
19 members of the public have been harmed in that they were not fully informed about the significant  
20 environmental impacts of the Reach Code prior to Respondents’ enactment of the same.  
21 Petitioner, as well as members of the general public, will suffer irreparable harm if the relief  
22 requested herein is not granted, as the Reach Code will be implemented in the absence of a full  
23 and adequate environmental review under CEQA. For the foregoing reasons, inter alia, Petitioner  
24 seeks an immediate stay of the Reach Code.

25 35. Petitioner has exhausted all administrative remedies made available to him to  
26 address Respondents’ unlawful conduct to the extent required and not excused, and any further  
27 attempts would in any event have been an idle and futile exercise even if available. Petitioner has  
28 no plain, speedy, and adequate remedy in the ordinary course of law to challenge the Reach Code,

1 and a writ of ordinary mandamus under Code of Civil Procedure section 1085 or 1094.5 is the  
2 prescribed remedy for violations of this type. Petitioner is herewith or shortly will be filing and  
3 serving on Respondents his election to prepare the supplemental administrative record pursuant to  
4 Public Resources Code section 21167, subdivision (b)(2), and all other applicable laws. Petitioner  
5 has also performed all other conditions precedent to issuance of a writ of mandate, including service  
6 of written notice of the commencement of this action on Respondents in accordance with the  
7 requirements of Public Resources Code section 21167.5, and mail service of the petition on the  
8 California Attorney General no more than ten (10) days after its filing (see Code Civ. Proc., § 388).

9 36. The adoption of the Reach Code, and the Town's subsequent passage of an  
10 ordinance amending its Municipal Code to incorporate the Reach Code, are in violation of CEQA  
11 and the CEQA Guidelines.

12 WHEREFORE, Petitioner prays for judgment as hereinafter set forth.

13  
14 **SECOND CAUSE OF ACTION**

15 (Writ of Mandamus – Violations of Cal. Code Regs., tit. 24, pt. 6, § 10-106 –

16 Code Civ. Proc., §§ 1085, 1094.5 –

17 Against All Respondents)

18 37. The allegations of paragraphs 1 through 36, above, are hereby incorporated by  
19 reference as though set forth in full.

20 38. Section 10-106 of the Reach Code Law requires that a jurisdiction enacting a reach  
21 code satisfy certain substantive and procedural requirements. As noted above, the Town was  
22 required to make “[a] determination that the standards are cost effective.” (Cal. Code Regs., tit. 24,  
23 pt. 6, § 10-106, subd. (a)(1).) The Town relied upon the Study to make this determination.  
24 However, the Study is materially contradicted by a separate study entitled “Residential Building  
25 Electrification in California.” The Town could therefore not make the proper determination under  
26 the Reach Code Law to pass the Reach Code.

27 39. The Reach Code Law also requires the submittal of an application to the Executive  
28 Director of the California State Energy Resources Conservation and Development Commission that

1 includes “[a]ny findings, determinations, declarations or reports, *including any negative*  
2 *declaration or environmental impact report, required pursuant to the California Environmental*  
3 *Quality Act*, Pub. Resources Code Section 21000 et seq.” (Cal. Code Regs., tit. 24, pt. 6, § 10-106,  
4 subd. (b)(4), emphasis added.) As noted above, the Town did not prepare a negative declaration or  
5 EIR in support of the Reach Code. Accordingly, it cannot make the requisite submittal under the  
6 Reach Code Law.

7 WHEREFORE, Petitioner prays for judgment as hereinafter set forth.

8 **THIRD CAUSE OF ACTION**

9 (Declaratory and Injunctive Relief

10 - Against All Respondents)

11 40. The allegations of paragraphs 1 through 39, above, are hereby incorporated by  
12 reference as though set forth in full.

13 41. An actual controversy has arisen and now exists between Petitioner and the  
14 Respondents. Petitioner contends that the Reach Code is invalid due to Respondents’ failure to  
15 follow CEQA and/or the Reach Code Law. Petitioner is informed and believes, and on that basis  
16 alleges, that Respondents contend that the Reach Code is valid and enforceable and was properly  
17 enacted.

18 42. Petitioner desires a judicial determination of the validity of the Reach Code. In  
19 particular, Petitioner desires a declaration that the Reach Code is invalid and unenforceable due to  
20 Respondents’ failure to follow CEQA and the Reach Code Law.

21 43. Such a declaration is necessary and appropriate at this time in order that Petitioner  
22 and similarly situated persons understand their rights and obligations with respect to the Reach  
23 Code.

24 44. Petitioner also seeks to enjoin Respondents from applying or enforcing the Reach  
25 Code, and to require that Respondents rescind their approval of the Reach Code.

1 WHEREFORE, Petitioner prays for judgment as follows:

2 A. On the First Cause of Action

3 1. For a stay, temporary restraining order, and preliminary injunction directed to  
4 Respondents' and Defendants' unlawful enactment and enforcement of the Reach Code without  
5 required CEQA review, analysis and mitigation as required by law, and for a peremptory writ of  
6 ordinary mandamus invalidating, voiding, and setting aside the Reach Code and any actions taken  
7 under or pursuant to them;

8 2. For monetary damages incidental to mandamus relief per Code of Civil  
9 Procedure section 1095 according to proof; and

10 3. For attorneys' fees pursuant to Code of Civil Procedure section 1021.5,  
11 Government Code section 800, and all applicable law.

12 B. On the Second Cause of Action

13 4. For a stay, temporary restraining order, and preliminary injunction directed to  
14 Respondents' and Defendants' unlawful enactment and enforcement of Reach Code, and for a  
15 peremptory writ of ordinary mandamus invalidating, voiding, and setting aside the Reach Code and  
16 any actions taken under or pursuant to it; and

17 5. For attorneys' fees pursuant to Code of Civil Procedure section 1021.5,  
18 Government Code section 800, and all applicable law.

19 C. On the Third Cause of Action

20 1. For a stay, temporary restraining order, and preliminary injunction directed to  
21 Defendants' unlawful enactment and enforcement of the Reach Code, and preventing the Reach  
22 Code from being enforced;

23 2. For a declaration that the Reach Code is invalid; and

24 3. For a permanent injunction preventing enforcement of the Reach Code.

25 D. On All Causes of Action

26 1. For costs and reasonable attorneys' fees as provided by law, including but  
27 not limited to attorneys' fees provided by Code of Civil Procedure section 1021.5; and  
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2. For such other and further relief as the Court may deem just and proper.

Dated: November \_\_, 2019

MILLER STARR REGALIA

By: \_\_\_\_\_  
MATTHEW C. HENDERSON  
Attorneys for Petitioner and Plaintiff  
WILLIAM P. GALLAHER

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**PROOF OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

On November 15, 2019, I served true copies of the following document(s) described as **NOTICE OF INTENT TO COMMENCE CEQA ACTION** on the interested parties in this action as follows:

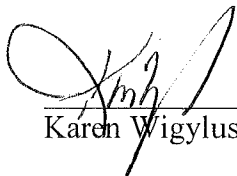
Town of Windsor  
9291 Old Redwood Highway  
Windsor, CA 95492

Town Council of the Town of Windsor  
9291 Old Redwood Highway  
Windsor, CA 95492

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Miller Starr Regalia for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Walnut Creek, California.

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

Executed on November 15, 2019, at Walnut Creek, California.

  
\_\_\_\_\_  
Karen Wigylus

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Telephone: 415-262-5100  
6 Facsimile: 415-262-5199

7 Attorneys for Petitioner and Plaintiff  
WINDSOR-JENSEN LAND COMPANY, LLC  
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF SONOMA**  
11

12 WINDSOR-JENSEN LAND COMPANY, LLC

13 Petitioner and Plaintiff,

14 vs.

15 TOWN OF WINDSOR, By and Through the  
16 Town Council of Windsor; and DOES 1 through  
25,

17 Respondents and Defendants.  
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ENDORSED  
FILED

NOV 22 2019

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SONOMA

CASE NO. *SCV265583*

**VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY RELIEF**

(CEQA, Pub. Res. Code § 21000, et seq; Cal.  
Code Civ. Proc. §§ 1060, 1094.5 and 1085)

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## I. INTRODUCTION

1. By this action, Petitioner Windsor-Jensen Land Company, LLC challenges the Town of Windsor's September 18, 2019 adoption of an Ordinance approving an All Electric Code, which prohibits gas applications and mechanical systems on all future new low-rise residential construction projects in the Town.

2. In adopting the Ordinance, the Town violated the California Environmental Quality Act ("CEQA") by finding that the Ordinance was exempt from CEQA. Under CEQA's well-established standards, an agency is required to prepare an Environmental Impact Report ("EIR") whenever substantial evidence in the record supports a "fair argument" that a project *may* have a significant effect on the environment. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; emphasis added.)

3. In this case, there are several environmental issue areas in which the Ordinance could cause significant effects, including hazards, public safety, service systems, wildfire, Greenhouse Gas ("GHG") emissions, air quality, population and housing, and land use/planning. The Town failed to evaluate the environmental consequences of the Ordinance in *all* of these issue areas. Because the Town's approval of the Ordinance violates CEQA, the Ordinance must be set aside and activities to implement it must be suspended.

4. Moreover, in order to adopt its All Electric Code, the Town was required by Section 10-106 of the 2016 Building Energy Efficiency Standards Code ("Energy Code" or "Title 24") to make findings supported by analysis that the All Electric Code would result in energy savings and cost effectiveness. The Town published a Cost-effectiveness Study that concluded the All Electric Code would result in cost savings with respect to consumer bills and lifecycle costs. However, the report was based upon a Statewide average that was not specific to the electricity provider in the Town of Windsor, Pacific Gas and Electric ("PG&E"). Evidence in the record shows that if the Town considered an average specific to PG&E, the All Electric Code would increase electricity costs. As such, the Town's adoption of the Ordinance violates Title 24. The approval of the Ordinance was an abuse of discretion and must be set aside.

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1 Ordinance adopting a reach code that prohibits gas appliances and mechanical systems for all new  
2 low-rise residential construction (“All Electric Code” or “Ordinance”). The Town Council voted to  
3 introduce the Ordinance at its September 4, 2019 meeting.

4 12. The Town’s All Electric Code applies to the development of new single-family homes,  
5 detached accessory dwelling units, and multi-family buildings up to three stories. Pursuant to the  
6 Ordinance, new developments that qualify are required to use only electric appliances and mechanical  
7 systems and are prohibited from using any gas appliances or mechanical systems.

8 13. In support of its All Electric Code, the Town published a “Cost-effectiveness Study”  
9 dated July 17, 2019, prepared by Frontier Energy, Inc. to analyze the feasibility and cost effectiveness  
10 of requiring new low-rise residential construction to be all-electric. (Ex. 1, Town of Windsor Cost-  
11 effectiveness Study, July 17, 2019.) The Cost-effectiveness Study indicated a cost savings with  
12 respect to consumer bills and lifecycle costs based upon a “Statewide Electric Residential Average  
13 Rate” of 2% per year from 2020 to 2025 and 1% thereafter.

14 14. However, an April 2019 study also authored by Frontier Energy, Inc., which was not  
15 published or cited by the Town, but was available on Frontier Energy’s website, concludes that all-  
16 electric homes would result in an *increase* in costs for “Bay Area” consumers purchasing new homes  
17 based upon electric rates specific to PG&E, which are assumed to increase faster than natural gas rates  
18 due to wildfire risk and liability. (Ex. 2, Cost-effectiveness Study, Frontier Energy, Inc., April 2019.)

19 15. In addition to the Town’s failure to account for electric rates specific to PG&E in its  
20 Cost-effectiveness Study, the Study fails to account for tiered electricity pricing and fails to analyze  
21 how that would apply to all-electric construction under the Ordinance. Moreover, the Cost-  
22 effectiveness study is not clear as to whether all-electric construction would lead to residential units  
23 that cannot meet the requirements of the Building Energy Efficiency Standards in Part 6 of Title 24,  
24 which would preclude building altogether.

25 16. The failures in the Cost-effectiveness study were identified in correspondence  
26 submitted prior to the Town’s September 4, 2019 meeting, including a letter from Windsor Jensen  
27 Land Company, LLC dated September 3, 2019 and a letter from Miller Starr Regalia on behalf of  
28 William Gallaher dated September 4, 2019.

1           17.     In support of its Ordinance, the Town Council prepared CEQA Findings, which stated  
2 that the Ordinance was exempt from the provisions of CEQA pursuant to (1) Section 15061(b)(3) of  
3 the CEQA Guidelines “because these standards are more protective of the environment than the State  
4 Standards, and there are no reasonably foreseeable adverse impacts” and (2) Section 15308 of the CEQA  
5 Guidelines – Actions by Regulatory Agencies for Protection of the Environment “because it is an action  
6 taken by local ordinance to assure the maintenance, restoration, enhancement, or protection of the  
7 environment.”

8           18.     Comment letters submitted in response to the Town’s Ordinance detailed the numerous  
9 reasons the Town’s position that the Ordinance was exempt from CEQA was legally deficient, due to  
10 substantial evidence of a “fair argument” that the All Electric Code may have significant adverse  
11 impacts on the environment in the following issue areas:

12               a.     Hazards and Public Safety, namely the inevitability that residents will rely on  
13 propane and gasoline generators that are more prone to accident or spillage than fixed natural gas  
14 lines. The Town failed to analyze the risks or impacts associated with such increased usage, including  
15 air quality, GHG, and fire impacts.

16               b.     Utilities/Service Systems/Wildfire, specifically, the failure of the Town to  
17 analyze whether new construction would be required for new homes to rely solely on electricity as a  
18 power source and whether the existing electrical grid is sufficient to satisfy demand.

19               c.     GHG/Air Quality impacts that would result from the use of alternative fuel  
20 sources such as wood, gasoline, and charcoal that would be substituted for the cleaner-burning natural  
21 gas that the Ordinance would eliminate.

22               d.     Population and Housing/Human impacts, including the displacement of people  
23 or housing that would occur if the All Electric Code substantially increases the cost of new  
24 construction.

25               e.     Land Use/Planning impacts caused by the Town’s improperly abbreviated  
26 analysis of consistency of the Ordinance with its General Plan.

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1           19.     Notwithstanding the substantial evidence presented to the Town that its Cost-  
2 effectiveness study did not comply with Title 24 and that the proposed Ordinance was not exempt  
3 from CEQA, the Town Council approved the Ordinance and CEQA Findings on September 18, 2019.

4           20.     On October 21, 2019, the Town filed a Notice of Exemption (“NOE”). The NOE  
5 asserts that the Ordinance is exempt under CEQA Guidelines Section 15308 and Section 15061(b)(3).)

6           21.     The NOE states that the project is exempt under CEQA Guidelines Section 15308  
7 “because it is an action taken by local ordinance to assure the maintenance, restoration, enhancement,  
8 or protection of the environment.”

9           22.     The NOE states that the project is exempt under CEQA Guidelines Section  
10 15061(b)(3) based on the following:

11                   a.     The standards in the All Electric Code are more protective of the environment  
12 compared to the 2019 California Energy Code.

13                   b.     The project would result in a shift from the use of gas and electricity to only  
14 electricity in new low-rise residential development, which the NOE alleges would result in a reduction  
15 in GHG emissions. The NOE notes that the Town estimated the potential increase in electricity use  
16 resulting from the All Electric Code using (1) a 2019 Cost-effectiveness Study, (2) the Town’s 2040  
17 General Plan EIR; and (3) the Town’s 10-year historic growth rate; and (4) the Town’s installation of  
18 a new solar facility that is not yet operational.

19           23.     Based on the factors above, the Town concluded in its NOE that any increase in  
20 electricity would be incremental and would occur over time and any increase in electricity demand  
21 would be offset by the Town’s new solar facility.

22           24.     To the contrary, there is no evidence that the increased electricity would be  
23 incremental, would occur over time, or would be offset by a new solar facility, the contribution of  
24 which cannot be measured at this time because it is not operational.

25           25.     Similarly, there is no evidence in the record that the Town’s All Electric Code is more  
26 protective of the environment than the 2019 Building Code, nor is there evidence in the record that the  
27 Ordinance would result in a reduction in GHG emissions. In fact, it is likely that as a result of  
28

1 inevitable increased use of generators, propane tanks, and outdoor wood firepits/fireplaces, GHG  
2 emissions would increase as a result of the Ordinance.

### 3 **STANDING**

4 26. Petitioner has standing to raise the CEQA claims in the petition because it (1) has a  
5 public interest in the impact of the Town of Windsor's Ordinance approving an All Electric Code; (2)  
6 has a direct and beneficial interest in the Town's full and complete compliance with state laws and  
7 regulations including, without limitation, CEQA and the Health & Safety Code. Petitioner will be  
8 subject to the Town's All Electric Code and will suffer injury caused by adoption of the Code.

9 27. Petitioner has no plain, speedy or adequate remedy in the ordinary course of law.

### 10 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

11 28. Petitioner and/or its representatives, agents, and members, participated in the Town of  
12 Windsor's public process for the approval of the All Electric Code, culminating in adoption of the  
13 Ordinance. Petitioner, itself and/or through its representatives, agents, and members, as well as other  
14 interested parties, submitted timely written and/or oral comments on the issues and legal deficiencies  
15 raised in this petition.

16 29. The Town of Windsor filed a Notice of Exemption for its All Electric Code Ordinance  
17 on October 21. Accordingly, the limitations period within which to challenge the Town's Ordinance  
18 is 35 days from the posting of the Notice of Exemption and this action is timely filed.

### 19 **NOTICE OF COMMENCEMENT OF CEQA PROCEEDING**

20 30. Prior to filing this petition and complaint, Petitioner served the Town of Windsor with  
21 a notice of intention to commence a proceeding against it for violation of CEQA in connection with its  
22 approval of the Ordinance. By serving the notice, Petitioner has complied with California Public  
23 Resources Code § 21167.5.

### 24 **FIRST CAUSE OF ACTION**

25 **(Violation of CEQA – The Project is not Exempt Under CEQA Guidelines Section 15308)**

26 31. Petitioner incorporates by reference the allegations of paragraphs 1 through 30 of this  
27 pleading, as though set forth fully in this paragraph.

32. CEQA is designed to ensure long-term protection of the environment by requiring public agencies to determine and disclose the impacts of an agency's action on the environment.

33. In adopting the Ordinance, the Town of Windsor unlawfully determined that the Ordinance was categorically exempt from CEQA. In its CEQA Findings supporting approval of the Ordinance, the Town included a cursory and unsupported explanation of why the Ordinance was allegedly exempt from CEQA review under Section 15308 of the CEQA Guidelines, namely "because it is an action taken by local ordinance to assure the maintenance, restoration, enhancement, or protection of the environment."

34. The Town has the burden of establishing that there is substantial evidence in the record that the CEQA Guidelines Section 15308 exemption applies. (*California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143 Cal.App.4th 173, 178.) It is well-established that an agency is required to prepare an EIR whenever substantial evidence in the record supports a "fair argument" that a project may have a significant effect on the environment. (*No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 75, 82.) If a non-exempt project may cause a significant effect on the environment, the lead agency must prepare an EIR. (Pub. Resources Code, §§ 21100, 21151; Cal. Code Regs., tit. 14, § 15064, subd. (a)(1)(f)(1).) An EIR may only be avoided if the lead agency properly finds no substantial evidence in the record that the project may significantly impact the environment (i.e., if there is no "reasonable possibility" that it will result in a significant impact). (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309.) "Substantial evidence" is evidence that has a ponderable legal significance, i.e., evidence that is reasonable and credible. (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 152.)

35. An action qualifies for the CEQA 15308 Categorical Exemption when it is "taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment." (14 Cal Code Regs, § 15308.)

36. There are two reasons the Town's finding that the Ordinance is exempt under CEQA Guidelines Section 15308 is unlawful.

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1           37.       First, the Ordinance does not “assure the maintenance, restoration, enhancement, or  
2 protection of the environment.” In its September 18, 2019 Agenda Report, the Town speculatively  
3 asserts that the Ordinance will result in reduced Greenhouse Gas Emissions. (Ex. 3, Agenda Report,  
4 p. 5 [“[t]he all-electric code requirement is expected to have a net benefit to the environment through  
5 the reduction of GHG emissions.”].) However, the Town’s conclusion is not supported by substantial  
6 evidence. In arriving at its conclusion that the Ordinance would reduce GHG emissions, the Town  
7 assumes that the Ordinance would eliminate the necessity for natural gas and other fuel sources. To  
8 the contrary, the Ordinance would inevitably cause residents to purchase generators to use in the event  
9 of a power outage, propane tanks to use when cooking outdoors, and outdoor wood burning fireplaces  
10 or firepits. Generators, propane tanks, and wood burning fireplaces/firepits are less safe and emit  
11 more CO2 than natural gas. (Ex. 4, U.S. Environmental Protection Agency, 2018 [natural gas has a  
12 “CO2 factor” of 53.06; wood and wood residuals has a “CO2 factor” of 93.80 (77% higher than  
13 natural gas); and propane gas has a “CO2 factor” of 61.46 (16% higher than natural gas).].) The Town  
14 fails to consider the inevitable increased use of generators, propane tanks, or outdoor  
15 fireplaces/firepits in its analysis of the Ordinance’s effect on GHG emissions. Therefore, the Town  
16 cannot conclude that the Ordinance assures environmental protection. (See *International*  
17 *Longshoremen’s & Warehousemen’s Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265;  
18 *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644.)

19           38.       Even assuming arguendo that the Town’s assertion that the Ordinance will result in  
20 reduced Greenhouse Gas Emissions is true, the Ordinance will plausibly result in impacts that will be  
21 detrimental to the environment, such as increased risk of fire. CEQA does not permit a “net benefit”  
22 analysis, particularly when such analysis does not contain substantial evidence to justify its  
23 conclusion. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1577,  
24 1580.) Rather, each potential environmental impact must be separately addressed and disclosed to the  
25 public.

26           39.       Second, to fall within the scope of the Section 15308 Exemption, the City’s regulatory  
27 process must include procedures that protect the environment. Typically, the Section 15308  
28 Exemption applies to State regulatory programs that meet statutory criteria that ensure protection of

1 the environment in a manner equivalent to CEQA compliance. Here, contrary to the typical instance  
2 where the 15308 Exemption is properly utilized, the Ordinance has no regulatory component that  
3 would protect the environment from environmental impacts of the Ordinance (i.e., fire risks from  
4 generators and power lines, health and safety impacts caused by power shutoffs by PG&E, etc.).

5 40. Likewise, the Town does not have any regulatory processes that will protect the  
6 environment from impacts that will likely result from the Ordinance. The Town's website includes a  
7 list of suggested actions to prepare for power shutoffs, including "consider alternate power generator  
8 choices," i.e., a backup generator. The Town's website also includes an "Action Plan" to respond to  
9 power shutoffs; however, the website itself notes that the Action Plan "should not be considered hard  
10 and fast, but as a guideline that can and should be adjusted as conditions may require." A guideline  
11 does not constitute a "regulatory process" and a backup generator certainly does not constitute a  
12 regulatory process that will protect the environment. To the contrary, backup generators will cause  
13 potentially significant environmental impacts. Therefore, the Town has no regulatory processes to  
14 protect the environment and cannot rely on the 15308 Exemption.

15 41. Even if the Ordinance were subject to a categorical exemption, the unusual  
16 circumstances exception would apply, rendering the exemption inapplicable. (14 Cal Code Regs, §  
17 15300.2, subd. (c).) Here, there is substantial evidence supporting a "reasonable possibility" that the  
18 Ordinance will have a significant effect on the environment as a result of unusual circumstances.  
19 (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1104.)

20 42. As only one example, substantial evidence supports a finding that the project presents  
21 unusual circumstances, including, for example PG&E's planned electricity service interruptions that  
22 will potentially last for days, creating serious health and safety impacts. Therefore, even assuming  
23 arguendo that a categorical exemption applies, there is a fair argument that adoption of the Ordinance  
24 may have significant adverse environmental effects due to unusual circumstances which require  
25 analysis in an EIR. (*No Oil, Inc. v. City of Los Angeles*, supra, 13 Cal.3d 68, 75, 82.) The reasonable  
26 possibilities of a significant environmental impact due to unusual circumstances render the categorical  
27 exemption inapplicable to adoption of the Ordinance by the Town of Windsor.

43. In light of the foregoing violations of CEQA, the Town Council's approval of the Ordinance must be set aside.

**SECOND CAUSE OF ACTION**  
**(Violation of CEQA – The Project is not Exempt Under CEQA Guidelines Section 15061(b)(3))**

44. Petitioner incorporates by reference the allegations of paragraphs 1 through 43 of this pleading, as though set forth fully in this paragraph.

45. The CEQA Section 15061(b)(3) Exemption, referred to as the “common sense” exemption, is available to agencies only when it can be “seen with certainty that there is ***no possibility*** that the activity in question may have a significant effect on the environment.” (14 Cal Code Regs, § 15061(b)(3); emphasis added.) The common sense exemption requires an agency’s determination to be “supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision.” (*Davidon Homes v. City of San Jose*, supra, 54 Cal.App.4th at p. 117.) The agency bears the burden to support its decision, before the burden shifts to the challenger. (*California Farm Bureau Federation v. California Wildlife Conservation Board*, supra, 143 Cal.App.4th at 116 [“Imposing the burden on members of the public in the first instance to prove a possibility for substantial adverse environmental impact would frustrate CEQA’s fundamental purpose of ensuring that government officials make decisions with environmental consequences in mind.”].)

46. There is no evidence that the Town took the potentially serious environmental impacts from the Ordinance into account before it made its decision to adopt the Ordinance. The Town's agenda report is cursory, relying on unsubstantiated assumptions and ignoring evidence of potential impacts. The Town's September 18, 2019 Agenda Report simply asserts that the Ordinance is exempt under Section 15061(b)(3) of the CEQA Guidelines "because these standards are more protective of the environment than the State Standards, and there are no reasonably foreseeable adverse impacts. Consequently, there is no possibility that the activity in question may have a significant effect on the environment." (Town of Windsor Agenda Report, p. 1.)

47. With respect to fire risk, the Town's September 18, 2019 Agenda Report makes an unsupported statement that "*no evidence exists* that the use of [portable cooking appliances and

generators] in an all-electric home presents any greater [fire] risk than use of such appliances in a home with a fixed natural gas line.” (Town of Windsor September 18, 2019 Agenda Report, p. 4; emphasis added.) The standard for declaring a project exempt under the common sense exemption, however, is not whether there is “no evidence” of a potentially significant environmental effect, but whether there is “no possibility” of a significant environmental effect. (14 Cal Code Regs, § 15061(b)(3).) If there is currently no evidence available to the Town that the Ordinance will create a fire risk, but there is a possibility that it will, the Town is required to investigate that possibility.

48. Contrary to the Town’s assertion in its Agenda Report, there is clear and obvious possibility that the Ordinance will increase the risk of fire. In making its conclusion that there is “no evidence” that portable cooking appliances and generators will increase fire risk compared to the use of such appliances in a home with natural gas, the Agenda Report fails to consider that a home with natural gas connections would not *require* the use of portable cooking appliances or generators. Therefore, the Ordinance will increase the use of such appliances, resulting in a possibility of increasing fire risk.

49. The Ordinance will result in residents purchasing backup generators in anticipation of power outages, propane tanks for outdoor barbeques, and outdoor firepits/fireplaces in lieu of electric firepits. The Town itself admits as much in its September 18, 2019 Agenda Report: “any new homes constructed in conformance with the all-electric code requirement may rely on portable cooking appliances (propane-fueled barbeques, charcoal barbeques, etc.) and power generators fueled by gasoline or diesel.” (Ex. 3, Town of Windsor September 18, 2019 Agenda Report, p. 4.) The Report goes on to state that it is “unknown how many people may turn to use these types of appliances.” (*Id.*)

50. Generators have potentially serious fire risks that were not considered by the Town. As noted in the Town’s October 2019 Action Plan, “[g]enerators can be dangerous if they are not installed correctly.” (Ex. 5, Town of Windsor Action Plan, October 2019, p. 16.) The Action Plan warns residents not to use generators in or near dry vegetation or plug generators into a house outlet. (*Id.*) The fire risk associated with generators alone would likely increase total fire risk compared to existing conditions, resulting in a significant environmental impact. Propane grills alone cause about 74% of home fires. (Ex. 6, National Fire Protection Association, Ahrens, 2019.) In comparison,

1 natural gas grills only cause 9% of home fires. (*Id.*) Likewise, electrical facilities have fire risks and  
2 caused one of the most lethal wildfires in California, the Camp Fire, just one year ago.

3 51. As a secondary explanation to support the Town’s conclusion that fire risk will not  
4 increase as a result of the Ordinance, the Agenda Report alleges that all-electric homes will be  
5 constructed incrementally over time and therefore will not significantly increase risks beyond the  
6 existing fire risk. (*Id.*) This statement is simply unsupported. The Town cannot conclude that an  
7 impact is not possible simply because the impact will not occur immediately, but will occur over time.  
8 (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 152  
9 [“substantial evidence” must have ponderable legal significance, i.e., evidence that is reasonable and  
10 credible.] )

11 52. The Town fails to provide the substantial evidence required by CEQA to support its  
12 determination that the Ordinance is exempt, given the potential fire risk associated with the Ordinance.  
13 The Town’s analysis fails to meaningfully consider the very real fire risks associated with the  
14 Ordinance, thereby violating CEQA.

15 53. Likewise, there is a possibility that the Ordinance will result in an environmental  
16 impacts with respect to GHG emissions. The increased use of generators, propane tanks, and wood  
17 burning firepits/fireplaces may result in a net increase in GHG emissions compared to existing  
18 conditions, despite the reduction in natural gas that is anticipated by the Town as a result of the  
19 Ordinance.

20 54. Similarly, the Town has not provided substantial evidence that there is no possibility  
21 that the Ordinance would cause public services impacts. Regarding the amount of energy usage and  
22 related infrastructure that will be necessary as a result of the Ordinance, the Agenda Report concludes,  
23 based on the EIR for the 2040 General Plan, that the increased demand for electricity would be offset  
24 by a solar project that is not currently in operation. Reliance on the 2040 General Plan EIR and  
25 projected demand offsets from a future project do not constitute substantial evidence justifying the use  
26 of the common sense exemption. The Agenda Report notes that PG&E submitted a letter in August  
27 2019 supporting the Town’s Ordinance and that PG&E’s letter “did not indicate that PG&E would be  
28 unable to support any increase in demand for electricity that may occur as a result” of adoption of the

1 Ordinance. (Ex. 3, Town of Windsor September 18, 2019 Agenda Report, p. 4.) However, this  
2 speculative statement cannot be interpreted as PG&E definitively stating that it would be able to  
3 support the increase in demand for electricity. The Town’s analysis dismissing potential public  
4 services impacts fails to meet the common sense exemption’s requirement that the Town must support  
5 its determination with substantial evidence. (*Davidon Homes v. City of San Jose*, supra, 54  
6 Cal.App.4th at p. 117.)

7 55. In light of the foregoing violations of CEQA, the Town Council’s approval of the  
8 Ordinance must be set aside.

9 **THIRD CAUSE OF ACTION**  
10 **(Violation of Cal. Code Civ. Pro. §§ 1085 and 1094.5 – Adoption of Ordinance in Violation of**  
11 **State Energy Code)**

12 56. Petitioner incorporates by reference the allegations of paragraphs 1 through 55 of this  
13 pleading, as though set forth fully in this paragraph.

14 57. Section 10-106 of the State Energy Code requires that the Town adopt “[a]  
15 determination that the [All Electric Code] standards are cost effective,” which requires “findings and  
16 supporting analyses on the energy savings and cost-effectiveness of the proposed energy standards.”  
17 (Cal. Code Regs., tit. 24, § 10-106.)

18 58. In support of its Ordinance, the Town published a “2019 Cost-effectiveness Study:  
19 Low Rise Residential New Construction” report dated July 17, 2019 prepared by Frontier Energy, Inc.  
20 (Ex. 1, Cost-effectiveness Study, Frontier Energy, Inc., July 17, 2019.) The report notes it was  
21 prepared for PG&E. Based on information and belief, the Town did not prepare any other materials to  
22 comply with Building Energy Efficiency standards Section 10-106.

23 59. The July 2019 concludes that there will be a cost savings associated with all-electric  
24 low rise residential uses with respect to consumer bills and lifecycle costs based on a “Statewide  
25 Electric Residential Average Rate” of 2% per year from 2020 to 2025 and 1% thereafter. However, an  
26 April 2019 study that was also authored by Frontier Energy, Inc. showed an increase in costs for “Bay  
27 Area” consumers purchasing new homes based specifically on PG&E electric rates, which would be  
28 applicable in the Town of Windsor. In support of its conclusion, the April 2019 study states that

1 “PG&E’s electric rates are assumed to increase faster than the natural gas rates due to wildfire risk and  
2 liability...”

3 60. Based on the failure of the Cost-effectiveness study to account for specific PG&E  
4 electric rates and the evidence that based upon electric rates specific to PG&E, costs would increase,  
5 the Town has failed to show that the All Electric Code would be cost effective, thereby violating  
6 Section 10-106 of the State Building Energy Efficiency standards.

7 61. In addition to the Town’s failure to account for electric rates specific to PG&E in its  
8 Cost-effectiveness Study, the Study fails to account for tiered electricity pricing and fails to analyze  
9 how that would apply to all-electric construction under the Ordinance. Moreover, the Cost-  
10 effectiveness study is not clear as to whether all-electric construction would lead to residential units  
11 that cannot meet the requirements of the Building Energy Efficiency Standards in Part 6 of Title 24,  
12 which would preclude building altogether.

13 62. The Town’s action in adopting the Ordinance was therefore arbitrary and capricious  
14 and/or constituted a prejudicial abuse of discretion in that they failed to proceed in a manner required  
15 by law. As such, the Town Council’s approval of the Ordinance must be set aside.

16 **FOURTH CAUSE OF ACTION**  
17 **(Declaratory Relief – Violation of Cal. Code Civ. Pro. § 1060)**

18 63. Petitioner incorporates by reference the allegations of paragraphs 1 through 62 of this  
19 pleading, as though set forth fully in this paragraph.

20 64. Petitioner alleges that the Ordinance is not cost effective, thereby violating Section 10-  
21 106 of the State Energy Code.

22 65. Energy Code Section 10-106 requires that the Town adopt “[a] determination that the  
23 [All Electric Code] standards are cost effective,” which requires “findings and supporting analyses on  
24 the energy savings and cost-effectiveness of the proposed energy standards.” (Cal. Code Regs., tit. 24,  
25 § 10-106.)

26 66. The Town of Windsor relied upon the “2019 Cost-effectiveness Study: Low Rise  
27 Residential New Construction” report prepared by Frontier Energy, Inc. to support the finding in its  
28

Ordinance that the Ordinance complies with Section 10-106 of the Energy Code. (Ex. 1, Cost-effectiveness Study, Frontier Energy, Inc., July 17, 2019.)

67. The purported study showing the cost effectiveness of the Ordinance, the “2019 Cost-effectiveness Study: Low Rise Residential New Construction” report prepared by Frontier Energy, Inc., fails to provide the requisite evidence that the Ordinance would be cost effective because it is based on statewide electric rates and does not account for PG&E electric rates.

68. There is evidence in the record that a Cost-effectiveness Study which accounts for electric rates of PG&E would result in a conclusion that an All Electric Code is not cost effective. (Ex. 2, Frontier Energy, Inc., Cost-effectiveness Study, April 2019.)

69. PG&E provides electricity to the Town of Windsor. Therefore, the Town’s reliance on statewide electricity rates is misleading and an improper abuse of discretion.

70. Prior to the Town’s implementation of the Ordinance, which could potentially create significant adverse cost impacts on builders and future homeowners, it would be most efficient for this court to determine what the cost effectiveness component of Energy Code Section 10-106 requires of the Town of Windsor.

### **PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays for judgment as set forth below:

1. For Alternative and Peremptory Writs of Mandate ordering the Town to vacate and set aside its approval of each and every element and aspect of the Ordinance;

2. For Alternative and Preemptory Writs of Mandate directing the Town to follow California statutes and regulations in complying with CEQA and all other applicable state and local laws as are directed by this Court;

3. A declaration consistent with Plaintiff and Petitioner’s claims for declaratory relief that the Town’s Ordinance was adopted in violation of its statutory obligations for rulemaking and that the Town lacked substantial evidentiary support thereby rendering its decision to adopt the Ordinance arbitrary and capricious and thus, the Town must rescind and set aside the Ordinance;

4. A preliminary and permanent injunction and/or stay enjoining the Town of Windsor and its agents, servants, employees, and volunteers, and all persons acting under, in concert with, or

1 for it, from (i) enforcing the new Ordinance unless and until the Town complies with all laws, policies,  
2 and regulations, including without limitation, preparation and certification of proper environmental  
3 review in full compliance with CEQA;

4 5. For reasonable attorney's fees associated with bringing this suit, as authorized under  
5 California Code of Civil Procedure § 1021.5 and any other applicable provisions of law;

6 6. For costs of suit; and

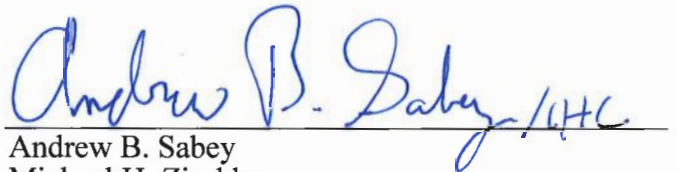
7 7. For such other and further relief as this Court deems proper.

8 Respectfully submitted,

9 DATED: November 22, 2019

COX, CASTLE & NICHOLSON LLP

10  
11 By:



12 Andrew B. Sabey  
13 Michael H. Zischke  
14 Morgan L. Gallagher  
15 Attorneys for Plaintiff and Petitioner,  
16 WINDSOR-JENSEN LAND COMPANY, LLC  
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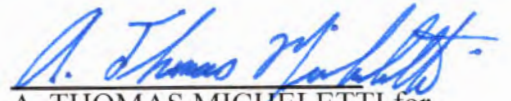
**VERIFICATION**

I, A. THOMAS MICHELETTI, declare:

I am a member of Windsor-Jensen Land Company, LLC. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, and know its contents. I am informed and believe, and on that ground allege, that the matters stated in the foregoing document are true.

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

Executed November 22, 2019, in Solano County, California.

  
A. THOMAS MICHELETTI for  
Windsor-Jensen Land Company, LLC