SHUTE, MIHALY & WEINBERGER LLP
ATTORNEYS AT LAW

E. CLEMENT SHUTE, JR.*
MARK I. WEINBERGER (1948-2005)
FRAN M. LAYTON
RACHEL B. HOOPER
ELLEN J. GARBER
TAMARA S. GALANTER
ANDREW W. SCHWARTZ
ELLISON FOLK
RICHARD S. TAYLOR
WILLIAM J. WHITE
ROBERT S. PERLMUTTER
OSA L. WOLFF
MATTHEW D. ZINN
CATHERINE C. ENGBERG
AMY J. BRICKER
GABRIEL M.B. ROSS
DEBORAH L. KEETH
WINTER KING
KEVIN P. BUNDY
*SENIOR COUNSEL

396 HAYES STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE: (415) 552-7272
FACSIMILE: (415) 552-5816
WWW.SMWLAW.COM

AMANDA R. GARCIA
JEANNETTE M. MACMILLAN
ISAAC N. BOWERS
HEATHER M. MINNER
ERIN B. CHALMERS

LAUREL L. IMPETT, AICP
CARMEN J. BORG, AICP
URBAN PLANNERS

November 5, 2008

Via U.S. Mail

Docket No. 07-AFC-4
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814-5512

Re: In the Matter of: The Application for Certification for the Chula Vista Energy Upgrade Project

Dear Docket Unit:

Enclosed are an original and one copy of the Opening Brief of Intervenor Environmental Health Coalition and Attachment A to the Opening Brief. Please file the originals with the docket unit and return a conformed copy to this office in the self-addressed stamped envelope also provided.

If you have any questions, then please do not hesitate to contact me at (415) 552-7272 ext. 245. Thank you.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Sarita C. Candy
Legal Assistant to Kevin P. Bundy

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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: The Application for Certification for the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4

OPENING BRIEF OF INTERVENOR ENVIRONMENTAL HEALTH COALITION

Osa L. Wolff
Kevin P. Bundy
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272
(415) 552-5816 Fax
wolff@smwlaw.com
bundy@smwlaw.com

Attorneys for the
ENVIRONMENTAL HEALTH
COALITION

STATE OF CALIFORNIA

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TABLE OF CONTENTS

OPENING BRIEF
OF INTERVENOR ENVIRONMENTAL HEALTH COALITION

The Chula Vista Energy Upgrade Project ("CVEUP" or "Project") cannot be certified in accordance with applicable law. The Project—to be sited a mere 350 feet from existing homes—squarely conflicts with the City of Chula Vista's general plan and zoning ordinances, both of which require that power plants be sited in general industrial zones, far away from residences and other sensitive receptors. In light of these fundamental conflicts with local law, the Commission cannot find the Project consistent with all applicable laws, ordinances, regulations, and standards ("LORS"). The Final Staff Assessment ("FSA") prepared by Commission Staff, moreover, does not meet the requirements of the California Environmental Quality Act ("CEQA"). The Project's significant environmental impacts have not been properly disclosed, analyzed, or mitigated, and feasible alternatives to the Project have not been adequately explored.

This Project also epitomizes the kind of environmental injustice that state and local governments have spent many years promising to avoid. People living in the neighborhood where this Project would be located—more than 80 percent of whom are minorities—are already living with both substandard air quality and significant respiratory health problems. Southern San Diego County, moreover, is already home to more megawatts of operating and permitted fossil-fueled generation per 10,000 people than any other part of the county. Yet the Project's air quality and climate change impacts have not been adequately disclosed or mitigated, and alternative sites located farther from residences were cursorily dismissed without adequate analysis or exploration. This Project would exacerbate rather than relieve existing environmental justice and public health problems in southwest Chula Vista.

Finally, there are more prudent, feasible, equitable, and environmentally responsible ways to satisfy the San Diego region's electricity needs. The Commission has for many years led California

agencies in planning an energy future predicated on conservation, demand reduction, greater efficiency, and renewable generation. There are concrete, achievable, and feasible strategies available that, taken together, would more than outweigh this Project's relatively minor contribution to the electricity supply. Under these circumstances, the Commission cannot make the findings required under the Warren-Alquist Act and CEQA to "override" both the Project's inconsistency with local LORS and its significant, unmitigated environmental impacts.

Given the public health crisis facing southwest Chula Vista—and the broader threat that global climate change poses to people far beyond the neighborhood affected by this Project—public convenience and necessity demand that the region's peaking power demand be satisfied in a way that does not exacerbate existing air quality problems or further increase greenhouse gas emissions. Denial of certification for this Project is not only required by law, but also consistent with the Commission's vision for California's energy future. The Environmental Health Coalition ("EHC") believes that the time to set a new direction in California energy policy, and to confirm the state's environmental justice commitment, is now.

STANDARD OF REVIEW AND BURDEN OF PROOF

The Commission has exclusive power to certify sites and related facilities for thermal power plants in California. (Pub. Res. Code[1] § 25500.) A certificate issued by the Commission operates in lieu of any other permit and supersedes otherwise applicable ordinances, statutes, and regulations. (*Id.*) Accordingly, the Commission itself must determine whether the Project complies with public safety standards, air and water quality standards, and "other applicable local, regional, state, and federal standards, ordinances, or laws." (§ 25523(d); see also Siting Regs. § 1752(a).) The

[1] All statutory references herein are to the Public Resources Code unless otherwise specified. Citations herein to "Siting Regs." refer to the Commission's Power Plant Site Certification Regulations, codified in Title 20 of the California Code of Regulations. Citations herein to "CEQA Guidelines" refer to regulations codified in Title 14 of the California Code of Regulations.

Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project "is required for public convenience and necessity" and (2) that "there are not more prudent and feasible means of achieving public convenience and necessity." (§ 25525; Siting Regs. § 1752(k).)

The Commission also serves as lead agency for purposes of CEQA. (§ 25519(c).) Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755.) These findings must be supported by substantial evidence in the record. (§ 21081.5; CEQA Guidelines § 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.)

The Applicant bears the burden of providing sufficient substantial evidence to support each of the findings and conclusions required for certification of the Project. (Siting Regs. § 1748(d).)

ARGUMENT

I. THE PROJECT IS INCONSISTENT WITH THE CITY OF CHULA VISTA'S GENERAL PLAN AND ZONING ORDINANCE.

In light of the Project's numerous facial conflicts with local standards, no reasonable person could conclude that the Project—with or without the additional measures proposed in the City's agreement with the Applicant—is consistent with LORS. On this record, moreover, the Commission cannot make the findings necessary to "override" these conflicts under section 25525 of the Warren-Alquist Act. Accordingly, the AFC must be denied.

A. The Project Conflicts with Applicable Land Use Designations, Objectives, and Policies of the General Plan.

In order to protect California's land resources and improve the quality of life in the state, each California city and county must adopt a comprehensive, long-term general plan governing development. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 352, citing Gov. Code §§ 65030, 65300.) The general plan sits at the top of the land use planning hierarchy (see *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773), and serves as a "constitution" or "charter" for all future development. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.)

General plan consistency is "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*deBottari v. Norco City Council* (1985) 171 Cal.App.3d 1204, 1213.) Accordingly, state law requires that all subordinate land use decisions, including conditional use permits, be consistent with the general plan.[2] (See Gov. Code § 65860(a)(2); *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184.)

A project *cannot* be found consistent with a general plan if it conflicts with a general plan policy that is "fundamental, mandatory, and clear," regardless of whether it is consistent with other general plan policies. (*Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 782-83; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341-42 ("*FUTURE*").) Moreover, even in the absence of such a direct conflict, a particular development project may not be approved if it interferes with or frustrates the general plan's policies and objectives. (*Napa Citizens*, *supra*, 91 Cal.App.4th at pp. 378-79; see also *Lesher*, *supra*,

[2] Although the City of Chula Vista is a charter city, it has adopted a general plan consistency requirement by ordinance. (See Chula Vista Municipal Code ("CVMC") § 19.06.030 [citing Gov. Code § 65860].)

52 Cal.3d at 544 [zoning ordinance restricting development conflicted with growth-oriented policies of general plan].)

1. The Project is Inconsistent with Fundamental General Plan Land Use Designations and Policies.

The Project is inconsistent with the intent and purpose of the general plan's Limited Industrial land use designation, which applies to the Project site. (Ex. 1, Fig. 5.6-2.). The Limited Industrial designation is "intended for light manufacturing; warehousing; auto repair; auto salvage yards; and flexible-use projects that combine these uses with associated office space." (Ex. 619 at LUT-53.) The General Industrial designation, in contrast, allows "heavier manufacturing, large-scale warehousing, transportation centers *and public utilities*." (*Id.* at LUT-54 [emphasis added].) Read together, these provisions demonstrate that a power plant, like a "public utility," should be considered a heavy or "general" industrial use rather than a limited industrial use.[3] This same distinction is found in the City's zoning ordinance, which lists "[e]lectrical generating plants" as permitted uses in the general industrial zone (Ex. 620 at p. 19-101 [CVMC § 19.46.020(E)]), but does not list such plants as either permitted or conditional uses in the limited industrial zone. (*Id.* at pp. 19-98 to 19-99 [CVMC §§ 19.44.020, 19.44.040].) The City's law is therefore unambiguously consistent in providing that power plants belong in the General Industrial land use category and zoning district, not the more restrictive Limited Industrial district.

The Project thus violates the general plan's fundamental land use principles, as pointed out in EHC's comments on the Preliminary Staff Assessment ("PSA"). (See Ex. 200 at 4.5-44.) Staff's response—essentially that the general plan is important, but may be disregarded in favor of an exclusive focus on zoning (Ex. 200 at 4.5-45)—misapprehends the law. As the California Supreme

[3] The general plan does not specifically define "public utility." Under state law, however, the owner of an electrical generating plant is a "public utility." (See Pub. Util. Code §§ 216(a), 217, 218(a).)

Court has pointedly held, "[t]he Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances. The tail does not wag the dog. The general plan is the charter to which the ordinance must conform." (*Lesher*, *supra*, 52 Cal.3d at p. 541.) The general plan thus governs both the content of zoning ordinances and subordinate land use decisions like conditional use permits. As the California Court of Appeal put it, a use permit "is struck from the mold of the zoning law," which "must comply with the adopted general plan," which itself "must conform with state law"; "[t]he validity of the permit process derives from compliance with this hierarchy of planning laws." (*Neighborhood Action Group*, *supra*, 156 Cal.App.3d at p. 1184.) Accordingly, this Project must be "compatible with the General Plan's objectives, policies, *general land uses* and programs." (*Napa Citizens*, *supra*, 91 Cal.App.4th at p. 355 [emphasis added]; see also *FUTURE*, *supra*, 62 Cal.App.4th at p. 1336.) The general plan is the fundamental, controlling document here, and its statement of "general land uses" controls interpretation and application of policies and projects lower down in the land use planning hierarchy. The Project is clearly incompatible with this statement.

Neither the Applicant nor Staff addressed this incompatibility in any detail in either the AFC or the Final Staff Assessment ("FSA"). Instead, both the Applicant and Staff concluded that the Project is similar to and therefore compatible with surrounding land uses. (See Ex. 1 at p. 5.6-16; Ex. 200 at p. 4.5-13.) These conclusory assertions, however, ignore the text of the general plan, which makes a clear distinction between limited and general industrial uses—and clearly assigns "public utilities" to the latter category. The Project therefore must be found inconsistent with local LORS.

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2. The Project Conflicts with General Plan Policy E 6.4.

a. Policy E 6.4 Is Fundamental, Mandatory, and Clear.

The Project is also plainly inconsistent with general plan Policy E 6.4, which contains a fundamental, mandatory, and specific limitation on the location of new and re-powered power plants. Noting that "[e]nergy conservation and a transition to renewable, non-fossil fuel based energy are an important means to reduce emissions caused by the generation of electricity," the general plan adopts a fundamental objective: to minimize emission of air pollutants and limit residents' exposure. (Ex. 619 at p. E-32.) To this end, the general plan requires that decision-makers "[a]void siting new or re-powered energy generation facilities and other major toxic air emitters within 1,000 feet of a sensitive receiver . . . ." (*Id.*) Policy E 6.4 on its face is specific and clear, fundamental in its citywide application and purpose, phrased in mandatory terms, and in direct conflict with this Project.

The Project will install entirely new turbines, emissions control equipment, and exhaust stacks on the site, and will result in removal of the existing peaker plant. (See Reporter's Transcript of Evidentiary Hearing (Oct. 2, 2008) (hereafter "Tr.") at p. 318:3-23.) It therefore must be considered a "new . . . energy generation facility." Nearby residences, located approximately 350 feet from the Project site, also must be considered "sensitive receivers" for purposes of the policy. (See Ex. 200 at p. 4.5-16 [acknowledging that "the proposed project is within 1,000 feet of residential sensitive receptors"].) Yet nothing about the Project "avoids" a location within 1,000 feet of homes. Indeed, the City determined that the Project does not appear to be consistent with Policy E 6.4. (See Ex. 622 at pp. 5, 7 [Advanced Planning Section Comments at pp. 1, 3].)

The Project's conflict with Policy E 6.4 is akin to other general plan conflicts that the courts have found fatal. In *Endangered Habitats League*, for example, the general plan mandated a particular methodology for assessment of traffic impacts; the county's decision to use a different methodology

conflicted with this unambiguous mandate, requiring that the county's approvals be set aside. (*Endangered Habitats League*, *supra*, 131 Cal.App.4th at p. 783.) Similarly, the court in *FUTURE* invalidated the application of a "low density residential" land use designation to a particular development project because the project was in an area where other general plan policies precluded the use of that designation. (*FUTURE*, *supra*, 62 Cal.App.4th at p. 1341.) Here, the Project's very character and location directly conflict with Policy E 6.4's requirement that that City "avoid" siting energy generation facilities within 1,000 feet of homes. According to the American Heritage Dictionary of the English Language (4th ed. 2000), "avoid" means to "stay clear of," to "shun," and to "keep from happening." Nothing in the Project "avoids" siting this peaker plant in a location that is clearly inappropriate under Policy E 6.4. As a result, the Project cannot be found consistent with the general plan, even if found consistent with other policies. (*FUTURE*, *supra*, 62 Cal.App.4th at p. 1342; *Endangered Habitats League*, *supra*, 131 Cal.App.4th at pp. 782-83.) As a matter of law, therefore, the Commission cannot find this Project consistent with LORS.

b. Attempts by the Applicant and Staff to Explain Away Policy E 6.4 Are Contrary to Law.

Instead of "avoiding" siting the proposed peaker plant in close proximity to sensitive receivers, as Policy E 6.4 plainly requires, the Applicant and Staff try to "avoid" the policy itself. These attempts fail.

i. Policy E 6.4 Applies to the Project.

The Applicant assumes that because the Project is not a "major source" of hazardous air pollutants under federal law, it is not a "major toxic emitter," and therefore Policy E 6.4 has no application. (Ex. 1 at 5.6-17.) This assumption lacks any support in the text of the general plan or other local law, and the Applicant identifies none. The City has found that Policy E 6.4 *does* apply to this Project. (Ex. 622 at pp. 5, 7 [Advanced Planning Section Comments at pp. 1, 3].) Indeed, the

Applicant's argument would read the phrase "new or re-powered energy generation facilities" right out of the policy. The plain text of the general plan shows that the City intended Policy E 6.4's restrictions to apply to "energy generation facilities," and the City has found the policy applicable here. The Applicant cannot avoid Policy E 6.4 by ignoring what it says.

ii. Staff's Attempt to Find the Project Consistent with Policy E 6.4 Contravenes Plain Logic, Controlling Law, and the Text of the General Plan.

Staff's attempts to explain away Policy E 6.4 are equally unsupportable. Staff's primary theory—that the Project is "appropriately sited" under Policy E 6.4 because the Redevelopment Agency years ago approved a use permit for the existing plant (Ex. 200 at 4.5-16; see also Tr. at p. 320:4-16)—is illogical and contrary to law. The use permit was approved in 2000. (*Id.* at 4.5-13.) Policy E 6.4 was adopted in 2005. (See Ex. 626D at p. 11, 626F at p. 11.) Staff acknowledged these facts at the evidentiary hearing. (Tr. at p. 343:21-344:12.) Yet Staff has never explained how an action taken on a use permit in 2000 could shed any light on the meaning of a general plan policy adopted five years later. The City itself has rejected Staff's reasoning on this point. (See Ex. 622 at p. 7 [Advanced Planning Section Comments at p. 3].) If anything, the City's later adoption of a more restrictive siting policy for power plants reflects a policy judgment that the existing plant, permitted under a less restrictive general plan, was inappropriately sited too close to homes. Staff's argument ignores the controlling place of the general plan in the land use hierarchy. It also makes no sense.

Its primary theory unworkable, Staff falls back on a subsidiary explanation: that the Project is consistent with Policy E 6.4 because it advances the City's overall goals and objectives for industrial development in the area. (Ex. 200 at pp. 4.5-16, 4.5-27; Tr. at p. 321:3-8.) At the evidentiary hearing, Staff's witness elaborated on this theory, explaining that the determination of consistency was based in part on Staff's erroneous view that the Project complies with the *zoning* ordinance. (See Tr. at 320:13-

16, 322:21-323:5.) Staff, noting the general requirement that zoning ordinances must be made consistent with the general plan, apparently interprets this requirement to mean that if a project is consistent with zoning, it must by definition also be consistent with the general plan. (See Ex. 200 at 4.5-30.)

Staff once again misapprehends the place of the zoning ordinance in the hierarchy of planning law. Even if the Project were consistent with the zoning ordinance—which, as explained in detail below, it is not—zoning consistency alone would not allow Staff to disregard the specific terms of the general plan. The Project must be found consistent with *both* the zoning ordinance *and* applicable provisions of the general plan. The City chose to place Policy E 6.4 in its general plan, as an overarching statement of policy that applies citywide; in this sense, the City was entirely correct in commenting that Policy E 6.4 may render the Project inconsistent with the general plan "regardless of whether the zoning of the site would permit it." (Ex. 622 at p. 7 [Advanced Planning Section Comments at p. 3].) Moreover, even if the enactment of Policy E 6.4 created some kind of conflict with specific zoning provisions (as Staff seems to believe), the remedy would be to amend the zoning ordinance, not to keep approving projects that are facially inconsistent with the general plan.[4] (See Gov. Code § 65860(c).) The City—and the Commission—must ensure that the Project is consistent with the general plan. Staff's contrary conclusion turns the law on its head.

Staff's explanation also has no basis in the actual text of Policy E 6.4. Nothing in the policy states that an energy generation facility may be located within 1,000 feet of a sensitive receiver so long as it is otherwise generally consistent with the City's industrial development goals and objectives. On the contrary, the point of Policy E 6.4 is to identify locations where energy generation facilities should be avoided *notwithstanding* other, more general industrial development goals and objectives. The

[4] Staff's response to the City's comment quotes a portion of the General Plan Guidelines that makes this same point. (Ex. 200 at p. 4.5-30.) Staff simply seems to have misunderstood its meaning.

Project is an energy generation facility located within 1,000 feet of sensitive receivers. Staff's attempt to create an exception to Policy E 6.4 based on other goals and objectives founders on the policy's plain language.

iii. The City's Agreement with the Applicant Does Not Make the Project Consistent with Policy E 6.4.

Both the City and Staff conclude that the City's agreement with the Applicant has resolved the Project's inconsistencies with the general plan, presumably including Policy E 6.4. (See, e.g., Ex. 803, City Letter [Aug. 7, 2008] at p. 1; Ex. 200 at p. 4.5-16.) Although a city normally will be accorded deference in determining whether a project is consistent with its own general plan, that deference has a limit: where no reasonable person could have reached the same conclusion on the available evidence, the determination must be reversed. (*Endangered Habitats League*, *supra*, 131 Cal.App.4th at 782.) Here, no reasonable person could conclude that the City's agreement with the Applicant renders this Project consistent with Policy E 6.4.

First and foremost, the agreement does nothing to "avoid" siting this Project within 1,000 feet of sensitive receivers as required by Policy E 6.4. At the evidentiary hearing, Staff's witness conceded that nothing in the agreement changes the location of the Project in relation to residences. (Tr. at p. 324:14-23.) Rather, the agreement outlined six "mitigation measures," only two of which are even remotely related to the public health purposes of Policy E 6.4: (1) additional funding for "energy efficiency and related improvements" to nearby homes and local businesses, and (2) an agreement that air quality mitigation already proposed for the Project should take place in southern Chula Vista "to the extent possible." (Ex. 803, MMC Letter [Aug. 4, 2008] at pp. 1-2.) It is irrational to argue that either of these measures "avoids" siting the power plant within 1,000 feet of residences.[5]

[5] The other "mitigation measures" include promises to pay the City's utility tax, provide funding for a weather station, remove the existing plant (already part of the Project), not seek additional expansion,

Even if effective, additional mitigation of the Project's air quality impacts would not satisfy either the text or the intent of Policy E 6.4. Indeed, the City considered and rejected an earlier version of the policy that relied on mitigation. As originally drafted, Policy E 6.4 would have required the City to "[r]educe or eliminate the environmental effects" of power plants on nearby residents and other sensitive receptors (Ex. 626A), essentially what the City's agreement with the Applicant, interpreted generously, aims to do. An interim staff amendment, however, strengthened the policy considerably, deleting the language regarding reduction of environmental effects, and adding language requiring the City to "[a]void siting" power plants within 1,000 feet of a sensitive receiver unless a health risk assessment demonstrated that attendant health risks would be within state and federal standards as well as "other relevant health hazard indices." (*Id.*) Upon evaluating this amendment, both community advocates and the City's mayor argued that the policy should be strengthened even further by removing the health risk assessment exception. (Ex. 626B at p. 2; Ex. 626C at pp. 4-5.) The City Council ultimately agreed, and deleted the exception. (See Ex. 626D at pp. 10-11.) The final policy therefore reflects the City's considered judgment that power plants within 1,000 feet of homes must be "avoided," mitigation measures and health risk assessments notwithstanding. (See Ex. 626G.)

Both the text and the history of the policy show that the City took a fundamentally precautionary approach to power plant siting by specifying locations where such land uses must be avoided regardless of mitigation measures or health risk studies. The City and the Applicant may not simply negotiate away this general plan requirement, which has the force of State law, by way of what is essentially an off-line settlement agreement between only two of the parties here. (See, e.g., *League of Residential Neighborhood Advocates v. City of Los Angeles* (9th Cir. 2007) 498 F.3d 1052, 1055-56 [invalidating settlement agreement that effectively granted conditional use permit without complying

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and share the cost of undergrounding transmission lines. (Ex. 803, MMC Letter [Aug. 4, 2008] at p. 2.)

with state law].) The City's conclusion that the agreement renders the Project consistent with the general plan is both irrational and unlawful, and the Commission owes it no deference.

In sum, Policy E 6.4 is a fundamental, mandatory, and clear policy that applies citywide without regard to zoning. It sets forth a simple, easily applied standard for determining where power plants must be avoided. This Project facially and fatally conflicts with that standard. Under the clear standards of State planning and zoning law, therefore, neither the City nor the Commission can rationally find this Project consistent with the general plan.

3. The Project Interferes with Achievement of the General Plan's Other Policies and Objectives.

To achieve general plan consistency, a project must do more than comply with the plan's fundamental, mandatory, and clear policies. The project also must be "compatible with" and "not frustrate" the general plan's goals and policies as a whole. (*Napa Citizens*, supra, 91 Cal.App.4th at p. 378.) Once again, the Project falls short of this standard.

a. The Project Will Frustrate Achievement of the General Plan's Air Quality and Environmental Justice Objectives and Policies.

In addition to Policy E 6.4, the City's general plan contains at least two other policies that aim to protect public health from the environmental effects of industry. In furtherance of the City's objective of improving local air quality, Policy E 6.15 requires that the City "[s]ite industries in a way that minimizes the potential impacts of poor air quality on homes, schools, hospitals, and other land uses where people congregate." (Ex. 619 at p. E-33.) The general plan also explicitly discusses environmental justice and affirmatively states that no group of people should bear a disproportionate share of the negative environmental consequences of industrial development. (See Chula Vista

General Plan[6] at pp. E-6 to E-8 [defining environmental justice and discussing relationship to land use].) The general plan expressly adopts an objective of providing fair treatment to people of all races and income levels in the implementation of environmental policies. (*Id.* at E-78 to E-79 [establishing Objective E 23].) To this end, Policy E 23.3 requires that the City "[a]void siting industrial facilities and uses that pose a significant hazard to human health and safety in proximity to schools or residential dwellings." (*Id.* at p. E-79; see also Ex. 200 at p. 4.5-17 [quoting policy].)

The Project will conflict with these objectives and policies. The southern portion of San Diego County, including southwest Chula Vista, already bears a disproportionate share of the environmental burdens from fossil-fueled electricity generation. (See Ex. 605, 606.) Emergency room discharge rates for asthma and chronic cardiopulmonary obstructive disease in the zip code where the Project would be located also are among the highest in the County. (Ex. 603B, 603C, 603L.) Finally, as discussed in detail below, the mitigation measures proposed for the Project do not adequately address its contribution to existing violations of air quality standards for particulate matter—a pollutant linked to respiratory illness and premature death. (See, e.g., Ex. 602 at p. 3; Ex 603D, 603F, 603J, 603K, 603M; see also Tr. at p. 137:17-21, 142:14-143:10.) Construction of the Project so close to homes and schools in a community already disproportionately burdened with environmental impacts will frustrate achievement of the general plan's policies and goals.

b. The Project Will Interfere with the City's Vision for the Main Street Corridor.

The general plan recognizes that industrial uses along Main Street may affect residential and open space needs in the area. (See Ex. 619 at pp. LUT-156 to LUT-157 [discussing characteristics of neighborhood and depicting land uses].) Accordingly, the general plan's objective for the area is to

[6] Excerpts from the Chula Vista General Plan and Zoning Code were offered into evidence as Exhibits 619 and 620. For the Committee's and the parties' convenience, additional provisions cited herein are included with this brief as Attachment A.

enhance the Main Street business district while achieving a balance between the community's economic needs and the need for "a strong open space connection with the nearby neighborhoods." (*Id.* at p. LUT-158 [Objective LUT 45].) In furtherance of this objective, Policy LUT 45.5 requires a specific plan and implementation program for the area, and 45.6 requires the City to "[m]aintain Main Street primarily as a limited industrial corridor." (*Id.* at pp. LUT-158 to LUT-159.)

Staff concludes that this Project will "help maintain the character of Main Street as an industrial corridor." (Ex. 200 at p. 4.5-15.) This overlooks one crucial point: that the general plan envisions maintaining Main Street as a *limited* industrial corridor. As previously discussed, the general plan classifies "public utilities" as a *general* (or heavy) industrial use—a classification carried forward into the city's zoning ordinance. The general plan does not lump all industrial uses together, nor does it suggest that any and all industrial uses would be appropriate in areas designated for "limited" industrial uses. By omitting the term "limited" from its discussion of industrial uses, Staff once again fails to consider what the general plan actually says.

B. The Project Violates Applicable Provisions of the Zoning Ordinance.

Interpretation of a zoning ordinance presents a question of law. (*Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928.) An agency's interpretation of its own zoning code, although entitled to some deference, is not binding and must be rejected if clearly erroneous or in conflict with the plain language. (*Id.* at 928, 930.)

As shown below, the Project is inconsistent with applicable zoning. Because the City has not clearly and specifically analyzed zoning compliance for the Project, no deference can be accorded. Moreover, the opinions expressed by witnesses for the Applicant and Staff on zoning consistency are of questionable relevance and contrary to law. Accordingly, the Commission must, as a matter of law, find that the Project does not comply with the City's zoning code.

1. The Project Is Inconsistent with the Site's Limited Industrial Zoning.

The zoning designation applicable to the power plant site is I-LP, or "Limited Industrial Precise Plan." (Ex. 1 at Fig. 5.6-3; Ex. 200 at p. 4.5-5.) The purposes of the I-L zone include the following: (1) to "encourage sound limited industrial development by providing and protecting an environment free from nuisances created by some industrial uses," (2) to ensure "the purity of the total environment of Chula Vista and San Diego County," and (3) to "protect nearby residential, commercial and industrial uses from any hazards or nuisances." (Ex. 620 at p. 19-98 [CVMC § 19.44.010].)

A peaker plant is not listed as a permitted or conditional use in the I-L zone. (*Id.* at pp. 19-98 to 19-99 [CVMC §§ 19.44.020, 19.44.040].) Rather, the City's zoning code specifies that "Electrical generating plants" are permitted in the "General Industrial" or "I" zone. (*Id.* at p. 19-101 [CVMC § 19.46.020(E)].) Read together with the City's general plan, which confines "public utility" uses to the general industrial land use designation, the zoning code clearly provides that power plants are a general industrial use, not a limited industrial use.

Staff dismisses the general industrial provisions of the zoning code as "irrelevant." (Ex. 200 at p. 4.5-38.) This is legally incorrect. Zoning ordinances must be interpreted according to the same rules governing construction of statutes. (See *Flavell v. City of Albany* (1993) 19 Cal.App.4th 1846, 1851.) Such statutory provisions "must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Douda v. Cal. Coastal Com.* (2008) 159 Cal.App.4th 1181, 1192.) Another familiar canon of statutory interpretation dictates that "[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) The express provision for electrical generating services in

the general industrial zone thus supports an inference that those uses are not allowed in a limited industrial zone. (See *Jones v. Robertson* (1947) 79 Cal.App.2d 813, 816 [provision permitting real estate offices in commercial zone supported implication that they were excluded from residential zone].) The general plan's land use designations, which identify "public utilities" as a general industrial use, further confirm this interpretation.

The City's offhand comment that that the Project might require a conditional use permit ("CUP") does not constitute a finding that the Project is consistent with applicable zoning. (See Ex. 621 at p. 2.) Indeed, the context of the City's comment suggests otherwise. First, the comment states that the City would require a CUP and other permits "if this project were being *considered* under the City's process." (*Id.* [emphasis added].) In "considering" the Project, of course, the City would have to determine in the first instance whether it would be consistent with applicable zoning, as well as whether it might adversely affect the general plan. (See CVMC § 19.14.080(C), (D).) One cannot assume that mere "consideration" of a CUP would automatically lead to a conclusion that the Project complies with existing zoning.[7] Second, the City's comment states that Staff correctly identified the Project as a "heavy" use not specifically allowed as either a permitted or conditional use in the limited industrial zone. (Ex. 621 at p. 2.) Once again, this illustrates that power plants belong in general industrial zones, where they are expressly permitted, rather than in limited industrial zones, where they are not.

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[7] At the evidentiary hearing, the City once again specifically declined to "go through [the] process" of determining whether the Project could qualify for a CUP under applicable zoning. (Tr. at p. 336:14-25.) As a result, the City has not performed any analysis to which the Commission might defer in weighing the Project's consistency with LORS. (See Siting Regs. § 1744(e).)

2. The Special Use Permit for the Existing Peaker Plant Does Not Make this Project Consistent with Applicable Zoning.

In finding the Project consistent with applicable zoning, both Staff and the Applicant rely heavily on a special use permit ("SUP") issued by the City's Redevelopment Agency for the existing plant. (See Ex. 1 at p. 5.6-16; Ex. 200 at p. 4.5-18.) For several reasons, this reliance is misplaced.

First, this Project does not merely continue the "same exact" type of land use, as Staff claims. Even Staff recognizes that the Project is an "intensification" of land use. (Ex. 200 at p. 4.5-18.) The degree of intensification is significant. The Project, frankly described in the AFC as a "new plant," would construct two new turbines with more than double the total generating capacity, two new 70-foot stacks, new emissions control equipment, and removal of all of the existing plant equipment save for the ammonia tank, fencing, retention basin, and gas, water, and electrical transmission connections—all in a location closer to nearby homes. (See Tr. at p. 318:3-23; see also Ex. 1 at p. 2-1, Figs. 2.1-1, 2.1-2.) This "new plant," not the existing plant, must be reviewed for consistency with applicable zoning requirements. Staff's contention that any and all power generating facilities, no matter what their size or characteristics, must be considered the same exact type of land use for zoning purposes (see Tr. at pp. 318:24-319:21) is simply not credible.[8]

Second, Staff incorrectly reads the City's approval of the SUP to mean that the City would view the Project to be "similar to the list of conditional uses permitted within the Limited Industrial zone." (Ex. 200 at p. 4.5-18.) As the Commission recently concluded in another proceeding, a city's prior approval of a power plant in a zone that does not specifically allow power plants "is not precedential," and new projects must be evaluated for consistency with LORS on a case-by-case basis.

[8] Staff's response to comments on the PSA fails to recognize that Such an interpretation is manifestly absurd and directly counter to law.

(Commission Decision, *Eastshore Energy Center*, Publication No. CEC-800-2008-004-CMF, Docket No. 006-AFC-6 (Oct. 2008) (hereafter "*Eastshore*"), at pp. 336-37.) This basic principle was articulated more than a century ago in *Laurel Hill Cemetery v. City and County of San Francisco* (1907) 152 Cal. 464. In that seminal case, the California Supreme Court held that a city's prior approval of a particular land use in a particular location cannot be construed as a promise that the same kind of land use may continue to expand and intensify in the future. (See *id.* at pp. 475-76.) Yet this is exactly how Staff would read the SUP for the existing plant: as an indication that because the City once approved an SUP, its zoning code must always and forever be interpreted to allow expanded power generation on the same site. Staff apparently presumes that the City relinquishes its police power with respect to future "intensification" of land use each and every time it approves a use permit. This is exactly what *Laurel Hill* says the City may *not* do. (*Id.*)

Third, both Staff and the Applicant repeatedly confuse the categories of "permitted" and "conditional" uses allowed in the I-L district by asserting that uses "similar" to listed conditional uses may be approved. (See, e.g., Ex. 1 at p. 5.6-16; Ex. 200 at p. 4.5-18; Tr. at p. 287:10-25.) Section 19.44.020 of the code, listing "permitted" uses in the limited industrial zone, includes "[a]ny other limited manufactured use which is determined by the commission to be of the same general character" as other permitted uses. (Ex. 620 at p. 19-99 [CVMC § 19.44.020(P)].) The "list of conditional uses" set forth in section 19.44.040 of the code, by contrast, contains no such catch-all category for uses of the "same general character," as the Applicant's witness conceded at the evidentiary hearing. (Tr. at p. 309:8-16.) The fact that the list of permitted uses includes a catch-all category makes clear that such a category cannot be read into the list of conditional uses. Indeed, accepted principles of statutory construction counsel that where an exception is specifically granted, additional exceptions should not be implied, absent clear legislative intent to the contrary. (See, e.g., *Simmons v. Ghaderi* (2008) 44

Cal.4th 570, 583.) No such intent is ascertainable on the face of the zoning code, and Staff identifies none.

Staff and the Applicant are thus incorrect that the Project's purported similarity to other conditional uses makes it consistent with the zoning code. The Commission must follow the actual text of the zoning code, not just "sort of look[] at all the documents in their entirety." (Tr. at p. 327:17-19.) Under the zoning code's actual text, the Project is not conditionally allowable.

Finally, and most critically, Staff's reliance on the SUP ignores the fact that the general plan—the document that controls all subsidiary land use decisions—changed fundamentally in the years since the SUP was granted. The City's Redevelopment Agency is no longer responsible for issuing SUPs. (Ex. 621 at p. 2.) The Montgomery Specific Plan—the portion of the general plan under which the SUP originally was approved—was deleted as part of the 2005 general plan update. (Ex. 622 at p. 5 [Advanced Planning Section Comments at p. 3].) That same general plan update also led to the adoption of environmental justice and public health policies, including Policy E 6.4, with which this Project would fatally conflict, even if it were consistent with applicable zoning. As the Commission has correctly recognized, the general plan represents a city's "predominant land use policy." (*Eastshore* at p. 337.) The SUP therefore should be given no weight in determining whether this Project is consistent with LORS.

3. The City Could Not Conditionally Permit the Project as an "Unclassified" Use.

At the hearing, witnesses for the Applicant and Staff were asked whether the Project could be permitted as an "unclassified" use under section 19.44.040(J) of the City's zoning code. Contrary to these witnesses' off-the-cuff testimony, "unclassified" uses are very specifically defined in the City's zoning code—and power plants are not among them.

As a threshold matter, the witnesses' testimony concerning the definition of an "unclassified" use was not credible. Both witnesses stated that they had not previously reviewed, and were not familiar with, this provision. (See Tr. at pp. 310:15-311:2 [Applicant's witness]; 327:15-25, 328:3-10 [Staff's witness].) Yet both witnesses then testified that "unclassified uses" allow the City broad discretion to approve various unspecified uses that it might deem appropriate. (Tr. at pp. 312:7-12 [Applicant's witness characterizing "unclassified uses" as things the City did not think about in writing its zoning code]; 327:10-14 [same general assertion from Staff's witness].) This testimony, given without any knowledge of the code, is without foundation.

In fact, this testimony *contradicts* the code. "Unclassified" uses do not comprise a purely discretionary catch-all category. Rather, like other uses, they are defined in a detailed and specific list. (See CVMC § 19.54.020.) The stated purpose of the "unclassified uses" chapter is to classify particular uses "possessing characteristics of such unique and special form as to make impractical their being included automatically in any classes of use as set forth in the various zones herein defined." (CVMC § 19.54.010(A).) The point of identifying "unclassified" uses, therefore, is to ensure that a small and specific group of activities that may not fit easily within any established zone can nonetheless be conditionally approved where appropriate. (See CVMC § 19.54.010(A), (B).) Electrical generating plants, in contrast, *are* included automatically in the classes of use expressly permitted in the general industrial zone. (Ex. 620 at p. 19-101 [CVMC § 19.46.020(E)].) Therefore, by the terms of the code itself, a power plant is not considered an unclassified use.

After quickly reviewing the zoning code during the hearing, the Applicant's witness pointed out that unclassified uses include "public/quasi-public" uses. (Tr. at p. 333:23-24 [citing CVMC § 19.54.020(M)].) The code does not define "public use." "Quasi-public use" means "used as or seemingly public," and the definition specifically includes electrical substations. (CVMC §

19.04.190.) It does not, however, include power plants, as the Applicant's witness conceded. (Tr. at p. 334:17-23.) Peaking power plants and electrical substations are entirely dissimilar, with different purposes and impacts. The Applicant—which has the burden of proof (Siting Regs. § 1748(d))—has presented no evidence to the contrary. The City's zoning code specifically provides that power plants belong in only the general industrial zone. Accordingly, the Commission cannot resolve the LORS inconsistency by characterizing the Project as an unclassified use.

4. The Applicant's Discussion of Unrelated Projects in Other Jurisdictions Is Irrelevant and Misleading.

The Applicant's conclusory, misleading Exhibit 24—a chart purporting to show that similar peaker plants had been approved in "equivalent" zoning districts in other jurisdictions—has no bearing on this Project's consistency with LORS. The chart and any argument based on it are legally irrelevant; the provisions of other jurisdictions' zoning codes, and decisions reached regarding whether different projects complied with those zoning codes, have no bearing upon *this* Project's consistency with the specific terms of the City's zoning code. In addition, many of the assertions made in the chart regarding the "equivalency" of other jurisdictions' zoning districts are demonstrably incorrect. The Applicant's witness conceded at the hearing that seven of the 12 zoning districts discussed in Exhibit 24 expressly allowed power plants either as permitted or conditional uses. (Tr. at p. 299:8-23.) These districts, therefore, are not at all "equivalent" to the City's limited industrial zone, but rather differ in perhaps the most critical possible respect. Exhibit 24's conclusions regarding the "equivalency" of the other zoning districts and other power plants are unsupported by any analysis or documentation. Exhibit 24 is legally irrelevant, factually unsupported, and in fundamentally misleading. It should be given no weight here.

5. The City's Agreement with the Applicant Cannot Make the Project Consistent with the Zoning Code.

Staff appears to suggest that the City's off-line, back-door agreement with the Applicant supports a determination that the Project complies with applicable zoning. (See Ex. 200 at p. 4.5-18 [citing agreement as "Basis for Consistency" with zoning].) The suggestion has no support in the record. Nothing in the City's letter confirming the agreement even mentions zoning, much less indicates that the agreement somehow renders the Project consistent with zoning. (Ex. 803 [City's August 7, 2008 letter] at p. 1.) As previously discussed, moreover, the City has no authority to adopt an agreement that would lead to a violation of its own zoning ordinance. (*League of Residential Neighborhood Advocates*, *supra*, 498 F.3d at pp. 1055-56.) The agreement has no bearing upon the Project's zoning inconsistencies.

6. Approval of *Any* Project in the I-LP Zone Requires Preparation of a Precise Plan.

The text of the City's zoning code is both clear and mandatory: once the "precise plan" modifier has been applied to a zoning district, developments within that district cannot be approved unless and until a precise plan is prepared. No precise plan exists for the portion of the district where this Project would be located. Therefore, approval of the Project would contravene this plain requirement.

The precise plan requirement is not imposed on a project-by-project basis. Rather, "[t]he city council may require that a precise plan be submitted for the development of the property *by attaching the P precise plan modifying district to the underlying zone*." (CVMC § 19.12.120(B) [emphasis added]; cf. *id.* at §§ 19.56.040-19.56.048 [establishing standards for precise plans].) It is the legislative act of attaching the modifying district to the underlying zone that imposes the precise plan requirement. The City Council has taken that legislative action here by adding the precise plan

modifier to the district in which the Project is proposed. Both the Applicant and Staff have conceded that the precise plan designation applies to the property. (Ex. 1 at Fig. 5.6-3 [showing project site within "Limited Industrial-Precise Plan" district]; Ex. 200 at p. 4.5-5 ["The entire CVEUP site is zoned 'ILP, Limited Industrial Precise Plan' . . . ."].)

The City's zoning code requires that a precise plan be prepared before any project can go forward in a precise plan district. "Where use is made of the precise plan procedure, as provided in this title, a zoning permit *shall not be issued* for such development or part thereof *until* the planning commission and city council have approved a precise plan for said development . . . ." (CVMC § 19.14.570.) A zoning permit is required for "any new or changed use of any land or building," and is a precondition to issuance of a building permit. (CVMC § 19.14.500.) The Project simply cannot be approved or built in accordance with the City's zoning code unless and until a precise plan is prepared.

Staff misunderstands the effect of these provisions. Noting the City's comment that the proposed Project site "[does] not include a precise plan," Staff concludes that "the Precise Plan modifier designation is not deemed applicable to the proposed project." (Ex. 200 at 4.5-49; see Ex. 621 at p. 2 [City commenting that "[t]o the best of our knowledge, the original project did not include a Precise Plan."].) Under the plain text of the zoning code, however, the *opposite* is true. The fact that no precise plan has been prepared does not mean that the requirement is inapplicable. It means that the Project cannot be approved until a precise plan is prepared. Until one is prepared and approved by the City, the Project cannot be found consistent with the zoning code.

7. Proposed Construction/Laydown Area Uses Are Inconsistent with Applicable Zoning.

The construction laydown/parking area for the project is incompatible with applicable zoning. This area is zoned A70, or "Agricultural/County." (Ex. 1, Fig. 5.6-3; Ex. 200 at p. 4.5-5.) Staff concludes that construction laydown and worker parking are consistent with this zoning district

because parking and equipment storage are listed as allowed "accessory" uses in this zone. (Ex. 200 at p. 4.5-20 [citing CVMC § 19.20.030].) The City's code defines "accessory" uses as those "customarily incidental" to the uses *permitted* in the Agricultural zone. (Ex. 620 at p. 19-60 [CVMC § 19.20.030].) Staff's reasoning fails, therefore, because construction of a peaking power plant is not a permitted use in the Agricultural zone. (See *id.* [CVMC §§ 19.20.020, 19.20.040].) Staff's alternate theory—that the construction/laydown use is temporary, and therefore consistent with applicable zoning requirements (see Ex. 200 at pp. 4.5-20, 4.5-45)—similarly has no basis in the text of the zoning code. Staff's conclusory assertions that the use is consistent do not make it so.

C. Condition LAND-1 Cannot Make the Project Consistent with the General Plan and Zoning Code.

As EHC pointed out in its comments on the PSA, condition LAND-1 cannot resolve the Project's multiple inconsistencies with the City's general plan and zoning code. First and foremost, the condition by its terms speaks only to compliance with the zoning code, and does not address general plan consistency. The City itself has pointed out that LAND-1 cannot resolve the Project's apparent inconsistency with Policy E 6.4. (Ex. 622 at 5 [Advanced Planning Section Comments at p. 1].) Nor can this condition, which essentially requires the Applicant to go through an advisory version of the City's CUP process after the Project is approved (see Ex. 200 at p. 4.5-56), ameliorate the Project's incompatibility with applicable zoning provisions. A CUP by its nature requires a finding of compliance with all "regulations and conditions" of the zoning code *before* it can be approved. (CVMC § 19.14.080(C).) In any event, the City could not use its CUP process to create an *ad hoc* exception from zoning requirements that benefits only one particular parcel of land within the district. (See *Neighbors in Support of Appropriate Land Use v. County of Tuolomne* (2007) 157 Cal.App.4th 997, 1009.) An advisory CUP process, conducted after the Project is already approved, cannot ensure general plan and zoning compliance.

Indeed, LAND-1 puts the cart squarely before the horse. The proposed condition makes the "project owner," rather than the Commission, responsible for "ensur[ing] that the project and its associated facilities are constructed and operated in compliance with the City of Chula Vista's Limited Industrial (I-L) Zone requirements . . . and other applicable municipal code requirements." (Ex. 200 at p. 4.5-56.) Ensuring that the Project is consistent with LORS, however, is the responsibility of the *Commission*, not the Applicant. (See §§ 25500, 25523(d); Siting Regs. §§ 1744, 1748(c), 1752(a)(3).) Moreover, by requiring preparation of a development plan that "include[s] all elements normally required for review and permitting of a similar project" only after approval, the condition also potentially defers a final determination of zoning consistency until after the Project is certified. (Ex. 200 at p. 4.5-56.) This violates statutory and regulatory provisions requiring the Commission to make specific findings regarding a proposed project's compliance with LORS *before* approval. (See §§ 25523(d), 25525; Siting Regs. § 1752(k).) The proposed condition thus not only fails to resolve the Project's multiple conflicts with local law, but also threatens to undermine compliance with the procedures set forth in the Warren-Alquist Act.

D. Staff's Alternative Site "C" Would Enable the Project to Comply with the General Plan and Zoning Ordinance.

The Project's non-compliance with the City's general plan and zoning code could be eliminated by locating the plant at the Otay Landfill (Staff's Alternative C). According to Staff's testimony, there is sufficient land available to locate two LM6000 turbines and associated equipment adjacent to the existing methane generators on the site. (Ex. 200 at p. 6-9.) The existing site is designated General Industrial on the City's zoning maps. (*Id.*; Tr. at p. 356:1-25.) Staff further testified that a peaker plant at this site would not require a conditional use permit. (Ex. 200 at p. 6-9; Tr. at p. 357:4-6.) This testimony suggests that the City's general industrial zoning designation, which allows electrical generating facilities as a permitted use, applies to this site. (Ex. 620 at p. 19-101

[CVMC § 19.46.020(E)].) Accordingly, it appears that Staff Alternative C would eliminate the Project's inconsistencies with the city's zoning code.

This alternative site also would eliminate the Project's conflicts with the general plan. Lands designated for General Industrial uses are appropriate sites for power plants. Alternative C also would be located about 2,000 feet from the nearest residence and approximately one mile from the nearest school; accordingly, there would be no conflict with Policy E 6.4. (Ex. 200 at p. 6-9.) In addition, Staff's Alternative C would be more consistent with Policies E 6.15 and E 23.3, both of which aim to protect public health by siting polluting facilities away from homes and schools. Finally, Alternative C would not compromise the City's vision for a *limited* industrial corridor along Main Street. On the whole—and unlike the Project—it would be reasonable on this record to find Alternative C consistent with the general plan.

Moreover, it appears from the record that Staff's Alternative C is feasible. CEQA defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (§ 21061.1.) A finding of infeasibility must be supported by substantial evidence. (*County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 100.) Evidence of infeasibility, moreover, must consist of "facts, independent analysis," and "meaningful detail," not mere assertions of an interested party. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356-57.) The mere fact that an alternative might be less profitable also does not render it infeasible, absent specific evidence that the reduced profitability actually makes proceeding with the project impractical. (*Id.* at p. 1357.) Nor does a project proponent's unwillingness to accept an otherwise feasible alternative render it infeasible. (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 601.)

Staff's main concern with Alternative C appears to be that although it would avoid noise, land use, and visual impacts associated with the Project, other environmental impacts could result from construction of linear facilities. (See Ex. 200 at pp. 6-9, 6-28.) However, the FSA does not provide any specific analysis to support its conclusions regarding the comparative impacts of the alternatives; indeed, Staff conceded that its conclusions regarding the alternative site's air quality impacts were not supported by any modeling. (Tr. at 358:18-359:8.) Staff's conclusory assertions regarding Alternative C's impacts—assertions not supported by specific facts and analysis in any meaningful detail—are insufficient to support a finding that the alternative is infeasible. (See *Preservation Action Council*, *supra*, 141 Cal.App.4th at pp. 1356-57.) Moreover, neither Staff nor the Applicant has provided any specific economic analysis demonstrating that the increased cost of constructing linear facilities at the alternative site would so dramatically affect profitability as to render the Project impractical. A mere assertion that Staff's Alternative C might be more expensive or less profitable does not constitute substantial evidence to support a finding of infeasibility. (*Uphold Our Heritage*, *supra*, 147 Cal.App.4th at p. 599.) On this record, Staff's Alternative C cannot be found infeasible.

Indeed, it is not even clear from the record that the marginal cost of the linear facilities would even be substantial, much less render the Project impractical. Staff concludes that a new three-mile transmission line from the site to the Otay Substation would be necessary. (Ex. 200 at p. 6-9.) In a response to a data request from EHC seeking information about existing transmission infrastructure for the landfill area, however, the Applicant confirmed that the Otay to Otay Lake Tap "high voltage transmission line" (TL649A) passes through eastern Chula Vista. (Ex. 7 at p. 9.) The Applicant notes that the Interconnection System Impact Study for the CVEUP identified potential overloads to this line. (*Id.*) CalISO's subsequent Interconnection Facilities Study ("IFS") concluded that either reconductoring or a special protection scheme would be needed to address these overloads. (See Ex.

11, IFS at p. 17.) The Applicant discussed this conclusion with CalISO and SDG&E, and "clarified with these agencies that *both options (reconductoring and SPS) are feasible*." (*Id.*, CH2M Hill Letter (March 27, 2008) at p. 1 [emphasis added].) The IFS estimated the cost of reconductoring TL649A—a cost deemed "feasible" by the Applicant—at $2.669 million. (*Id.*, IFS at p. 5.) The mere fact that a System Impact Study would be required for Staff's Alternative C does not render the alternative infeasible; like the study conducted for this Project, such a study could instead identify feasible upgrades necessary to render the alternative deliverable at least partly along existing transmission lines.[9]

Staff's Alternative C would avoid multiple conflicts with the City's general plan and zoning code, as well as significant environmental impacts to neighboring residences. On the record before it, moreover, the Commission cannot find that Alternative C is infeasible.

E. The Commission Cannot "Override" the Project's Noncompliance with Local LORS.

"[T]he Commission has consistently regarded a LORS override [as] an extraordinary measure which . . . must be done in as limited a manner as possible." (*Eastshore*, at p. 453 [quotation omitted].) In order to approve a project that conflicts with LORS, the Commission must make two independent findings: (1) that public convenience and necessity require the project, and (2) that there are not more prudent and feasible means of achieving public convenience and necessity. (§ 25525; Siting Regs. §§ 1752(k), 1755(b).) Neither finding can be made on the record here.

1. Public Convenience and Necessity Do Not Require the Project.

The Applicant has not met its burden of presenting substantial evidence to support a finding that public convenience and necessity require this project. (See Siting Regs. § 1748(d).) The phrase

[9] Even if a brand-new three-mile transmission line were required, according to the Applicant's own testimony it would not cost much more than the reconductoring that the Applicant already found feasible. (See Tr. at p. 355:5-9 [estimating transmission line construction cost at $1 million per mile].)

"public convenience and necessity," depending on the facts presented, can mean anything from "indispensable" to "highly important" to "needful, requisite, or conducive." (*San Diego & Coronado Ferry Co. v. Railroad Com. of California* (1930) 210 Cal. 504, 511-12.) A more recent decision defines the phrase as meaning "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment, that which is enjoyed by others similarly situated." (*Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, 557-58.) In *Eastshore*, the Commission stated that its practice is to balance the benefits of each project against the public purposes of the LORS with which it conflicts. (See *Eastshore* at p. 455.) Under any of these tests, public convenience and necessity do not require this Project, and as a result it cannot be certified.

The Project will provide at best only modest benefits. The Project will increase overall generating capacity by 49 MW (Tr. at p. 234:8-20)—approximately one-tenth of one percent of CalISO's 1-in-2 forecast demand for summer 2008 statewide (48,900 MW), and less than two-tenths of one percent of forecast demand south of Path 26 (28,331 MW). (Ex. 617E at p. 17.) During the hottest summer days—when electricity demand is at is peak—the Project will produce significantly less power. (Tr. at pp. 403:4-404:1 [clarifying that turbine output drops to 36 MW at 100 degrees Fahrenheit].) This is substantially less generation benefit than the Commission found "modest at best" in *Eastshore*. (*Eastshore* at p. 453.) Nor is the Project essential to meet future demand for peak power. As explained in the testimony of Bill Powers, investor-owned utility compliance with California Public Utilities Commission ("CPUC") decision D.07-10-032 "will result in no increase in peak demand over time, and a marked decrease in energy demand." (Ex. 616 at p. 4.) The demand forecasts used by Staff failed to take this decision into account, and thus overstated the need for the Project. (See *id.* at pp. 1-4.) Furthermore, although the Project may be incrementally more efficient

per megawatt-hour than the existing plant, there is no evidence that the existing plant—built less than a decade ago—is so obsolete as to render necessary its replacement with a larger facility that will run more often.[10] Indeed, the Project will result in a net increase in criteria air pollutant concentrations, and a dramatic increase in greenhouse gas emissions, as compared to the existing plant. (Ex. 200 at pp. 4.1-34, 4.1-53 to 4.1-54.)

Staff and the Applicant have suggested that the Project will aid in retiring the South Bay Power Plant, which is currently running under a reliability-must run ("RMR") contract with CalISO. (See, e.g., Ex. 200 at p. 6-15.) As much as EHC would like to see the RMR designation removed and South Bay retired, this Project does not substantially advance that goal. According to CalISO's testimony at the hearing, removal of the RMR contract could require not only replacement of South Bay's entire 690 MW baseload capacity, but also approval of the Sunrise Powerlink, additional peaking power plants, additional plants with black start capability, and perhaps even a new plant with dual fuel capability. (See Tr. at pp. 232:2-233:3, 237:13-238:12.) CalISO's witness also clarified that although additional peaking capacity would make some incremental contribution toward removal of the RMR contract, there is no reason why that capacity must be added at the location of an existing plant; indeed, the same benefit could be achieved by a project located anywhere in the San Diego area. (See Tr. at pp. 244:20-245:8.) Accordingly, any incremental contribution to removal of, or even decreased reliance on, the South Bay Power Plant would not be specific to this particular Project. The same benefit could be achieved with a more appropriately sited alternative project.

The Project's vanishingly modest benefits cannot outweigh the benefits of the local policies and ordinances with which the Project conflicts. The City's basic general plan land use designations

[10] We note that Staff specifically compared the Project's efficiency and emissions to those of the South Bay Power Plant rather than the existing plant. (See Ex. 200 at pp. 6-14 to 6-15.) As discussed below, certification of this Project alone will not lead to closure of the South Bay Power Plant.

and zoning districts, which expressly categorize public utilities and power plants as general industrial uses, secure the benefit of orderly, planned, and appropriate development to the City and its residents. The City's specific vision for the Main Street corridor envisions limited industrial development that is sensitive to both residences and open space areas nearby. This Project would frustrate, rather than further, attainment of those goals and the public benefits they provide. The City's adoption of Policy E 6.4, moreover, represents a strong precautionary approach to public health. This approach is intended to directly benefit residents, like those in southwest Chula Vista, already living with poor air quality and severe respiratory illnesses commonly linked to air pollution. This Project would at best maintain current levels of pollution—and given the unenforceability and inadequacy of proposed air quality mitigation measures, as described below, is far more likely to make things worse. Finally, the Project would add yet another heavy industrial facility to an area already suffering disproportionate environmental burdens, undermining the general plan's explicit purpose, set forth in Objective 23 and Policy E 23.3, of distributing environmental burdens fairly.

Even when viewed most generously, the Project's incremental benefits do not even compare to, much less outweigh, the substantial public benefits conferred by the policies, programs, and standards that the Project would violate. Under the approach described in *Eastshore*, therefore, public convenience and necessity do not require this Project. Nor would denial of the Project deprive the people of the community, to their detriment, of benefits that others enjoy. (See *Luxor Cab*, supra, 21 Cal.App.3d at pp. 557-58.) Quite to the contrary, approval of the Project would saddle the community with additional burdens that others similarly situated will not have to bear.

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2. There Are More Prudent and Feasible Means of Achieving Public Convenience and Necessity.

Even if the Commission were to find that public convenience and necessity require a way to address peak electricity demand in the San Diego region, there would still be more prudent and feasible means of achieving that goal. This precludes an "override" of LORS for the Project.

Staff's Alternative C, for example, would provide exactly the same amount and kind of peaking power generation as the Project, without violating the City's general plan and zoning code. Alternative C would avoid impacts to neighboring residences and schools, avoid potential exacerbation of existing public health problems in southwest Chula Vista, avoid locating a new heavy industrial facility in a predominantly minority neighborhood, and better fit the City's vision for general industrial development of the Otay Landfill area. All of these characteristics indicate that Staff's Alternative C is a "more prudent" location for a peaker plant. Furthermore, neither the Applicant nor Staff has shown that Alternative C is infeasible, either due to increased costs or other environmental impacts.

Moreover, as detailed in the testimony of Bill Powers, there are a number of potentially feasible strategies that could achieve public convenience and necessity by reducing demand and/or providing additional generation from alternative sources. For example, as previously discussed, compliance with CPUC decision D.07-10-032 will flatten demand for new peaking generation over the next several years. (See Ex. 616 at pp. 3-4 [Figs. 1 and 2].) Conservation measures addressing air conditioning—the "dominant contributor to peak power demand" on hot summer days (*id.* at p. 6)—also could reduce the need for additional peaking generation. Implementation of a central air conditioning upgrade protocol by SDG&E, providing incentives to replace air conditioners with state-of-the-art units, could reduce peak demand by more than 400 MW by 2016 in SDG&E's service territory. (*Id.* at p. 6.) Increased participation in SDG&E's air conditioner cycling program, in

combination with advanced metering techniques currently being implemented in the utility's service territory, could "reduce instantaneous MW load during critical demand periods by 100s of MW" without affecting residents' comfort.[11] (*Id.* at p. 7.) Even a program to correct improper air conditioner installations could reduce air conditioning load by 20-30%—a potential savings of 300-450 MW in SDG&E's service territory. (*Id.* at p. 8.) These examples show that public convenience and necessity can be achieved more effectively by reducing peak demand than by building more peaker plants.

Renewable generation alternatives and distributed generation applications (such as combined heat and power) also can provide needed power and reliability. A distributed rooftop and parking lot solar PV project on land owned by the City and available rooftop space in the Otay Mesa warehouse area, modeled on Southern California Edison's proposed 250 MW urban solar project, could generate 50-100 MW. (Ex. 616 at p. 12.) Using the Commission's own cost estimates for different generation technologies, moreover, and taking into account different capacity factors, the cost of thin-film PV generation compares well to that of a simple-cycle peaking gas turbine like the Project. (See *id.* at pp. 13-14.) Addition of limited energy storage to such a PV program would provide reliable power throughout the peak demand period on hot summer days. (*Id.* at pp. 14-15.) Distributed combined heat and power projects also could help reduce overall load during peak demand periods. (See *id.* at pp. 15-16.) Alone or in combination, these alternative and distributed generation strategies could achieve public convenience and necessity.

Demand reduction, conservation, and alternative generation strategies are more prudent than additional gas-fired generation. According to California's Energy Action Plan, energy efficiency,

[11] Advanced meters containing smart thermostats, although not currently being installed in the service area, are potentially feasible and would result in even greater demand reductions. (See Ex. 616 at pp. 7-8; see also Ex. 617J.)

demand response, renewable sources of power, and distributed generation (including combined heat and power) all precede conventional utility-scale fossil-fired generation in the loading order. (See Ex. 617C at p. 12.) Indeed, only where the strategies higher in the loading order are insufficient will utility-scale fossil-fired generation be supportable. (*Id.*) Most of the alternative proposals described above *alone* would be more than sufficient to address whatever public convenience and necessity this Project might achieve. These alternatives also could be combined for even greater effect. (Tr. at p. 402:15-22 [describing combination of strategies as "ideal"].)

These strategies also are more prudent in terms of meeting California's greenhouse gas emissions reduction mandates. Achieving a 20% renewable portfolio standard would reduce greenhouse gas emissions from the electricity sector in the San Diego area by 2.0 MMT CO_2e, and reducing electricity consumption by 10% would result in an additional 1.0 MMT CO_2e reduction. (Ex. 617H at p. 7.) Together these strategies account for 68% of the reductions necessary to achieve AB 32's goals for electricity. (*Id.*) In contrast, cleaner electricity purchases—from sources emitting less than 1,100 pounds CO_2e per MWh—account for only 15% of the AB 32 goal. (*Id.*) This Project, which according to Staff will emit more than 1,200 pounds CO_2e per MWh, does not even qualify as "cleaner electricity." (Ex. 200 at p. 4.1-53 [estimating Project emissions at .546 metric tonnes CO_2e/MWh; one metric tonne equals 2,204.6 pounds].) It is no longer "prudent" in any respect to permit projects that impede rather than advance achievement of California's greenhouse gas emissions reduction targets.

Finally, there has been no showing that the various alternatives discussed in Mr. Powers' testimony, either individually or collectively, are infeasible. Indeed, the evidence in the record demonstrates otherwise. For example, the Sacramento Municipal Utility District, a utility of comparable size to SDG&E, has achieved nearly 40% consumer participation in its air conditioner

cycling program. (Ex. 616 at p. 8.) Moreover, Southern California Edison is actively pursuing a large-scale distributed urban solar PV generation project using commercial warehouse rooftops.[12] (*Id.* at p. 11.) There are already a number of combined heat and power sites in SDG&E territory, and additional opportunities for development abound. (*Id.* at p. 16.) These technologies are not remote or speculative. They are being implemented now.

On this record, therefore, the Commission cannot make the findings required for an "override" of LORS under section 25525.

II. APPROVAL OF THE PROJECT WOULD VIOLATE THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

The Commission's power plant siting process is a certified regulatory program for purposes of CEQA. (See § 21080.5; CEQA Guidelines § 15251(j).) Although certification exempts the Commission from CEQA's environmental impact report requirement, the Commission still must comply with CEQA's substantive and procedural mandates. (§§ 21000, 21002; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 667-68.)

A. The CEQA "Baseline" Should Reflect Existing Physical Conditions.

The Commission's briefing order requested that the parties address the proper "baseline" for CEQA analysis. In general, the "environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." (CEQA Guidelines § 15125 (a).) Although determination of what constitutes existing physical conditions will vary with

[12] EHC notes that SDG&E also recently filed an application with the CPUC to install up to 77 MW of distributed PV throughout the load basin. (Application of San Diego Gas & Electric Company (U902-M) for Approval of the SDG&E Solar Energy Project, CPUC Docket No. A08-07-017 (July 11, 2008) at p. 3, available at http://docs.cpuc.ca.gov/efile/A/85265.pdf.) SDG&E has proposed partnering with landowners to use open areas and parking lots for installation of the solar panels (*id.* at p. 4), just as Mr. Powers suggests. (See Ex. 616 at p. 12.) The main docket page for this proceeding is at http://docs.cpuc.ca.gov/published/proceedings/A0807017.htm.

the facts of each case, the baseline should reflect the project's real-world physical setting—"real conditions on the ground"—rather than "hypothetical situations." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121, 125; see also *Woodward Park Homeowner's Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-09.) An agency must clearly and conspicuously identify the assumptions guiding its choice of a baseline, and must support that choice with substantial evidence. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278.)

Staff has not explicitly identified the baseline assumptions used in the FSA. For example, the FSA appears to use at least three different baselines for air quality impacts: (1) data regarding existing ambient air quality to determine the significance of operational emissions of criteria pollutants (Ex. 200 at p. 4.1-34 [Table 20]); (2) data regarding the total amount of pollutant emissions on a tons per year basis at the existing plant to calculate emissions for mitigation purposes (*Id.* at p. 4.1-26); and (3) data regarding the rate of greenhouse gas emissions on a metric tons per MWh basis at the existing plant to assess climate change impacts. (*Id.* at p. 4.1-54.) Yet the FSA never explains how each baseline was chosen, discusses why it might be appropriate, or offers support for the decision to use different baselines for different impacts. The document thus forces the Commission and the public to "sift through obscure minutiae" in the discussion of impacts "in order to ferret out the fundamental baseline assumptions" being used for analysis—a clear violation of CEQA. (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 659.) The FSA's failure to discuss its baseline assumptions effectively precludes any inquiry into whether the baselines used are appropriate. This falls far short of what the law requires.

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B. The FSA Fails to Disclose, Analyze, and Propose Mitigation for the Project's Impacts when Operating at the Permit Limit of 4,400 Hours Per Year.

The FSA sends conflicting signals to decision-makers and the public concerning the actual impacts of the Project as permitted, and thus fails as an informational document under CEQA.

CEQA requires a consistent, stable description of the Project's impacts. In *San Joaquin Raptor*, *supra*, the Court of Appeal held an Environmental Impact Report ("EIR") for a gravel quarry expansion proposal inadequate due to its conflicting assumptions concerning the actual impacts of the expansion. In that case, the quarry owner sought a permit to produce 550,000 tons per year of aggregate, but the EIR analyzed impacts and proposed mitigation based on the assumption that the quarry would actually produce less than half that amount. (See 149 Cal.App.4th at pp. 655-56.) Noting that this approach gave "conflicting signals to decisionmakers and the public about the nature and scope of the activity being proposed," the court held the EIR "insufficient as an informational document for purposes of CEQA, amounting to a prejudicial abuse of discretion." (*Id.* at pp. 655-56, 657.)

The FSA here suffers from the same problem. Both SDG&E and the San Diego Air Pollution Control District require that the Project be permitted to operate at a maximum level of 4,400 hours per year. (Ex. 200 at p. 4.1-68.) According to the Applicant, this level of operation represents "the worst-case potential emergency needs for a peaking power plant over an entire year." (Ex. 5 at p. 11.) Accordingly, the Project will be permitted to run for 4,400 hours per year. (Ex. 200 at p. 4.1-85 [APCD condition AQ-5].)

The FSA considers the air quality impacts of operation at this level and determines that those impacts are significant. (*Id.* at pp. 4.1-34 [PM10 and PM2.5], 4.1-37 [ozone].) Yet the FSA only proposes mitigation for a maximum of 1,200 hours per year (200 hours of startup operations and 1,000 hours of normal operations). (*Id.* at pp. 4.1-41, 4.1-80 to 4.1-82 [condition AQ-SC6].) Staff claims

that this is permissible because operation at 4,400 hours is unlikely to occur. (See *id.* at p. 4.1-69.) The public and decision-makers are thus left with a conundrum: although SDG&E and the SDAPCD require that the plant be permitted to run 4,400 hours per year in order to address what the Applicant admits are "worst case" emergency conditions, Staff's assessment insists that this "worst case" will never happen, and thus declines to provide any mitigation for the possibility. The result is the same as that condemned in *San Joaquin Raptor*: the FSA sends conflicting signals to decision-makers and the public, and thus fails as an informational document. (See *San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 657.) As discussed below, moreover, this inconsistent view of the Project results in a complete failure to provide mitigation for identified significant impacts. The FSA violates CEQA and cannot support certification of the Project.

C. The Project Will Cause Significant Adverse Impacts that Have Not Been Mitigated to a Less that Significant Level.

1. Air Quality

The FSA concludes that construction and operation of the Project will cause potentially significant air quality impacts by exacerbating existing violations of state standards for particulate matter (PM10 and PM2.5) and ozone. (See Ex. 200 at pp. 4.1-7 [Table 3, showing air basin non-attainment status], 4.1-19 [Table 10, showing background concentrations of criteria pollutants], 4.1-29 [describing construction impacts as significant], 4.1-34 [describing operational PM10 and PM2.5 impacts as significant], 4.1-37 [describing operational ozone impacts as significant].) The primary issue here, therefore, is whether the mitigation measures proposed in the FSA and conditions of approval are both feasible and adequate to reduce these impacts to a level of insignificance.

Under its certified regulatory program, the Commission must evaluate mitigation measures that could feasibly avoid the Project's significant impacts. (Siting Regs. § 1742.5(a); see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134-35.) Mitigation measures must be

made enforceable through conditions of approval or other legally binding instruments. (See § 21081.6(b); CEQA Guidelines § 15126.4(a)(2).) Conclusions regarding the effectiveness of mitigation measures must be supported by substantial evidence. (See, e.g., *Gray v. County of Madera* (Oct. 24, 2008) __ Cal.App.4th __, 2008 WL 4682664 at pp. *11-12.) The FSA fails to meet these requirements.

a. The FSA Provides No Mitigation for Operations Above 1,200 Hours Per Year.

The FSA provides no mechanism for mitigating any of the potential impacts of operations exceeding 1,200 hours per year. For operational emissions, the FSA relies on a one-time mitigation fee payment based on the total amount of certain pollutants that could be emitted annually during 1,000 hours of normal operations and 200 hours of startup operations. (See Ex. 200 at pp. 4.1-41, 4.1-80; see also Tr. at p. 74:1-7.) At the hearing, Staff confirmed that nothing in proposed condition AQ-SC6 requires the Applicant to mitigate emissions resulting from operations exceeding 1,200 hours per year.[13] (Tr. at p. 73:21-74:1.) Therefore, although the FSA identified the impacts of such operations as significant, it does not identify any mitigation measures to address these impacts, as CEQA requires.

b. There Is Insufficient Evidence to Conclude that Condition AQ-SC6 Will Provide Effective Mitigation.

The FSA proposes to mitigate the Project's significant air quality impacts primarily by requiring payment of a one-time mitigation fee. (Ex. 200 at pp. 4.1-80 to 4.1-82 [condition AQ-SC6].) Staff's conclusion that this payment will reduce the project's impacts to a less than significant level (*id.* at p. 4.1-40), lacks both evidentiary and legal support.

[13] Staff's testimony is consistent with the text of condition AQ-SC6 (see Ex. 200 at pp. 4.1-80 to 4.1-82), but directly contradicts assertions made by the Applicant's witness that each and every hour of operation will be mitigated. (See Tr. at pp. 53:23-54:11, 56:17-22.) There is nothing in condition AQ-SC6, or elsewhere in the record, to support these assertions.

CEQA requires a lead agency to "ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.) Accordingly, fee-based mitigation measures must be based on a reasonable plan of actual mitigation that the lead agency commits itself to implementing. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188-89.) An agreement to fund mitigation is inadequate absent analysis showing that the mitigation actually will occur. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-28.)

Condition AQ-SC6 provides three mitigation alternatives. First, it requires the Applicant to "fund emission reductions through the Carl Moyer Fund" in the amount of $16,000 for each ton of NOx, PM10, SOx, and VOC that would be emitted by the Project over the course of one year (assuming 1,200 hours of operation). (Ex. 200 at pp. 4.1-81 to 4.1-82.) This payment, plus a 20% administration fee, would be used to "find and fund local emission projects to the extent feasible." (*Id.* at p. 4.1-82.) Second, the Project owner "can fund other existing public agency regulated stationary or mobile source emission reduction programs," or some other "project specific fund" administered by a public agency, to "provide surplus emission reductions." (*Id.*) Third, if "local emission reduction projects" are clearly demonstrated to be unavailable, the Project owner can purchase emission reduction credit ("ERC") certificates from the SDAPCD. (*Id.*) The Project owner must "work with the appropriate agencies to target emission reduction projects in the project area to the extent feasible." (*Id.*)

Condition AQ-SC6 falls short of legal requirements in several ways. First and foremost, the Carl Moyer Fund cannot be used to offset the emissions reduction obligations of any entity. (Health & Saf. Code § 44281(b) ["No emission reduction generated by the program shall be used . . . to offset

any emission reduction obligation of any person or entity"]; Ex. 618 at p. II-1.) The Applicant's witness conceded at the hearing that mitigation requirements are emission reduction obligations, under both CEQA and the Commission's procedures. (See Tr. at p. 59:2-15.) Although this witness clarified that the Applicant intends to use the Carl Moyer program as a pass-through mechanism for mitigation funding, rather than a source of public funds for emissions reduction (see Tr. at p. 63:17-66:4), such a use still conflicts with the express provisions of the governing statute and the Carl Moyer Program Guidelines.

Even if the Carl Moyer program could be used as a pass-through mechanism, condition AQ-SC6 would not constitute a reasonable plan of *actual* mitigation, as CEQA requires. Nothing in condition AQ-SC6, or elsewhere in the FSA, identifies specific emissions reduction projects sufficient to mitigate the Project's impacts. Reliance on the Carl Moyer program, moreover, cannot cure this lack of specificity. While the Project will have a life span of 30 years (Ex. 7 at p. 3), the maximum project life for emissions reduction projects under the Carl Moyer program is 20 years. (Ex. 618 at p. B-1.) In *Kings County Farm Bureau*, *supra*, the Court of Appeal invalidated an EIR in part because it failed to analyze whether there was any actual water available for purchase under a proposed mitigation agreement. (See 221 Cal.App.3d at pp. 727-28.) The FSA here, having failed to analyze whether there are emissions reduction projects available through the Carl Moyer program, each with a 30-year project life and together sufficient to mitigate the Project's significant impacts, suffers from the same deficiency.[14]

[14] At the hearing, one of Staff's witnesses, Mr. Layton, suggested that retrofits of water taxis and other water craft could have a project life of more than 30 years. (Tr. at p. 79:19-22.) The Carl Moyer Program Guidelines, however, provide that marine vessel retrofit projects must meet a number of detailed criteria, including the requirement that retrofits be completed well before applicable regulatory compliance deadlines, to ensure that emissions reductions are truly "surplus" as the program requires. (See generally Ex. 618, Chapter 9.) The longest project life specified for marine vessel projects—repowering, or engine replacement—is 16 years, absent a specific showing that a

Other than the Carl Moyer program, condition AQ-SC6 does not even specify a particular program or agency to receive the mitigation funds. (See Ex. 200 at p. 4.1-81.) This falls far short of CEQA's requirement that mitigation fees support a reasonable plan of actual mitigation. For example, in *Anderson First*, *supra*, the Court of Appeal held a project's "fair share" contribution toward a highway interchange improvement project inadequate in part because a program to provide those improvements had not yet been finalized. (See *Anderson First*, supra, 130 Cal.App.4th at pp. 1188-89.) The mitigation plan here is even less specific than the one found lacking in *Anderson First*, which was at least able to identify the particular mitigation project at issue and its actual cost. (*Id.*; see also *Endangered Habitats League*, *supra*, 131 Cal.App.4th at p. 785 [finding mitigation fee inadequate in absence of evidence regarding what improvements would be funded and whether those improvements would be effective].) Nor may the Commission simply defer questions concerning which program might receive the funding, which agency will administer it, and which projects will be adequate to offset the Project's emissions to some future date. Like the lead agency in *Gray v. County of Madera*, *supra*, which committed itself only to the "mitigation goal" of replacing water lost by neighboring landowners rather than any specific performance standard (2008 WL 4682664 at p. *13), the Commission in adopting condition AQ-SC6 would be committing only to the "goal" of offsetting the Project's emissions, without any specific criteria for implementation. Again, CEQA requires more.

The final fall-back strategy in condition AQ-SC6—allowing purchase of ERCs from the SDAPCD if local emissions reduction projects are unavailable—does not provide adequate mitigation.

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longer period is warranted, and this period might be shorter if other regulatory requirements apply. (Ex. 618 at pp. IX-7 to IX-8.) In any event, Mr. Layton did not testify that marine vessel projects sufficient to offset the Project's emissions over a 30-year period are available now. The FSA failed to identify even one emissions reduction project with a 30-year project life that could be funded consistent with the Carl Moyer Program Guidelines.

By definition, the Applicant may avail itself of this option only "if local emission reduction projects are clearly demonstrated to be unavailable." (Ex. 200 at p. 4.1-81.) Many of this Project's air quality impacts, however, will occur locally—at the residences, schools, day care centers, and businesses closest to the site. By definition, ERCs can be used for this project only if these local impacts cannot be addressed—leaving those local impacts essentially unmitigated. As a result, there is no substantial evidence to support Staff's conclusion that the mitigation strategy adopted in condition AQ-SC6 will actually and effectively mitigate the Project's emissions to a less than significant level.

c. There Is No Substantial Evidence that Construction-Related Impacts Will Be Mitigated to a Less Than Significant Level.

The Project's construction-related PM10 and PM2.5 impacts are potentially significant. (Ex. 200 at p. 4.1-29.) According to the FSA, the Project will contribute to existing violations of state air quality standards for 24-hour and annual PM10 concentrations and annual PM2.5 concentrations, and will cause total 24-hour PM2.5 concentrations to exceed the national ambient air quality standard. (*Id.* [Table 19].) The FSA's analysis of these impacts, moreover, assumes implementation of the mitigation measures proposed by the Applicant. (*Id.* at p. 4.1-28 [impact analysis based on Tables 11 and 12, at page 4.1-21, which set forth "mitigated" construction emissions]; Tr. at p. 82:2-13.) Staff thus concludes that all "reasonable feasible construction emission mitigation measures," including additional measures proposed in conditions AQ-SC1 though AQ-SC5, are required to mitigate particulate matter impacts. (Ex. 200 at p. 4.1-31 to 4.1-33.) Based on implementation of these measures, Staff concludes that construction impacts will be less than significant. (*Id.* at p. 4.1-33.)

Staff's conclusion lacks support. At the hearing, Staff conceded that the beneficial effect of Staff's additional mitigation measures has not been quantified. (See Tr. at p. 85:10-15.) Staff has not even determined the overall emissions control factor for fugitive dust under its mitigation program. (*Id.* at pp. 84:23-85:3.) Accordingly, there is no evidentiary support for Staff's determination that its

additional mitigation measures will reduce construction-related impacts to a less than significant level. Indeed, Staff's witness frankly admitted that construction emissions will contribute to existing violations of applicable standards even after mitigation: "I don't think there's any argument that there will be some contribution because there will be a number over zero. So, it's just the level of how much that is and the fact that we are mitigating to the extent feasible, which is essentially, you know, all we can do." (Tr. at 86:6-12.) In other words, these impacts are likely to remain significant after mitigation.

d. The FSA's Analysis of Greenhouse Gas Emissions Violates CEQA.

The FSA's discussion of greenhouse gas impacts fails the basic purpose of CEQA: to provide decision-makers and the public with enough information to enable a decision that intelligently takes account of the Project's environmental consequences. (*Kings County Farm Bureau*, *supra*, 221 Cal.App.3d at p. 712.) Far from representing the "good faith effort at full disclosure" that CEQA requires (CEQA Guidelines § 15151), the FSA instead paints a misleading, incomplete, and speculative picture of the Project's potential contribution to climate change. The FSA's conclusion that these impacts are less than significant is indefensible.

First, the FSA never clearly identifies the baseline against which the significance of greenhouse gas emissions should be measured. This is in and of itself a violation of CEQA, which requires a clear and conspicuous identification of the assumptions regarding an agency's choice of a baseline. (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 659.) Staff appears to use the CO2 emissions *rate* at the existing peaker plant, rather than its total CO2 emissions, as the baseline point of comparison with the Project. (See Ex. 200 at pp. 4.1-54 to 4.1-55.) Because the Project is expected to emit fewer metric tons of CO2 per MWH than the existing plant, Staff concludes not only that the

Project's impacts will be insignificant, but that the Project's emissions would be *less* than those of the existing plant. (*Id.* at p. 4.1-55.)

This conclusion suffers from two obvious logical flaws. First, it does not take into account that the Project will run for more hours than the existing plant, and thus will cause a net increase in greenhouse gas emissions. Second, it does not account for the fact that the stated purpose of the Project is not to replace, but rather to *increase*, overall generating capacity at the site and in the region. (See Ex. 1 at p. 1-1.) Indeed, Staff's conclusion that the Project's greenhouse gas emissions will be less than those of the existing plant is so speculative, and so contrary to the available evidence, as to appear disingenuous. Greenhouse gas concentrations in the atmosphere depend upon the total amount of pollutants emitted. As the FSA recognizes, California has enacted legislation and is in the midst of refining regulations aimed at reducing total statewide greenhouse gas emissions to 1990 levels. (See *id.* at pp. 4.1-50 to 4.1-51.) The only way for the Commission to know whether the Project is advancing or impeding that goal is to quantify the actual net emissions of the Project. Accordingly, the most important comparison here is between existing physical conditions—total greenhouse gas emissions from the existing peaker plant—and the anticipated emissions from the Project.

In light of the daunting task California faces in meeting its greenhouse gas reduction goals, *any* increase in greenhouse gas emissions should be found significant for CEQA purposes. Here, the evidence clearly shows that the Project will dramatically increase greenhouse gas emissions as compared to the existing plant. According to the Applicant, the existing plant has the potential to emit 168,821 metric tons of CO2 equivalent ($MTCO_2e$) per year. (Ex. 7 at p. 3.) The Project, in comparison, has the potential to emit 220,933 $MTCO_2e$ /yr.[15] (Ex. 200 at p. 4.1-53.) The Applicant's

[15] The Applicant provided three different figures for the Project's potential greenhouse gas emissions, apparently calculated using different operational assumptions. At 4,400 hours per year, the Applicant

witness conceded at the hearing that the Project has the potential to increase greenhouse gas emissions as compared to the existing facility. (Tr. at p. 62:6-10.) That potential increase—more than 50,000 $MTCO_2e$ per year—is substantial.

A comparison of actual emissions from the existing plant to projected emissions from the Project similarly shows a breathtaking increase in greenhouse gas emissions.[16] At its highest operating rate, during 2002 and 2003, the existing plant emitted 15,075 $MTCO_2$ over the two-year period—an average of about 7,500 $MTCO_2$ per year.[17] (Ex. 200 at p. 4.1-54.) At 1,200 hours (110,400 MWh at 92 MW[18]) per year, the operational level used by Staff to calculate CEQA mitigation in other sections of the FSA, the Project would emit 59,726.4 $MTCO_2$/yr. (*Id.* at p. 4.1-53.) In other words, when compared to the existing plant on the same basis used by Staff for assessment of other air quality impacts, the Project will increase CO_2 emissions by more than 50,000 MT/yr—almost *eight times* the amount emitted by the existing plant at its highest historic operating level. By any measure, such an increase is significant under CEQA.[19]

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estimates potential emissions of 218,426 $MTCO_2e$/yr. (Tr. at p. 418:17-419:5.) Due to the variability in the Applicant's estimates, EHC will use Staff's estimate.

[16] In response to a question from Commissioner Boyd, the Applicant's witness, Mr. Darvin, clarified that greenhouse gas emissions may be extrapolated in a linear fashion based on the number of hours of operation. (Tr. at p. 67:16-21.)

[17] Staff's calculations for the existing plant include only CO_2 emissions, not the other greenhouse gases that comprise CO_2e. (Ex. 200 at p. 4.1-54.) For purposes of a fair comparison, we have used Staff's estimate of .541 $MTCO_2$/MWh for the Project rather than the slightly higher rate for CO_2e. (*Id.* at p. 4.1-53.)

[18] According to Staff's calculations, the Project at 4,400 hours per year will produce 404,800 MWh. (Ex. 200 at p. 4.1-53.) This apparently assumes that the Project will produce an average of 92 MW over the course of the year (404,800/4,400 = 92). We use this assumption for the sake of comparison only, without conceding its accuracy.

[19] By way of comparison, California Air Resources Board staff recently recommended a presumptive threshold of significance of 7,000 $MTCO_2e$/yr for industrial projects. (California Air Resources Board, Preliminary Draft Staff Proposal, *Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases Under the California Environmental Quality Act* (Oct. 24, 2008) at p. 10, available at http://www.arb.ca.gov/cc/localgov/ceqa/meetings/102708/prelimdraftproposal102408.pdf.)

Staff nonetheless surmises that the Project will have no significant effect because it will replace "other less efficient peaking power sources in San Diego County" and because "it is possible that this project could displace electricity that may have otherwise been generated by more GHG intensive facilities." (Ex. 200 at p. 4.1-55.) According to Staff, therefore, "it would be speculative to conclude that the project would result in a cumulatively significant GHG impact." (*Id.* at p. 4.1-57.) Yet Staff never identifies any "less efficient" or "more GHG intensive" source, other than the existing plant, that the Project would replace, much less quantifies any reduction in emissions. As shown above, under the same assumptions used to calculate CEQA mitigation for other air quality impacts, the Project's greenhouse gas emissions dwarf those of the existing plant. Moreover, the Project's greenhouse gas emissions rate—the figure Staff cites in concluding that the Project's impacts are less than significant—is actually substantially *higher* than the California systemwide average as of 2004. (*Id.* at p. 4.1-55.) As explained above, moreover, the Project's emissions rate of .546 $MTCO_2e$/MWh exceeds the prevailing standard of 1,100 pounds/MWh used to define the kind of "clean electricity" purchases that are necessary to meet AB 32's goals. (See Ex. 617H at p. 7.) Contrary to Staff's conclusions, therefore, the Project might actually displace *more* efficient generation. The mere "possibility" that the Project "could" replace unspecified electricity that "may" result in higher emissions is not substantial evidence. (See CEQA Guidelines § 15384.) It is mere speculation, and cannot support a finding that the Project's impacts are less than significant.

Before a lead agency can conclude that a project's impacts are too speculative for analysis, CEQA requires the agency to conduct a thorough investigation, using its best efforts to disclose all that it reasonably can. (*Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1370-71.) CEQA also requires that a cumulative impacts analysis—such as a discussion of climate change, perhaps the quintessential cumulative impact—be based on either a list

of past, present, and reasonably foreseeable future projects, or an adopted plan that described or evaluated conditions contributing to the cumulative impact. (See CEQA Guidelines § 15130(b)(1).) Here, Staff failed to disclose any data regarding greenhouse gas emissions at existing, planned, or proposed plants that might have supported its assertions regarding the Project's ability to "displace" less efficient generation. Staff also failed to discuss any adopted plan that described or evaluated greenhouse gas emissions. (See Ex. 200 at pp. 4.1-44 to 4.1-47 [discussing projections from air quality plans].) These omissions not only deprive Staff's conclusions of evidentiary support, but also render them inconsistent with CEQA. As a result, the FSA fails to identify the Project's impacts as significant, and provides no substantive mitigation. The Commission cannot certify the Project on the basis of this speculative and frankly misleading analysis.[20]

To comply with CEQA, rather, Commission staff must revise the FSA's deficient greenhouse gas discussion, conclude that the Project's impacts are significant in light of California's greenhouse gas reduction goals, propose mitigation, and recirculate the document for additional agency review and public comment. (See *Joy Road*, *supra*, 142 Cal.App.4th at pp. 671-72 [applying CEQA's notice and recirculation requirements to certified regulatory program].) As Staff correctly recognized, there is a "general scientific consensus" that climate change is occurring, that human activity is contributing to it, and that the consequences of failing to curtail greenhouse gas emissions could be "catastrophic." (Ex. 200 at p. 4.1-50.) CEQA demands—and both the Commission and the public deserve—a good-faith analysis of these impacts grounded in detailed, quantitative evidence, not mere speculation.

[20] We note further that the Commission is presently conducting a proceeding to determine how best to analyze and mitigate the climate change impacts of power plants under CEQA. (See Order Instituting Informational Proceeding, Docket No. 08-GHG OII-1 (Oct. 8, 2008).) The Commission should revise and recirculate the greenhouse gas analysis in the FSA in light of the outcome of this proceeding *before* considering Project certification.

2. Public Health

The FSA did not adequately assess the significance of the Project's public health impacts. Using adopted ambient air quality standards and default cancer risk assumptions as thresholds of significance (see Ex. 200 at pp. 4.1-26, 4.7-6), the FSA concludes that public health impacts will not be significant after mitigation. Established thresholds, however, are not conclusive as to the significance of an impact, and they "cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) As discussed in the testimony of Joy Williams, there is substantial evidence that the Project's public health impacts are significant.

Ms. Williams' testimony raises three major issues. First, the FSA did not adequately model off-site exposure to construction-related diesel particulate matter ("DPM"). (Ex. 602 at p. 2.) Although it appears that DPM exposure would be below the chronic reference exposure level, there is considerable uncertainty regarding the risk of acute exposure, especially for children. (See Tr. at pp. 132:23-133:25.) The FSA failed to address this uncertainty.

Second, the FSA did not adequately consider the severity of existing respiratory health problems—and asthma in particular—in southwest Chula Vista. (Ex. 602 at pp. 2-3.) Emergency room discharge rates for asthma and chronic obstructive pulmonary disease in the zip code that includes the Project site are among the highest in San Diego County, as are hospitalizations and emergency room discharges for children with asthma. (*Id.*; Ex. 603B, 603C, 603L.) The FSA's focus on countywide asthma incidence rather than local asthma severity resulted in an incomplete and inaccurate assessment of potential impacts; asthma incidence is difficult to quantify because asthma is not a reportable disease, countywide health statistics tend to obscure relevant disparities in income,

race, and access to health care. (Ex. 602 at p. 2; Tr. at pp. 134:12-137:3, 145:15-23; see also Ex. 609B [showing disparities in health insurance coverage].) This Project, moreover, would exacerbate existing violations of air quality standards involving pollutants (PM10, PM2.5, and ozone) that are known either to cause or to exacerbate respiratory health problems. (See Ex. 602 at pp. 3-4; see also Ex. 603D, 603F, 603J, 603K; Ex, 200 at pp. 4.7-19 to 4.7-22.)

Third, there is evidence that significant public health impacts may occur at air pollutant concentrations below state and national ambient air quality standards, the thresholds of significance used in the FSA to assess air quality and related public health impacts. For example, a recent California Air Resources Board staff report suggests that reducing PM2.5 concentrations from the state standard of 12 $\mu g/m^3$ to a threshold of 7 $\mu g/m^3$ could avoid more than 500 premature deaths in San Diego County alone. (Tr. at pp. 142:14-143:18; see Ex. 603M at pp. 34-36 [Tables 4a, 4d].) The weight of the scientific evidence supports the conclusion that there are measurable health impacts occurring at pollutant concentrations below state and federal standards. (Tr. at p. 155:17-20.) During both construction and operation, this Project will contribute additional PM2.5 to an area already suffering from concentrations in excess of state standards; construction emissions will actually cause a violation of the 24-hour national standard for PM2.5. (Ex. 200 at p. 4.1-29 [Table 19].)

As lead agency under CEQA, the Commission must address this evidence and make its own determination as to whether these impacts are significant, and if so, whether it is feasible to mitigate those impacts to a less than significant level. As written, the FSA fails to provide an adequate analysis of this evidence.

3. Environmental Justice

Staff's analysis obscures the environmental justice implications of Project certification. Under Staff's approach, an environmental justice issue arises only where an unmitigated significant

environmental impact affects a high-minority or low income population. (Ex. 200 at p. 4.9-13.) This approach renders the concept of environmental *justice*—as opposed to mere environmental impact—all but meaningless. CEQA requires that all significant environmental impacts be mitigated or avoided where it is feasible to do so. Environmental justice, in contrast, requires special attention to equitable distribution of environmental benefits and burdens, whatever their significance for CEQA purposes. In any event, the Project will have significant, inadequately mitigated impacts on a predominantly minority community, as described herein.

Environmental justice issues are addressed in detail in Part III of this brief.

4. Noise

The FSA improperly understates the significance of noise impacts resulting from nighttime operations and overlooks a feasible mitigation measure.

According to the FSA, the cumulative nighttime noise level at the nearest residential receptor will be 46 dBA. (Ex. 200 at p. 4.6-11.) This level exceeds the City's nighttime noise limit of 45 dBA for the residential land use category. (*Id.* at p. 4.6-4 [Table 2].) Under the thresholds adopted in the FSA, this impact is significant. (*Id.*) The Project's nighttime noise level also represents an increase of 9 dBA over background conditions, which is just below Staff's presumptive threshold of significance for ambient noise increases, and is considered potentially significant. (*Id.* at pp. 4.6-4, 4.6-11; Tr. at pp. 259:17-260:1.) At the hearing, Staff's witness testified that this impact was considered less than significant because the Project would operate after 10 p.m. only infrequently. (See Tr. at pp. 260:21-23, 262:1-4.) The witness conceded that he had not quantified potential nighttime operations. (*Id.* at p. 262:8-11.)

This analysis falls short of CEQA's requirements. The FSA assumes a four percent capacity factor, or about 350 hours of operation per year, in concluding that the Project's nighttime noise

impacts are less than significant. (Ex. 200 at p. 4.6-14; Tr. at p. 261:13-15.) As previously noted, however, the Project is permitted to run 4,400 hours per year, and Staff assumed for air quality mitigation purposes that it would run 1,200 hours per year. The FSA does not explain why air quality impacts are evaluated using one set of assumptions about Project operation, but noise impacts are evaluated using different, far lower estimates. As a result, the FSA presents decision-makers and the public with conflicting information in violation of CEQA. (See *San Joaquin Raptor*, *supra*, 149 Cal.App.4th at pp. 655-56, 657.)

The FSA's inconsistent depictions of the Project's impacts also cast doubt on Staff's conclusion that the increase in ambient noise should be considered less than significant. Given the uncertainty regarding nighttime operations, and the inconsistencies between the noise analysis and other sections of the FSA, this impact should be deemed significant. There is also evidence in the record that the City has found an increase of 3dBA above background levels to be significant in other contexts (see Ex. 630 at p. 439), providing additional support for a finding of significance here. This impact could be mitigated to a less than significant level by a condition prohibiting operations between 10:00 p.m. and 7:00 a.m., when the violations of local noise standards and greatest increases over ambient levels are likely to occur. If Staff is correct that nighttime operations constitute only a small portion of the Project's profitability (see Tr. at p. 261:20-25), such a condition should be economically feasible.

5. Land Use

As discussed in detail in Part I of this brief, the Project conflicts with several provisions of the City's general plan and zoning code. Such conflicts are treated as significant impacts under CEQA. (See *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930 [finding substantial evidence of conflict with local land use guideline sufficient to require preparation of EIR].) The FSA

failed to identify these conflicts as significant impacts. Moreover, as discussed above, Staff's proposed condition LAND-1 is inadequate to mitigate these impacts. A general plan amendment, zoning amendment, and precise plan would be required before the City could issue a CUP for this Project. Requiring the Applicant to prepare what amounts to an advisory CUP after the fact cannot ameliorate the Project's numerous, significant land use conflicts.

D. The Commission May Not "Override" the Project's Significant Impacts Under CEQA.

In order to approve the Project despite its significant environmental impacts, the Commission must find (1) that mitigation measures or alternatives to lessen these impacts are infeasible, and (2) specific overriding benefits of the Project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755.) As with the findings required to "override" LORS inconsistencies under the Warren-Alquist Act, the record does not contain substantial evidence to support either of the findings necessary to "override" a significant impact under CEQA.

As previously detailed in Part I of this brief, neither the Applicant nor Staff has demonstrated that Staff's Alternative C is infeasible. If the site is feasible—as all available evidence suggests—then the Commission cannot make the findings required to "override" the Project's significant impacts. In any event, the FSA failed to identify a number of the Project's impacts as significant, including land use policy conflicts, greenhouse gas emissions, public health impacts, and nighttime noise. The Commission thus has no basis to conclude that mitigation of these impacts is infeasible, because no mitigation has been proposed. Finally, there is inadequate evidence to support a finding that the Project's benefits outweigh its significant effects. Again, as previously discussed, the Project's benefits are exceedingly modest, while its impacts—multiple land use inconsistencies, exacerbation of air quality violations, associated public health impacts, and substantial increases in greenhouse gas

emissions—are more than considerable. On this record, therefore, the Commission cannot make the findings necessary to "override" the Project's significant environmental impacts under CEQA.

E. The FSA's Alternatives Analysis Fails to Meet CEQA's Requirements.

1. CEQA Requires Analysis of Alternatives in the FSA.

Under CEQA, a lead agency may not approve a project if there are feasible alternatives that would avoid or lessen its significant environmental effects. (§§ 21002, 21002.1(b).) To this end, an EIR is required to consider a range of potentially feasible alternatives to a project, or to the location of a project, that would feasibly attain most of the project's basic objectives while avoiding or substantially lessening any of the project's significant environmental impacts. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1456.) The discussion of alternatives must be sufficiently detailed to foster informed decision-making and public participation, not simply vague and conclusory. (*Id.* at pp. 1456, 1460.) The same requirements apply to an environmental document, like an FSA, prepared as part of a certified regulatory program. (See *Sierra Club v. Bd. of Forestry*, *supra*, 7 Cal.4th at pp. 1228-29.) Alternatives must be analyzed in such a document even if measures intended to mitigate a project's significant impacts also are proposed. (*Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1393-94.) The FSA identified a number of potentially significant environmental impacts, and accordingly must analyze potentially feasible alternatives that would avoid or lessen those impacts.

Contrary to these controlling principles, the FSA suggests that under the Warren-Alquist Act, no alternative sites need to be considered due to the Project's relationship to an existing industrial site. (See Ex. 200 at p. 6-1 [citing § 25540.6(b)].) This misconstrues the statute. The Warren-Alquist Act provides that the Commission "may . . . *accept an application* . . . without requiring a discussion of site alternatives if the commission finds that the project has a strong relationship to the existing

industrial site and that it is therefore reasonable not to analyze alternative sites for the project." (§ 25540.6(b) [emphasis added].) This provision allows the Commission only to "accept an application" that does not discuss alternative sites. Section 25540.6(b) does not supersede, conflict with, or even address the Commission's independent duty under CEQA to analyze a reasonable range of feasible alternatives in the FSA.

In fact, the statues can be easily harmonized: the Commission retains discretion under the Warren-Alquist Act, upon making appropriate findings, to accept an AFC that does not analyze alternative sites, but the Commission must still follow CEQA in evaluating alternatives that would avoid or lessen the environmental impacts of the proposed facility. CEQA's well-settled principles governing analysis of alternatives therefore apply here.

2. The FSA's Discussion of Alternatives Is Inadequate.

The FSA briefly discussed three site alternatives. The two sites proposed by the Applicant, however, fail to reduce the Project's significant impacts, and Staff rejected the remaining site for conclusory and unsupported reasons. The FSA also dismissively concluded that demand reduction and alternative generation strategies were infeasible. The FSA fails to provide meaningful information regarding a reasonable range of alternatives, as CEQA requires.

The two sites proposed by the Applicant do not satisfy the sole purpose of an alternatives analysis under CEQA: to explore alternatives that avoid or lessen the Project's significant environmental impacts. Here, as discussed in detail above, the Project's significant impacts include multiple conflicts with local land use LORS, contributions to existing violations of air quality standards, and nighttime noise impacts.[21] Yet both of the Applicant's alternative sites are *closer* to

[21] The FSA's alternatives analysis states that "staff has not identified any potentially significant impacts of the proposed project." (Ex. 200 at p. 6-1.) This is incorrect. The FSA explicitly identified the Project's air quality impacts as significant. (See *id.* at pp. 4.1-29, 4.1-34, 4.1-37.)

sensitive receptors—homes and schools—than the Project site. (Ex. 200 at pp. 6-7, 6-8.) The FSA states in conclusory fashion that air quality impacts would be "similar" at the alternative sites, and that noise and land use impacts would be "less," but provides absolutely no analysis or discussion in support of these conclusions. (*Id.* at p. 6-11 [Table 2].) CEQA requires a discussion of alternatives to provide "meaningful information" about an alternative site's suitability, not just "vague and conclusory" statements. (*Save Round Valley Alliance*, *supra*, 157 Cal.App.4th at p. 1460.) Staff conceded that the FSA's conclusions regarding air quality impacts at the various sites were unsupported by any modeling. (Tr. at pp. 358:18-359:8.) Accordingly, there is no basis to conclude that either of the Applicant's sites reduce or avoid any of the Project's significant environmental impacts. Indeed, the FSA explicitly concluded that impacts to traffic as well as visual, cultural, and biological resources would be greater at both sites. (Ex. 200 at pp. 6-7, 6-8.)

Staff's Alternative C, in contrast, would avoid the Project's land use impacts, as discussed in detail in Part I of this brief. Alternative C also would locate the peaker plant much further from sensitive receptors, potentially reducing air quality and noise impacts, and would avoid visual impacts. (Ex. 200 at pp. 6-9, 6-11.) The FSA omits crucial details, however, regarding the potential environmental impacts of linear facilities. As previously discussed, the FSA assumes that a brand new transmission line would have to be built between the site and the Otay Substation, but does not mention the existing transmission line running through eastern Chula Vista. (See Ex. 7 at p. 9.) Nor does the FSA offer anything other than conclusory statements regarding the site's other environmental impacts. (Ex. 200 at p. 6-9.) In *Save Round Valley Alliance*, *supra*, the Court of Appeal invalidated an EIR's discussion of alternatives where the EIR failed to provide meaningful information regarding "any physical features, hydrological characteristics, views from the property, . . . or other attributes

relevant to the suitability of the property for the project." (157 Cal.App.4th at p. 1460.) The FSA here suffers from the same lack of detail.

The FSA's discussion of conservation and renewable resources alternatives is similarly inadequate. Staff improperly dismisses analysis of conservation and demand management, citing section 25305(c) of the Public Resources Code for the proposition that these measures "shall not be considered as alternatives to a proposed facility during the siting process." (Ex. 200 at p. 6-12.) This provision was repealed in 2002. (See Ex. 623 [§ 25305 (2002)]; Ex. 624 at p. 2 [Stats.2002, c.568 (SB 1389), § 1].) Staff appears to have recognized this error in its first FSA Addendum (see Ex. 205 at pp. 4-5), but the addendum contains no new analysis of any specific demand side or conservation programs, and its rejection of these approaches remains conclusory. The FSA's rejection of solar generation as speculative and infeasible—without any mention of the distributed, urban solar projects proposed by both Southern California Edison and SDG&E—is similarly vague, conclusory, and unsupported. Once again, CEQA requires that the FSA uncover and disclose "meaningful information" about these alternatives. (*Save Round Valley Alliance*, *supra*, 157 Cal.App.4th at p. 1460.) The FSA's conclusory assertions that Staff looked into these strategies, but just found them impractical, will not suffice.

Finally, the FSA's discussion of the "no project" alternative—which focuses primarily on emissions from the South Bay Power Plant—is speculative, conclusory, and ultimately misleading. (See Ex. 200 at pp. 6-14 to 6-15.) As previously discussed, the FSA improperly suggests that construction of this Project will lead to removal of the RMR designation from the South Bay Power Plant and allow that facility to close down.

In sum, the FSA's discussion of alternatives does not satisfy CEQA.

III. THE PROJECT IS INCONSISTENT WITH FEDERAL, STATE AND LOCAL ENVIRONMENTAL JUSTICE LAWS AND PRINCIPLES.

A. Federal, State, and Local Statutes, Policies, and Guidelines Inform Analysis of the Project's Environmental Justice Implications.

Federal and state statutes and policies require the Commission to review the Project's environmental justice implications. Under federal law, Title VI of the federal Civil Rights Act prohibits discrimination on the basis of race, color, or national origin in all programs receiving federal financial assistance. (See 42 U.S.C. § 2000d et seq.) Executive Order 12,898, signed by President Clinton in 1994, requires agencies receiving federal funds to identify and address the disproportionately high and adverse human health or environmental effects of their programs on minority and low-income populations. (Ex. 200 at p. 4.9-1.) Guidelines adopted by the United States Environmental Protection Agency ("USEPA") identify as "minority or low-income populations" those areas having a minority or low-income population exceeding 50 percent. (*Id.* at pp. 4.9-1 to 4.9-2.)

California law defines environmental justice as "the fair treatment of people of all races, cultures and income with respect to the development, adoption, implementation and enforcement of environmental laws, regulations and policies." (Gov. Code § 65040.12(e).). The California Resources Agency's policy on environmental justice directs that "the fair treatment of people of all races, cultures and income shall be fully considered during the planning, decisionmaking, development and implementation of all Resources Agency programs, policies and activities." (Ex. 200 at p. 4.9-2.) Furthermore, the intent of this policy is to ensure that minority and low-income populations are not discriminated against, treated unfairly, or exposed to "disproportionately high and adverse human health or environmental effects from environmental decisions." (*Id.*)

The California Environmental Protection Agency's ("CalEPA's") Environmental Justice Advisory Committee ("CEJAC") has adopted detailed recommendations to guide state agencies in

implementing these policies. The CEJAC was established under SB 115 (1999) and SB 89 (2000) to advise agencies within CalEPA, as well as the Governor's Office of Planning and Research, in developing an environmental justice strategy. (Ex. 608 at p. 1; Ex. 609A at p. 3.) The CEJAC adopted the goal of integrating environmental justice into the "development, adoption, implementation, and enforcement of environmental laws, regulations and policies." (Ex. 609A at p. 20.). Diane Takvorian, an expert in environmental justice principles in California and the former co-chair of the CEJAC, testified that the committee' specific criteria for meeting this goal include: (1) considering environmental justice issues in program implementation, including explicit analysis of these issues in staff reports for significant actions; (2) ensuring that program development and adoption do not create new, or exacerbate existing, environmental justice problems; and (3) assessing the relationship between socio-economic indicators and the distribution of pollution sources and associated health impacts. (Ex. 608 at p. 2; Ex. 609A at p. 20.) These recommendations, although not adopted as regulations, nonetheless were intended to guide all California state agencies in complying with environmental justice mandates.

The CEJAC also recommended specific, enforceable measures that local agencies could adopt to prevent environmental injustice, including (1) buffer zones to separate sensitive receptors from pollution-emitting sources, and (2) siting criteria for industrial facilities that may increase pollution in communities already suffering disproportionate impacts. (Ex. 609A at p. 22.) Reflecting these recommendations, the City incorporated an environmental justice element into its General Plan, the objective of which is to "[p]rovide fair treatment for people of all races, cultures, and income levels with respect to development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." (Chula Vista General Plan at p. E-79.) Policies designed to meet this objective include Policy E 23.3, which directs the City to avoid siting industrial facilities that pose

significant human health and safety hazards in proximity to schools and residences, and Policy E 23.4, which requires that new schools and residences be located in areas sufficiently buffered from hazardous industrial uses. (See *id.*) Policy E 6.4, which directs the City to avoid siting power plants within 1,000 feet of sensitive receptors (Ex. 619 at p. E-32), goes one step further by requiring an easily measurable buffer zone between particularly problematic and sensitive land uses.

These polices translate the CEJAC's recommendations into enforceable standards at the local level. Ms. Takvorian, who was involved in the development of Policy E 6.4 (Tr. at p. 204:1-21), testified that the environmental justice provisions of the General Plan represent "an affirmative statement from [the City] reflecting the buffer zone that was recommended in the CEJAC recommendations as a way to separate sensitive uses from sources of pollution." (Tr. at p. 198:20-23.) Policy E 6.4 in particular represents a "great example" of turning the CEJAC's recommendations into a "firm policy." (*Id.* at p. 199:5-9). As discussed in detail in Part I of this brief, the Project is inconsistent with the clear objectives and policies articulated in the City's general plan.

B. The Project Will Disproportionately Impact a Minority Population.

According to census block information, within six miles of the Project the population is 73% non-white, while within one mile of the Project, the population is 81.3% non-white. (Ex. 200 at p. 4.9-3 and Fig. 1.) Under USEPA guidance, therefore, the Project is located in a minority community. (See *id.* at 4.9-1 [setting 50% threshold].) Most of the Project's impacts will fall on the residents of this predominately Latino community. As described above, the Project conflicts with several General Plan goals and policies adopted to advance environmental justice objectives, such as protecting minority communities against unfair treatment. According to the Public Health section in the FSA, moreover, the maximum impact location for air emissions from the project is immediately beyond the existing property boundary—and thus also very near the residential community located roughly 350

feet away. (See Ex. 200 at p. 4.7-12.) The closest residential receptor for noise impacts is a residence within this neighborhood. (See Ex. 200 at p. 4.6-6.) Due to the location of the Project and the demographic makeup of the surrounding community, the Project's impacts will fall disproportionately on a minority population.

C. The Project Would Violate Environmental Justice Principles Even If Its Significant Environmental Effects Were Mitigated.

As discussed in detail in Part II of this brief, the Project's significant environmental impacts have not been adequately disclosed or mitigated in accordance with CEQA. Those impacts, as summarized above, will fall disproportionately on the minority community living closest to the Project site. Accordingly, the Project raises serious environmental justice issues.

Furthermore, in addition to requiring analysis of environmental impacts, environmental justice principles stress the importance of fairness and equitable distribution of environmental burdens. Definitions of environmental justice uniformly include "the fair treatment" of people regardless of ethnic, racial, or socioeconomic status. Therefore, as Ms. Takvorian explained, environmental justice requires taking "a broad view of the disparities into consideration whenever we're thinking about a project application or permitting a new project." (Tr. at p. 205:9-12.) For example, disparities in nutrition, access to health care, and housing must be considered in analyzing a specific project's effects on a particular population. (*Id.* at p. 205:13-24.) Cumulative impacts analysis specifically must be broadened to include discussion of these disparities. (*Id.* at pp. 205:25-206:13.) Indeed, Ms. Takvorian characterized this broader approach to impacts analysis as the "heart and soul of environmental justice." (*Id.* at p. 205:19-20.) Staff's approach to environmental justice, which examines only whether a significant impact remains after mitigation (see Ex. 200 at p. 4.9-13), does not adequately take account of these factors. Accordingly, siting this Project as proposed would not represent "fair treatment" of this community.

The relevant disparities here are striking. As previously discussed, air pollution in the area close to the Project site already violates applicable standards (see Ex. 200 at pp. 4.1-7 [Table 3], 4.1-19 [Table 10]), and the Project will contribute further to these violations. (*Id.* at pp. 4.1-29, 4.1-34, 4.1-37.) Furthermore, residents of southern San Diego County already bear a disproportionate burden in the siting of fossil-fueled electricity generation. The metropolitan statistical area in which the Project would be located already produces more fossil-fueled megawatts per 10,000 people, and has a higher concentration of people of color, than any other such area of the County. (See Ex. 605, 606.) In other words, the area with the highest non-white population is also the one that already hosts more operating or permitted fossil-fueled power plants than any other area of the County. This indicates a disparity in allocation of environmental burdens—the epitome of an environmental justice problem.

Western Chula Vista residents also face severe respiratory health problems in comparison to the rest of the County. The Chula Vista zip code in which the Project would be located also has the some of the County's highest youth asthma-related hospital discharge rates, asthma-related emergency department discharge rates, and chronic obstructive pulmonary disease (COPD) emergency department discharge rates. (See Ex. 603B, 603C, 603L.) Moreover, Latinos in San Diego County—including those living in the community closest to the Project site—are three times more likely not to have health insurance than non-Latinos. (See Ex. 609B [24% of Latino/Hispanic County residents lack insurance, as compared to 8% of non-Latino/non-Hispanic residents].) This means that existing health conditions may become aggravated due to inadequate treatment. Again, these disparities are relevant to any examination of environmental justice. The FSA simply did not adequately address these disparities when considering the air quality and public health impacts of the Project.

The Commission has a responsibility under existing law to address environmental justice issues. As the evidence in this proceeding shows, that responsibility certainly includes, but ultimately

goes beyond, proper analysis and mitigation of significant environmental effects in accordance with CEQA. The Commission also must give effect to the "justice" half of "environmental justice"—the part of the concept that emphasizes fair treatment of minority communities—by paying careful attention to existing disproportionate burdens, past environmental injustices, and relevant disparities in siting projects. Those disparities, as they directly affect the community most impacted by this Project, were not adequately addressed here.

Put another way, the "significance" of any environmental impact represents a policy judgment on the part of a lead agency. (See Tr. at p. 138:16-17.) Where, as here, a minority community is already bearing a disproportionate environmental burden, any project that exacerbates or even simply maintains that burden should be considered to have significant impacts on that community. Under these circumstances, both the Applicant and the Commission should do everything in their power to find a feasible alternative site for the Project. Here, the Applicant defined its objectives so narrowly that the Project site "by definition" was the only acceptable location (Ex. 5 at p. 25; Tr. at pp. 351:5-15, 353:4-8), and analyzed two alternative sites that are actually closer to residences in the same minority community. (Tr. at pp. 350:24-351:4.) The FSA, as discussed in detail in Part II of this brief, dismissed other alternatives based on errors of law and vague, conclusory analysis. A conscientious approach to environmental justice, consistent with the standards and principles outlined under federal and state law, and informed by the CEJAC recommendations, requires significantly more.

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CONCLUSION

For the foregoing reasons, the Commission should deny the application for certification.

Dated: November 5, 2008

Respectfully Submitted,

SHUTE, MIHALY & WEINBERGER LLP

Kevin P. Bundy

Attorneys for the
ENVIRONMENTAL HEALTH COALITION

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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: The Application for Certification for the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4

PROOF OF SERVICE

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-4
1516 Ninth Street, MS-15
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT
Harry Scarborough
Sr. Vice President
MMC Energy Inc.
437 J Street, Suite 305
San Diego, CA 92101
hscarborough@mmcenergy.com

APPLICANT'S CONSULTANT
Douglas M. Davy, Ph.D.
Senior Project Manager
CH2M Hill
2485 Natomas Park Drive, Suite 600
Sacramento, CA 95833
ddavy@ch2m.com

APPLICANT'S ENGINEER
Steven Blue
Project Manager
Worley Parsons
2330 E. Bidwell, Suite 150
Folsom, CA 95630
Steven.blue@worleyparsons.com

COUNSEL FOR APPLICANT
Jane Luckhardt, Esq.
Downey Brand Law Firm
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
jluckhardt@downeybrand.com

INTERESTED AGENCIES
California ISO
P.O. Box 639014
Folsom, CA 95763-9014
e-recipient@caiso.com

INTERVENORS
California Unions for Reliable Energy (CURE)
c/o Marc D. Joseph
Gloria Smith
Suma Peesapati
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com
gsmith@adamsbroadwell.com
speesapati@adamsbroadwell.com

City of Chula Vista, California
c/o Charles H. Pomeroy
Caren J. Dawson
McKenna, Long & Aldridge, LLP
444 South Flower Street
Los Angeles, CA 90071
cpomeroy@mckennalong.com
cdawson@mckennalong.com

ENERGY COMMISSION

Jackalyne Pfannenstiel, Chair
Commissioner and Presiding Member
jpfannen@energy.state.ca.us

James D. Boyd, Vice Chair
Commissioner and Associate Member
jboyd@energy.state.ca.us

Raoul Renaud
Hearing Officer
rrenaud@energy.state.ca.us

Chris Meyer
Project Manager
cmeyer@energy.state.ca.us

Kevin W. Bell
Staff Counsel
kwbell@energy.state.ca.us

Public Adviser's Office
publicadviser@energy.state.ca.us

I, Kevin P. Bundy, declare that on November 5, 2008, I deposited copies of the attached **OPENING BRIEF OF INTERVENOR ENVIRONMENTAL HEALTH COALITION** in the United States mail at San Francisco, California, with first class postage thereon fully prepaid and addressed to those on the Proof of Service list above.

--OR--

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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

Kevin P. Bundy

STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: The Application for Certification for the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4

ATTACHMENT A TO OPENING BRIEF OF INTERVENOR ENVIRONMENTAL HEALTH COALITION

Additional Excerpts from the Chula Vista General Plan and Municipal Code

Osa L. Wolff
Kevin P. Bundy
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272
(415) 552-5816 Fax
wolff@smwlaw.com
bundy@smwlaw.com

Attorneys for the
ENVIRONMENTAL HEALTH
COALITION

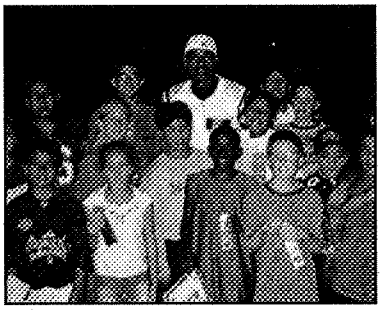
1.6 Environmental Justice

State law defines environmental justice as:

"The fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."

The U.S. Environmental Protection Agency states:

"Fair treatment means that no group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, and local policies."



Environmental justice problems are often related to procedural inequity and geographic inequity. Procedural inequity occurs when the planning process is not applied uniformly, resulting in disproportionate impacts to lower income or minority populations. Geographic inequity occurs when the burdens of undesirable land uses are concentrated in certain neighborhoods while the benefits are received elsewhere. It also describes a situation in which public amenities are concentrated only in certain areas.

The following topics, discussed in detail below, represent areas in which environmental justice can be addressed at the local level -- General Plan land use planning and policies; equitable distribution of public facilities and services; overconcentration of industrial uses; and transit-oriented development.

1.6.1 Relationship to General Plan Land Use Planning and Policies

Planning policies that promote livable communities and smart growth can be tools for achieving environmental justice. The primary purpose of planning, and the source of government authority to engage in planning, is to protect the public health, safety, and welfare. Traditionally, land use planning has attempted to minimize health and safety risks by segregating land uses. However, rigid separation of land uses has resulted in disconnected islands of activity and contributed to sprawl, counter to sustainable development goals. Mixed use development is a more sustainable approach to land use planning. Despite the desirability of mixed use development, it is important to recognize that there are certain land uses (e.g.,industrial, agricultural, major roadways and freeways) that will, in most cases, be incompatible with sensitive receptors, including residential

and school uses. Sensitive receptors may be adversely impacted by incompatible land uses as a result of air pollutant emissions, exposure to hazardous materials and related accident risks, and excessive noise. Most land use incompatibility issues can be addressed at the General Plan level through appropriate land use planning and the inclusion of policies addressing the siting and development of potentially harmful land uses in proximity to sensitive receptors.

1.6.2 Equitable Distribution of Public Facilities and Services

To the extent feasible through its General Plan, a jurisdiction should plan for the equitable distribution of new public facilities throughout the community, and services that increase and enhance community quality of life. Public facilities and services that enhance quality of life include: parks; open space; trails; recreational facilities; child care facilities; libraries; and museums. The equitable distribution of facilities and services has two components. The first component is the number and size of facilities -- a community should have adequate facilities and services to serve all residents equally. The second component is access, which can be measured as the distance or travel time from residential areas to facilities and services.

1.6.3 Overconcentration of Industrial Uses

Overconcentration occurs when two or more industrial facilities or uses, which do not individually exceed acceptable regulatory standards for public health and safety, pose a significant hazard to adjacent sensitive receptors, due to their cumulative effects. It is important to differentiate between overconcentration and the mere presence of materials that may be classified as hazardous. Many neighborhood businesses, such as, gas stations, retail paint stores, and dry cleaners, utilize hazardous materials. While these activities must be conducted in a responsible manner in accordance with applicable environmental regulations, they should not be confused with those truly industrial activities that are inappropriate within or adjacent to residential or mixed use areas. A General Plan should seek to avoid the development of sensitive receptors in close proximity to land uses that pose a significant hazard to human health and safety, due to the quantity, concentration, or physical or chemical characteristics of the hazardous materials that they utilize, or the hazardous waste that they generate or emit.

1.6.4 Transit-Oriented Development

Expanding opportunities for transit-oriented development (TOD) promotes livable communities. TOD is defined as moderate- to high-density development located within an easy walk of a major transit stop, generally with a mix of residential, employment, and shopping opportunities. TOD can provide mobility choices; increase public safety; increase disposable household income by reducing transportation costs; reduce air pollution and energy consumption rates; help conserve resources and open space; assist in economic development; and expand the supply of housing.

By improving access to jobs and housing and revitalizing existing neighborhoods, TOD can be a tool for promoting environmental justice. Jurisdictions can promote TOD through general plan policies that support mixed use development; higher land use densities; reduced parking requirements; and increased transit service. TOD policies should facilitate a pedestrian-oriented environment with features such as traffic calming strategies and architectural and streetscape design that orients buildings to sidewalks, plazas, parks, and other public spaces, rather than to parking.

The promotion of environmental justice on a local level may be accomplished through a broad range of actions taken on various fronts, including through land use planning and policies at the general plan level. The issues of land use incompatibility; equitable distribution of public facilities and services; overconcentration of industrial uses; and transit-oriented development can be addressed in a general plan. Through various goals, objectives, policies, and implementation measures established through the adoption of this General Plan, Chula Vista is taking steps to address these issues in the interest of promoting environmental justice.

Policies

E 22.1 Work to stabilize traffic volumes in residential neighborhoods by limiting throughways and by facilitating the use of alternative routes around, rather than through, Neighborhoods.

E 22.2 Explore the feasibility of using new technologies to minimize traffic noise, such as use of rubberized asphalt in road surface materials.

E 22.3 Employ traffic calming measures, where appropriate, such as narrow roadways and on-street parking, in commercial and mixed use districts.

E 22.4 Encourage walking; biking; carpooling; use of public transit; and other alternative modes of transportation to minimize vehicular use and associated traffic noise.

E 22.5 Require projects to construct appropriate mitigation measures in order to attenuate existing and projected traffic noise levels, in accordance with applicable standards, including the exterior land use/noise compatibility guidelines listed in Table 9-2 of this Environmental Element.

3.6 Environmental Justice

Environmental justice is introduced, defined and discussed in Section 1.6 of this Environmental Element. Please refer to that section, and other related sections of this document for additional background

The following objective and policies augment other parts of this General Plan that help to further, at the local level some of the comcepts and principles that have emerged regarding this topic at at the national, state, and regional levels.

Objective - E 23

Provide fair treatment for people of all races, cultures, and income levels with respect to development, adoption, implementation, and enforcement of environmental laws, regulations and policies.

Policies

E 23.1 Provide public outreach efforts and public involvement opportunities for residents affected by proposed City projects.

E 23.2 Plan for the equitable distribution of public facilities and services.

E 23.3 Avoid siting industrial facilities and uses that pose a significant hazard to human health and safety in proximity to schools or residential dwellings.

E 23.4 Build new schools and residential dwellings with sufficient separation and buffering from industrial facilities and uses that pose a significant hazard to human health and safety.

E 23.5 Promote more livable communities by expanding opportunities for transit-oriented development.

19.04.190 Quasi-public.

"Quasi-public" means used as or seemingly public. For the purposes of this title, electrical substations shall be considered quasi-public uses, of a public service type. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.192 Recreation, commercial.

"Commercial recreation" means recreation facilities operated as a business and open to the general public for a fee. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.194 Recreation, private, noncommercial.

"Private, noncommercial recreation" means clubs or recreation facilities operated by a nonprofit organization and open only to bona fide members of such nonprofit organization. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.196 Recreation, public.

"Public recreation" means publicly owned or operated recreation facilities. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.198 Residential density.

"Residential density" means the average number of families living on one acre of land in a given area. "Net residential density" is determined by dividing the total number of families in a defined area by the total acreage of all parcels of land within the area that are used for residential and accessory purposes. "Gross residential density" is obtained by dividing all land in a defined area used for residences, streets, local schools, local parks and local shopping facilities into the total number of families in said area. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.199 Salvage yard.

For "salvage yard," see "junkyard." (Ord. 2108 § 1, 1985; Ord. 1356 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.200 Satellite dish antenna.

"Satellite dish antenna" is a device or instrument designed or used for the reception of television or other electronic communications signal broadcast or relayed from an earth satellite. It may be a solid, open mesh or bar configured structure, typically eight to 12 feet in diameter, in the shape of a shallow dish or parabola. (Ord. 2108 § 1, 1985).

19.04.201 Senior housing development.

"Senior housing development" means a residential project which may exceed the maximum density permitted for families in the zones in which it is located, and which is established and maintained for the exclusive use of low- or moderate-income senior residents. (Ord. 1878 § 1, 1979).

19.04.202 Service station.

For "service station," see "automobile service station." (Ord. 1356 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.204 Setback.

For "setback," see specific "yard" definitions. (Ord. 1356 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.205 Sexual encounter studio.

"Sexual encounter studio" means a business establishment wherein the patrons thereof are invited to discuss sexual matters or engage in sexual activities with an unclothed or partially unclothed person and who pay a fee for such discussion or activities; provided, however, that this definition shall not encompass any sexual activities or practices prohibited under the laws of the state and does not constitute a condonation of any sexual activities by the city. This definition does not include therapy sessions conducted by physicians, therapists and counselors licensed and regulated by the state. (Ord. 1855 § 2, 1979).

19.04.205.1 Sexually explicit material.

"Sexually explicit material" means any book, magazine, periodical, pamphlet, display or other printed matter or photograph which contains on the front or back cover visual representations or depictions of specified sexual activities or specified anatomical areas (as same are defined by CVMC 19.04.271 and 19.04.270 respectively). (Ord. 2379 § 1, 1990).

19.04.206 Shoreline.

"Shoreline" means the boundary between land above and land below the "mean higher high water," as defined by the latest U.S. Coast and Geodetic Survey. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.208 – 19.04.268

Repealed by Ord. 2924 § 3, 2003.

19.04.322 Yard, side, least width – How measured.

Such width shall be measured from the nearest side lot line and, in case the nearest side lot line is a side street lot line, from the right-of-way line of the existing street; provided, however, that if the proposed location of the right-of-way line of such street as adopted by the city differs from that of the existing street, then the required side yard, least width, shall be measured from the right-of-way of such street as adopted; or said building shall comply with any applicable official setback lines. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.324 Zone.

"Zone" means a portion of the territory of the city within which certain uniform regulations and requirements or various combinations thereof apply under the provisions of this title. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.326 Zoning map.

"Zoning map" means the zoning map or maps of Chula Vista, together with all amendments subsequently adopted. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.328 Zoning permit.

"Zoning permit" means a document issued by the building inspector authorizing buildings, structures or uses consistent with the terms of this title, and for the purpose of carrying out and enforcing its provisions. (Ord. 1212 § 1, 1969; prior code § 33.1401).

19.04.330 Zoning wall or fence.

"Zoning wall or fence" means a wall or fence erected along the property line or zoning boundary to separate any commercial or industrial zones or uses from adjacent residential zones and a fence to separate multiple-family zones from single-family zones. (Ord. 1356 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.1401).

Chapter 19.06

GENERAL PLAN

Sections:

19.06.010 Statutory authority – Scope.

Sections 65300 through 65361 of the Government Code of the state relating to the authority for and scope of general plans, and the method of adoption of general plans, are hereby adopted and incorporated herein by reference as though set forth in full. The fee for processing general plan amendments shall be the required fee(s). (Ord. 2506 § 1, 1992; Ord. 1961 § 1, 1982; Ord. 1854 § 1, 1979; Ord. 1825 § 1, 1978; Ord. 1212 § 1, 1969; prior code § 33.201).

19.06.020 Administration.

Sections 65400 through 65402 of the Government Code of the state of California relating to the administration of the general plan are hereby adopted and incorporated herein by reference as though set forth in full. (Ord. 1854 § 1, 1979; Ord. 1825 § 1, 1978; Ord. 1212 § 1, 1969; prior code § 33.202).

19.06.030 Implementation of.

The systematic implementation of the general plan or any general plan element as provided in Section 65303 of the Government Code of the state may be undertaken by the adoption of specific plans, which shall include all detailed regulations, conditions, programs and proposed legislation which may be necessary or convenient for such implementation. The general plan may also be implemented by the adoption of zoning ordinances which shall in accordance with Section 65860 of the Government Code of the state be consistent with said general plan.

When a general plan amendment is adopted and existing zoning is thereby inconsistent with the general plan and the developer desires to develop the property in accordance with the existing zoning, the developer must first submit a proposed amendment to the general plan. All such amendments shall be subject to public hearings by the planning commission and the city council. If the amendment is adopted, the developer can proceed with the normal processing of the development proposal.

Notwithstanding the above provisions, those projects which have been substantially processed consistent with existing zoning and which are affected by the general plan amendment may proceed; provided, that the zoning administrator issues, in each case, a permit to complete processing based upon the findings that the effectiveness of the general plan and the order and amenity of the community would not be substantially impaired by the issuance of the permit.

Projects shall be deemed to be substantially processed where the property owners have procured approved tentative subdivision or parcel maps, building permits, conditional use permits, or design review committee approvals, in furtherance of the proposed projects. The zoning administrator, furthermore, may deem that projects have been substantially processed where the involved property owners have submitted tentative subdivision or parcel maps or applications for design review, but are awaiting consideration by the appropriate city agency or official, as well as projects which have been submitted to the planning department for design review consideration not more than six months prior to the adoption of the general plan. The property owner shall provide evidence to the zoning administrator not more than 90 days after the general plan adoption that the submittal of project plans has occurred within the aforementioned specified period to qualify for this provision.

In addition, projects which have been submitted to the planning department for design review consideration after the adoption of the 1989 general plan update (July 11, 1989) and before the adoption of Ordinance No. 2327 (September 5, 1989) may be processed; provided, the property owners submit evidence that such submittal has taken place.

Appeals from the actions of the zoning administrator may be filed, within 10 days after the dates of said actions, with the planning commission. Further appeals to the city council may be submitted pursuant to the provisions of CVMC 19.14.110 and 19.14.130. (Ord. 2359 § 1, 1990; Ord. 2327 § 1, 1989; Ord. 1854 § 1, 1979; Ord. 1825 § 1, 1978; Ord. 1212 § 1, 1969; prior code § 33.203).

Chapter 19.07

SPECIFIC PLANS

Sections:

19.07.010 Statutory authority – Scope of.

Sections 65450 through 65507 of the Government Code of the state relating to the authority for the scope of specific plans, and the procedures for the adoption of specific plans, are hereby adopted and incorporated herein by reference as though set forth in full. The fee for processing specific plan amendments and specific plan development proposals or modifications shall be the required fee(s). (Ord. 2506 § 1, 1992; Ord. 2011 § 1, 1982; Ord. 1854 § 2, 1979; Ord. 1825 § 2, 1978).

19.07.020 Administration of.

Sections 65550 through 65553 of the Government Code of the state relating to the administration of specific plans are hereby adopted and incorporated herein by reference as though set forth in full. (Ord. 1854 § 2, 1979; Ord. 1825 § 2, 1978).

19.07.030 Zoning implementation thereof.

A. Specific plans may be implemented through the adoption of standard zoning ordinances, the planned community zone, as provided in this title, or by plan effectuation standards incorporated within the text of an individual specific plan. The method of implementing an individual specific plan shall be established and expressed by its adopting resolution or ordinance.

If the specific plan is to be implemented through the use of standard zones, any open space uses or other public uses so designated on the specific plan may be allowed to be developed in a manner logically consistent with and in conformity to adjacent and contiguous land uses as shown on the specific plan; provided, however, the developer must show that such development, which must be residential, thus allowed will not increase the overall density of the total area incorporated into the specific plan. Further, in no case shall any designated open space land, or land designated for other public use in said specific plan, be developed for any use other than residential. Should all adjacent and contiguous land uses be designated for uses other than residential, the underlying land use on such open space

Precise Plans

govern: the lower the number of the section, the more restrictive the zone is in relation to other zones established by this title. If such required findings cannot be made, the commission shall deny the application. (Ord. 1212 § 1, 1969; prior code § 33.1203).

19.12.100 Commission – Approval actions – Procedure.

If the application is approved or a more restrictive zone recommended, the commission shall forward its resolution and the application with a report of its findings to the city clerk who shall cause the matter to be set for hearing before the city council in the same manner as required herein for setting a hearing before the planning commission. (Ord. 2374 § 1, 1990; Ord. 1212 § 1, 1969; prior code § 33.1203(1)).

19.12.110 Commission – Denial actions – Appeal procedure.

If an application for change or reclassification or adoption or amendment of the comprehensive zoning law is denied by the commission, the applicant or interested party may, within 10 days of the date of the mailing of the notification of denial, appeal to the city council by written notice of appeal filed with the city clerk. Such appeal shall be filed in duplicate and shall set forth specifically wherein the commission's findings were in error and wherein the public necessity, convenience, welfare or good zoning practice requires such change or reclassification. Upon receipt of such appeal, the city clerk shall set the matter for hearing in the manner prescribed herein, and shall forward the findings of fact of the planning commission to the city council. The city council may, after the public hearing and consideration of the matter, affirm the action of the planning commission or may grant the appeal or a modification thereof by the affirmative vote of not less than a majority of its total membership. (Ord. 2193 § 1, 1987; Ord. 1212 § 1, 1969; prior code § 33.1203(2)).

19.12.120 Attachment of conditions – Public improvements and precise plan requirements.

A. Neither the planning commission nor the city council may attach any conditions to the zoning of any property except for supplemental zones as provided in this title, and the property owner shall be authorized, without restriction, to use the property for the uses and purposes enumerated in the zone subject only to the regulations of the zone; provided, however, that the commission may recommend or the council may require on its own motion that all public improvements, including streets and sidewalks and drainage facilities, as well as necessary dedications deemed needed to serve the uses authorized under the proposed zoning, be installed as a precedent to the zoning in order to prevent the imposition of a burden upon the community and the city created by said uses. The requirement for installation of public improvements may be deferred in accordance with the provisions as set forth in this title.

B. In addition to the requirement for the installation of public improvements in necessary dedications, the planning commission or the city council may require that a precise plan be submitted for the development of the property by attaching the P precise plan modifying district to the underlying zone. The precise plan includes, but is not limited to, the location, height, size, and setbacks of buildings or structures, open spaces, signs, and densities. The requirements and circumstances for applying the P precise plan modifying district are set forth in full in CVMC 19.56.040 through 19.56.048. The procedures for submission and approval of a precise plan are set forth in CVMC 19.14.570 through 19.14.580. (Ord. 1632 §§ 1, 3, 1975; Ord. 1222 § 1, 1969; prior code § 33.1204).

19.12.130 Interim zoning – Procedure generally – Time limit.

Without following the procedures otherwise required preliminary to the adoption of a zoning ordinance, the city council, to protect the public safety, health and welfare, may adopt, as an urgency measure, an interim ordinance prohibiting any uses which may be in conflict with a contemplated zoning proposal which the city council, planning commission or planning department is considering or studying or intends to study within a reasonable time. Such urgency measure shall require four-fifths vote of the city council for adoption. Such interim ordinance shall be of no further force and effect 90 days from the date of adoption thereof; provided, however, that after said notice, pursuant to CVMC 19.12.060 through 19.12.080, and public hearing, the city council may, by a four-fifths vote, extend such interim ordinance for one year. Not more than two such extensions may be adopted. When such interim ordinance has been adopted, every subsequent ordinance adopted pursuant to this section, covering the whole or part of the same property, shall automatically terminate and be of no further force and effect upon the ter-

1. Modification of distance or area regulations;

2. Additions to structures which are nonconforming as to side yard, rear yard, or lot coverage, providing the additions meet the requirements of this title affecting the property;

3. Walls or fences to exceed heights permitted by ordinances.

Modifications requested in said applications for relief to be administered with the requirement for a public hearing shall be limited to deviations not to exceed 20 percent of the requirements imposed by ordinances.

C. Site, Architectural, and Landscape Plan Approvals. The zoning administrator shall be empowered to grant site plan, architectural plan and landscape plan approval as provided herein.

D. Performance Standard Procedure. The zoning administrator shall be authorized to issue a zoning permit for uses subject to performance standards procedures, as provided herein.

E. Home Occupations. The zoning administrator shall be authorized to grant permits for home occupations, as defined and regulated in CVMC 19.14.490.

F. Fees. A fee, in the amount as presently designated or as may be in the future amended in the master fee schedule, shall accompany each application for a variance or conditional use permit or modifications thereto considered by the zoning administrator without a public hearing.

In regard to applications on any of the aforementioned subjects, the zoning administrator shall set a reasonable time for the consideration of the same and give notice thereof to the applicant and to other interested persons as defined in this title. In the event objections or protests are received, the zoning administrator shall set the matter for public hearing as provided herein. (Ord. 2616 § 5, 1994; Ord. 2526 § 1, 1992; Ord. 2506 § 1, 1992; Ord. 2290 § 1, 1989; Ord. 2075 § 2, 1984; Ord. 2011 § 1, 1982; Ord. 1813 § 1, 1978; Ord. 1371 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.1302(B)).

19.14.040 Variances – Public hearing required when – Exceptions.

In the case of applications for variances, other than those for limited relief as set forth in CVMC 19.14.030, the zoning administrator shall set the matter for public hearing in the manner provided herein. (Ord. 1212 § 1, 1969; prior code § 33.1302 (C)).

19.14.050 Public hearing – Mandatory when.

A. The zoning administrator may, at her/his option, refer any of the matters on which she/he is authorized to rule and/or issue a permit to the planning commission for review. In addition, a project applicant may request that any such matter be referred directly to the planning commission for action. In such cases, a public hearing as provided herein shall be mandatory.

B. Any person who disagrees with the ruling of the zoning administrator may appeal such ruling to the planning commission. In such cases, a public hearing as provided herein shall be mandatory. Any person who disagrees with a sign design ruling of the zoning administrator may appeal such ruling to the design review committee. In such cases, the sign project ruling under appeal shall be reviewed by the design review committee in accordance with CVMC 19.14.582.

C. Notwithstanding the above provisions, the zoning administrator may, at his option, or upon appeal, refer applications for carnivals and circuses on which he is authorized to issue a permit to the city council for review. In such cases, a public hearing as provided herein shall be mandatory. (Ord. 2575 § 1, 1993; Ord. 2365 § 1, 1990; Ord. 1212 § 1, 1969; prior code § 33.1302(D)).

19.14.060 Conditional use permit – Defined – Purpose and intent.

The granting of a conditional use permit is an administrative act to authorize permitted uses subject to specific conditions because of the unusual characteristic or need to give special consideration to the proper location of said uses in relation to adjacent uses, the development of the community and to the various elements of the general plan. It is the purpose of this chapter to set forth the findings necessary for such administrative action and to establish a procedure for granting conditional use permits. (Ord. 1212 § 1, 1969; prior code § 33.1303).

19.14.070 Conditional use permit – Application – Fee – Public hearing.

A. Applications for conditional use permits or modifications thereto shall be made to the planning commission in writing on a form prescribed by the planning commission and shall be accompanied by plans and data sufficient to show the detail of the proposed use or building. The application shall be accompanied by a fee as presently designated, or as may in the future be amended, in the master fee schedule. The director of planning shall cause the

matter to be set for hearing in the same manner as required for setting zoning matters for hearing. The director of planning or the planning commission shall have the discretion to include in the notice of the hearing on such application notice that the planning commission will consider classifications of other than that for which application is made and/or additional properties and/or uses.

In those cases where the application conforms to the requirements of CVMC 19.14.030(A), the application shall be directed to the zoning administrator.

B. In the case of hazardous waste facilities as defined in CVMC 19.04.107, applications for conditional use permits or modifications thereto shall be made pursuant to CVMC 19.58.178, and shall be considered by the planning commission with a recommendation to be forwarded to the city council for final review and action. The requirements of CVMC 19.14.090 shall apply to both the planning commission recommendation and the city council resolution, with the following modifications:

1. The written findings, in addition to the requirements of CVMC 19.14.080, shall address those matters as set forth in CVMC 19.58.178(K).

2. The decision of the planning commission shall constitute a recommendation only, and shall not become final or subject to appeal as provided in CVMC 19.14.100 to 19.14.130.

3. The city council's decision shall be considered final, and the city clerk shall transmit a copy of the resolution as provided by CVMC 19.14.130. (Ord. 2542 § 2, 1993; Ord. 2011 § 1, 1982; Ord. 1813 § 1, 1978; Ord. 1371 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.1304).

19.14.080 Conditional use permit – Prerequisites for granting.

After the public hearing, the planning commission or the zoning administrator may, by resolution, grant a conditional use permit if the planning commission or the zoning administrator finds from the evidence presented at said hearing that all of the following facts exist:

A. That the proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community;

B. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity;

C. That the proposed use will comply with the regulations and conditions specified in this title for such use;

D. That the granting of this conditional use will not adversely affect the general plan of the city or the adopted plan of any governmental agency;

E. That the proposed conditional use, if located in the coastal zone, is consistent with the certified local coastal program and is consistent with the intent of the zoning district. (Res. 11903, 1985; Ord. 1212 § 1, 1969; prior code § 33.1305(A)).

19.14.090 Conditional use permit – Public hearing procedure – Finding of facts.

The planning commission or the zoning administrator shall make a written finding which shall specify acts relied upon in rendering said decision and attaching such conditions and safeguards as deemed necessary and desirable, not more than 10 days following the decision of the commission or the zoning administrator, and shall fully set forth wherein the facts and circumstances fulfill or fail to fulfill the requirements of this section and CVMC 19.14.080. A copy of this written finding of facts shall be filed with the city clerk, with the director of planning and building, and mailed to the applicant. The decision of the planning commission or zoning administrator shall be final on the eleventh day following its filing in the office of the city clerk, except where appeal is taken as provided herein. (Ord. 2790, 1999; Ord. 2374 § 2, 1990; Ord. 1212 § 1, 1969; prior code § 33.1305(B)).

19.14.100 Conditional use permit – Appeals – Procedure generally.

The applicant or other interested persons may appeal the decision of the zoning administrator to the planning commission within 10 days after the decision is filed with the city clerk, and the hearing on said appeal shall be processed by the planning commission in the same manner as a conditional use permit within the original jurisdiction of the planning commission. The applicant or other interested persons shall have the same right of appeal from any determination of the planning commission in such instances as set forth in CVMC 19.14.110 through 19.14.130. (Ord. 1212 § 1, 1969; prior code § 33.1305(C)).

19.14.110 Conditional use permit – Appeals – Form – Contents – Effect of filing.

The applicant or other interested person may appeal from the decision of the planning commis-

sion granting or denying any conditional use permit as provided in CVMC 19.14.240 and 19.14.250 to the city council within 10 days after said decision is filed with the city clerk. Said appeal shall be in writing and filed in triplicate with the city clerk upon forms provided by the planning department and shall specify wherein there was error in the decision of the planning commission. If an appeal is filed within the time limit specified, it automatically stays proceedings in the matter until a determination is made by the city council.

Where an application is denied by the planning commission by less than four votes, the applicant shall have the right to either a rehearing at the next planning commission meeting or an appeal to the city council without payment of additional fees. The choice of alternatives shall be discretionary with the applicant. All other proceedings pertaining to appeals shall continue to apply. (Ord. 1212 § 1, 1969; prior code § 33.1306(A)).

19.14.120 Conditional use permit – Appeals – City clerk duties.

Upon the filing of the appeal, the city clerk shall set the matter for public hearing, giving the same notice as required in CVMC 19.12.060 through 19.12.080. The city clerk shall send the planning department a duplicate copy of the appeal and request the planning commission to transmit to the city council a copy of its decision and findings, minutes of the hearing and all other evidence, maps, papers and exhibits upon which the planning commission made its decision. (Ord. 1212 § 1, 1969; prior code § 33.1306(B)).

19.14.130 Conditional use permit – Appeals – City council action – Resolution contents and transmittal.

Upon the hearing of such appeal, the city council may, by resolution, affirm, reverse or modify in whole or in part any determination of the planning commission, subject to the same limitations and requirements of findings as are placed upon the planning commission by this chapter. The resolution must contain a finding of facts showing wherein the conditional use meets or fails to meet the requirements of CVMC 19.14.080 through 19.14.100. Not later than 10 days following the adoption of said resolution, the city clerk shall transmit a copy of the resolution and finding to the director of planning, to the director of building and housing, and shall mail a copy to the applicant. (Ord. 2074 § 1, 1984; Ord. 1212 § 1, 1969; prior code § 33.1306(C)).

19.14.140 Variance – Defined – Purpose and intent – Prohibited when.

The granting of a variance is an administrative act to allow a variation from the strict application of the regulations of the particular zone, and to provide a reasonable use for a parcel of property having unique characteristics by virtue of its size, location, design or topographical features, and its relationship to adjacent or surrounding properties and developments. The purpose of the variance is to bring a particular parcel up to parity with other property in the same zone and vicinity insofar as a reasonable use is concerned, and it is not to grant any special privilege or concession not enjoyed by other properties in the same zone and vicinity. The variance may not be used to correct improper zoning. It is the purpose of this chapter to set forth the findings necessary for such administrative action and to establish a procedure for granting variances. In no case shall a variance be granted to permit a use other than a use permitted in the district in which the subject property is situated. (Ord. 1212 § 1, 1969; prior code § 33.1307).

19.14.150 Variance – Application.

Application shall be made by the property owner to the zoning administrator on a form prescribed for that purpose by the city. (Ord. 1212 § 1, 1969; prior code § 33.1308(A)).

19.14.160 Variance – Fee required.

The fee, no part of which shall be refundable, for a variance or modification thereof shall be the required fee(s). (Ord. 2506 § 1, 1992; Ord. 2011 § 1, 1982; Ord. 1813 § 1, 1978; Ord. 1371 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.1308(B)).

19.14.170 Variance – Accompanying documents required.

The following accompanying maps and drawings are required: maps and drawings required to demonstrate that the conditions set forth in CVMC 19.14.150 through 19.14.230 apply to subject property, together with any other data required. (Ord. 1212 § 1, 1969; prior code § 33.1308(C)).

19.14.180 Variance – Public hearing – Procedure – Notice required.

A public hearing shall be held by the zoning administrator in the following manner:

The zoning administrator shall publish a notice of hearing in a newspaper of general circulation in the city not less than five days prior to the date of said hearing. Notice of hearing may also be made,

C. Create a nuisance by reason of noise, dust, odor, vibration, fumes, smoke, electrical interference, or other causes;

D. Permit any external display of products, merchandise, or any sign to identify the home occupation.

A home occupation permit shall be revoked by the planning director upon violation of any requirement of this chapter, or of any conditions or limitation of any permit issued, unless such violation is corrected within 15 days of notice of such violation, and any such permit may be revoked for repeated violation of the requirements of this section or of the conditions of such permit.

In the event of denial of any permit, or the revocation thereof, or of objection to the limitations placed thereon, appeal may be made in writing to the planning commission, whose decision shall be final. (Ord. 2506 § 1, 1992; Ord. 2011 § 1, 1982; Ord. 1212 § 1, 1969; prior code § 33.1314).

19.14.500 Zoning permit – Required when – Exceptions.

The purpose of the zoning permit is to secure compliance with the provisions of this title by property owners requesting building permits. From and after August 8, 1969, no owner shall establish or permit the establishment of any new or changed use of any land or building until a zoning permit therefor has been issued by the building inspector; provided, however, that no zoning permit shall be required for the practice of horticulture or for grazing of livestock. (Ord. 1212 § 1, 1969; prior code § 33.1315).

19.14.510 Zoning permit – Application.

Application shall be made by the property owner or agent thereof on a form prescribed by the city, and shall be accompanied by the required filing fee(s). (Ord. 2506 § 1, 1992; Ord. 2011 § 1, 1982; Ord. 1212 § 1, 1969; prior code § 33.1315(A)).

19.14.520 Zoning permit – Accompanying documents required.

The application shall be accompanied by drawings required by the building code and, in addition, by a plot plan showing the lot lines and dimensions and locations of improvements with dimensions and any other data necessary to show that yard requirements and all other provisions of this title are fulfilled. (Ord. 1212 § 1, 1969; prior code § 33.1315(B)).

19.14.530 Zoning permit – Issuance prerequisites – Compliance required.

It shall be the duty of the building inspector to issue a zoning permit; provided, he is satisfied that the structure, building, or premises, and the proposed use thereof, conform with all requirements within this title, and that all other reviews and actions, if any, called for in this title have been complied with and all necessary approvals secured therefor. (Ord. 1212 § 1, 1969; prior code § 33.1315 (C)).

19.14.540 Zoning permit – Use limitations – Display of permit required.

Land or buildings may be occupied and used only for the use for which the zoning permit is issued. Said zoning permit shall be displayed on the site. (Ord. 1212 § 1, 1969; prior code § 33.1315 (D)).

19.14.550 Zoning permit – Grounds for revocation – Notice required – Time limit for use.

The zoning permit may be revoked in either of the following situations:

A. In any case where the conditions of such permit have not been or are not complied with, the permittee shall be given notice of intention to revoke such permit at least 10 days prior to revocation. After conclusion of said 10 days, the permit may be revoked.

B. In any case where the zoning permit has not been used within six months after the date of granting thereof, then, without further action, the permit granted shall be null and void. (Ord. 1212 § 1, 1969; prior code § 33.1315(E)).

19.14.570 Precise plan approval.

Where use is made of the precise plan procedure, as provided in this title, a zoning permit shall not be issued for such development or part thereof until the planning commission and city council have approved a precise plan application for said development as provided in CVMC 19.14.571 through 19.14.580. (Ord. 1632 § 2, 1975).

19.14.571 Precise plan approval – Application and fee.

Application shall be made on a form prescribed for this purpose by the city and shall be accompanied or preceded by a zone change application establishing the P modifying district. The required fee(s) shall accompany the precise plan applica-

tion. (Ord. 2506 § 1, 1992; Ord. 1961 § 1, 1982; Ord. 1632 § 2, 1975).

19.14.572 Precise plan approval – Required information.

The application shall include:

A. The name and address of the applicant and of all persons owning any or all of the property proposed to be used. The application must be signed by the owner/option holder, or written permission must be given authorizing an agent to sign the application;

B. All data and maps as specified in CVMC 19.56.042. (Ord. 1632 § 2, 1975).

19.14.573 Precise plan approval – Public hearings.

A public hearing shall be held by the planning commission and city council as provided herein:

A. The hearing before the city council shall be set by the city clerk within 30 days after planning commission action.

B. The secretary of the planning commission and city clerk shall publish notice of hearings in a newspaper of general circulation in the city not less than 10 days prior to the date of said hearings. Failure of owners to receive notice of hearings shall in no way affect the validity of action taken. Any requested exceptions to the requirements of the underlying zone shall be specified in the public hearing notice. (Ord. 2374 § 2, 1990; Ord. 1632 § 2, 1975).

19.14.574 Precise plan approval – Planning commission action.

In taking action the commission may recommend to the city council denial of a precise plan, approval of the precise plan as submitted, or approval of a precise plan subject to additional conditions. The planning commission may recommend approval if, from the facts presented, the commission can make the necessary findings noted in CVMC 19.14.576. Recommendation for approval shall require the affirmative vote of not less than a majority of the total membership of the planning commission. Any precise plan, as authorized, shall be subject to all conditions imposed, and shall be excepted from other provisions of this title only to the extent specified in the resolution of approval or shown by an approved plan. (Ord. 2374 § 2, 1990; Ord. 1632 § 2, 1975).

19.14.575 Precise plan approval – City council action.

The city council, after the public hearing and consideration of the matter, may affirm the action of the planning commission, deny the action of the planning commission, or modify conditions recommended by the planning commission. An affirmative vote of at least three members of the city council shall be necessary to change or modify the recommendations of the planning commission. (Ord. 1632 § 2, 1975).

19.14.576 Precise plan approval – Findings.

The planning commission may recommend approval of the plan and the city council may grant approval of the plan if all of the following facts are found:

A. That such plan will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity;

B. That such plan satisfies the principle for the application of the P modifying district as set forth in CVMC 19.56.041;

C. That any exceptions granted which deviate from the underlying zoning requirements shall be warranted only when necessary to meet the purpose and application of the P precise plan modifying district;

D. That approval of this plan will conform to the general plan and the adopted policies of the city. (Ord. 1632 § 2, 1975).

19.14.577 Precise plan approval – Modifications of the precise plan.

Requests for modifications shall be submitted to the planning director in written form and shall be accompanied by the required filing fee(s) and such additional maps, statements or other information as may be required to support the modification. If the proposed modification is deemed by the director of planning to be insignificant in nature, the changes may be approved by the director subject to the filing of a written report to the planning commission and city council. If, in the opinion of the director of planning, the proposed changes are significant in scope, the applicant will be notified within 10 days of the written request that a new application and hearing will be required. (Ord. 2506 § 1, 1992; Ord. 2011 § 1, 1982; Ord. 1632 § 2, 1975).

19.14.578 Precise plan approval – Zoning administrator.

Following the recommendations by the planning commission and approval of a precise plan by the city council, the zoning administrator shall issue a zoning permit as provided in CVMC 19.14.500 through 19.14.550, and the building inspector shall ensure that development is undertaken and completed in conformance with the approved plans. (Ord. 1632 § 2, 1975).

19.14.579 Precise plan approval – Multiple-family dwellings and commercial or industrial projects.

Notwithstanding the provisions of other sections of this chapter, the review of precise plans for multiple-family dwelling, commercial, or industrial projects shall be procedurally governed by the rules adopted by the design review committee, created under CVMC 19.14.581. (Ord. 1893 § 1, 1980; Ord. 1771 § 2, 1977).

19.14.580 Precise plan approval – Multiple-family dwellings and commercial or industrial projects – Zoning administrator.

Following the approval or conditional approval of a precise plan for a multiple-family dwelling, commercial, or industrial project by the design review committee, or upon appeal, by the planning commission or city council, the zoning administrator shall issue a zoning permit, as provided in CVMC 19.14.500 through 19.14.550, and the building inspector shall ensure that the development is undertaken and completed in conformance with the approved plan. (Ord. 1893 § 1, 1980; Ord. 1771 § 2, 1977).

19.14.581 Design review committee – Creation.

In order to relieve the planning commission of certain routine functions necessary to the proper administration of this chapter, to intensify this municipality's efforts to improve its townscape, and to promote the orderly growth and amenity of the city and environs, there is established a design review committee with such authority as is granted by this chapter. The design review committee's purpose is to ensure that development within the city of Chula Vista is orderly, of a high quality, and consistent with city-approved design guidelines. (Ord. 2822 § 1, 2000; Ord. 1771 § 3, 1977).

19.14.582 Design review committee – Duties and responsibilities.

A. The design review committee shall review plans for the establishment, location, expansion or alteration of uses or structures in all R-3 zones, all commercial and industrial zones, and development and redevelopment within redevelopment project area boundaries, and shall approve, conditionally approve or deny such plans, except when projects are within the boundaries of a redevelopment project, in which case the committee shall recommend approval, conditional approval or denial to the redevelopment agency of the city. The committee shall render decisions on minor proposals as defined in agency Resolution No. 71.

B. The design review committee shall also review plans for the establishment, location, expansion or alteration of multiple-family dwelling uses, major use permits and commercial or industrial projects or structures located within the 1985 Montgomery annexation area, and governed by Chapter 19.70 CVMC.

C. The responsibility of the design review committee shall be limited to the review of site plans, landscaping, and the exterior design of buildings, for consistency with city-approved design guidelines. In reviewing a residential project, the DRC shall consider the costs/benefits of any recommended improvement as reported by the applicant.

D. The design review committee shall review all appeals filed to contest sign design rulings of the zoning administrator.

E. The design review committee shall base its findings and actions upon the provisions of the effected design manuals of the city.

F. The design review committee shall prepare and adopt operational procedures, bylaws and business forms.

G. The design review committee shall submit annual reports on its operations to the city planning commission and redevelopment agency.

H. The fee for a hearing before the design review committee is the required fee(s).

I. The zoning administrator has the discretion, with the concurrence of the applicant, to act in the place of the design review committee in the case of minor projects, including signs; commercial, industrial or institutional additions which constitute less than a 50 percent increase in floor area or 20,000 square feet, whichever is less; and residential projects of four units or less. The zoning administrator may also act in the place of the design review committee in the case of new commercial, industrial or institutional projects with a total floor area

Chapter 19.54

UNCLASSIFIED USES

Sections:

19.54.010 Authorized when – Purpose of review.

A. All of the following, and all matters directly related thereto, are declared to be uses possessing characteristics of such unique and special form as to make impractical their being included automatically in any classes of use as set forth in the various zones herein defined, and the authority for the location and operation thereof shall be subject to review and the issuance of a conditional use permit; provided, however, that conditional use permits may not be granted for a use in a zone in which it is specifically excluded by the provisions of this title.

B. The purpose of this review shall be to determine that the characteristics of such use shall not be incompatible with the type of uses permitted in surrounding areas and for the further purpose of stipulating such conditions as may reasonably assure that the basic purposes of this title shall be served. Factors to be considered and the manner in which conditional use applications are to be processed shall be as set forth in CVMC 19.14.060, et seq. (Ord. 1281 § 2, 1970; Ord. 1212 § 1, 1969; prior code § 33.535).

19.54.020 Designated – Limitations and standards.

The following uses may be considered for location in any zone, subject to the provisions set forth herein, and additional conditions set forth in Chapter 19.58 CVMC (references indicated for uses):

A. Borrow pits and quarries for rock, sand and gravel;

B. Campgrounds: See CVMC 19.58.040;

C. Cemeteries: See CVMC 19.58.080;

D. Colleges, universities, private schools, and elementary and secondary public schools;

E. Columbariums, crematoriums and mausoleums; provided, that these uses are specifically excluded from all R zones unless inside of a cemetery: See CVMC 19.58.080;

F. Churches: See CVMC 19.58.110;

G. Dumps, public or private;

H. Hospitals, including, but not limited to, emergency, general, convalescent, rest homes, nursing homes (for the aged, crippled, and mentally retarded of all ages), psychiatric, etc.: See CVMC 19.58.110.

Further, approval shall not be granted until the following findings can be made (homes for mentally retarded children):

1. The size of the parcel to be used shall provide adequate light and air in proportion to the number of residents,

2. The location of windows and open play areas shall be so situated as to not adversely impact adjoining uses,

3. Spacing between these facilities shall be such that the character of the neighborhood is not affected by the grouping of these homes;

I. Mortuaries: See CVMC 19.58.080;

J. Establishments or enterprises involving large assemblages of people or automobiles, as follows; provided, that these uses shall be deemed to be generally undesirable in the R zones:

1. Airports and heliports: See CVMC 19.58.180,

2. Amusement parks and amusement enterprises: See CVMC 19.58.040,

3. Arenas: See CVMC 19.58.040;

4. Fairgrounds: See CVMC 19.58.040,

5. Museums,

6. Open air theaters, except drive-in theaters: See CVMC 19.58.120(B),

7. Race tracks and rodeos: See CVMC 19.58.040,

8. Recreational centers, commercially operated: See CVMC 19.58.040,

9. Stadiums,

10. Shooting clubs: See CVMC 19.58.290;

K. Golf courses: See CVMC 19.58.090;

L. Passenger stations for rail or bus travel;

M. Public and quasi-public uses;

N. Radio or television transmitters;

O. Trailers (commercial coaches): See CVMC 19.58.330;

P. Senior housing developments: See CVMC 19.58.390;

Q. Recreational vehicle storage yards: See CVMC 19.58.400;

R. Off-site advertising signs: See CVMC 19.60.050(E);

S. Water distribution facilities: See CVMC 19.58.420;

T. Certified farmers' markets: See CVMC 19.58.148;

U. Ambulance services: See CVMC 19.58.245.

Conditional use permit applications for the uses listed in this section shall be considered and approved by the following body or official. The zoning administrator shall approve all ambulance services uses. The planning commission shall approve campgrounds, recreational vehicle storage yards, churches, amusement arcades and centers, trailers (commercial coaches), water distribution facilities and borrow pits of not more than two acres. The city council, subsequent to its receipt of recommendations thereon from the planning commission, shall approve all other unclassified uses not mentioned in this paragraph. (Ord. 2958 § 1, 2004; Ord. 2921 § 2, 2003; Ord. 2449 § 1, 1991; Ord. 2296 § 6, 1989; Ord. 2169 § 1, 1986; Ord. 2075 § 3, 1984; Ord. 2054 § 1, 1983; Ord. 1878 § 2, 1979; Ord. 1711 § 1, 1976; Ord. 1697 § 1, 1976; Ord. 1626 §§ 1, 2, 1975; Ord. 1464 § 2, 1973; Ord. 1456 § 2, 1973; Ord. 1356 § 1, 1971; Ord. 1281 § 2, 1970; Ord. 1246 § 2, 1969; Ord. 1232 § 2, 1969; Ord. 1212 § 1, 1969; prior code § 33.535(A)).

19.54.030 Yard requirements.

The requirements for front, side, and rear yards applicable to the particular property and zone in which such use is proposed shall prevail unless, in the findings and conditions recited in the resolution dealing with each matter, specific exceptions, additions or modifications are made with respect thereto. (Ord. 1281 § 2, 1970; Ord. 1212 § 1, 1969; prior code § 33.535(B)).

19.54.040 Height regulations.

The requirements for building height limit applicable to the particular property and zone in which such use is proposed shall prevail unless, in the findings and conditions recited in the resolution dealing with each matter, specific exceptions, additions or modifications are made with respect thereto. (Ord. 1281 § 2, 1970; Ord. 1212 § 1, 1969; prior code § 33.535(C)).

19.54.050 Off-street parking and loading facilities.

Off-street parking and loading facilities for the specific use proposed shall be determined by the planning commission in the event such requirements are not enumerated in CVMC 19.62.010 through 19.62.140. (Ord. 1356 § 1, 1971; Ord. 1281 § 2, 1970; Ord. 1212 § 1, 1969; prior code § 3.535 (D)).

19.54.060 Site plan and architectural approval.

Site plan and architectural approval is required for all uses, as provided in CVMC 19.14.420 through 19.14.480. (Ord. 1281 § 2, 1970; Ord. 1212 § 1, 1969; prior code § 33.535(E)).

19.56.030 S height of buildings (stories) modifying district – Yard size modifications for exceptions.

A. Whenever the S modifying district is established on the zoning map of the city, no building shall be built higher than the number of stories specified after the S on said map, and said number of stories shall take precedence over any height requirement specified otherwise in the zone modified by this provision.

B. For any building permitted under this section to be built higher than otherwise permitted in the zone modified by this provision, side and rear yards shall be increased by six feet plus two additional feet per story for every story over three. (Ord. 1212 § 1, 1969; prior code § 33.601(A)(2)).

19.56.040 P precise plan modifying district – Purpose.

See also CVMC 19.12.120 and 19.14.570 through 19.14.580. The purpose of the P precise plan modifying district is to allow diversification in the spatial relationship of land uses, density, buildings, structures, landscaping and open spaces, as well as design review of architecture and signs through the adoption of specific conditions of approval for development of property in the city. Within the boundaries of the P district, the location, height, size and setbacks of buildings or structures, open spaces, signs and densities indicated on the precise plan shall take precedence over the otherwise applicable regulations of the underlying zone. (Ord. 1632 § 1, 1975; Ord. 1356 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.601(A)(3)).

19.56.041 P precise plan modifying district – Application.

The P modifying district may be applied to areas within the city only when one or more of the following circumstances is evident:

A. The subject property, or the neighborhood or area in which the property is located, is unique by virtue of topography, geological characteristics, access, configuration, traffic circulation or some social or historic situation requiring special handling of the development on a precise plan basis.

B. The property or area to which the P modifying district is applied is an area adjacent and contiguous to a zone allowing different land uses, and the development of a precise plan will allow the area so designated to coexist between land usages which might otherwise prove incompatible.

C. The basic or underlying zone regulations do not allow the property owner and/or the city appropriate control or flexibility needed to achieve an efficient and proper relationship among the uses allowed in the adjacent zones.

D. The area to which the P modifying district is applied consists of two or more properties under separate ownership wherein coordination regarding access, on-site circulation, site planning, building design and identification is necessary to enhance the public convenience, health, safety and general welfare. (Ord. 1632 § 2, 1975).

19.56.042 P precise plan modifying district – Required maps and information.

An application for approval of a precise plan shall be accompanied by a detailed dimensioned drawing of the project on a scale of sufficient size so as to readily indicate all dimensions of the various elements of the development. The required elements are as follows:

A. Legal description, legend, scale, north arrow, vicinity map, and identification of designer;

B. The boundary lines of subject property, fully dimensioned, together with the name and dimensions of adjoining streets;

C. Existing topography and proposed grading plan, showing slope, retaining walls, pad elevations, and percent of slope on streets, driveways and other graded areas;

D. Existing and proposed streets, utilities, and easements;

E. Access, pedestrian, vehicular and service; points of ingress and egress; with driveway locations and dimensions;

F. Loading and trash areas, walls and/or fences (including height);

G. Proposed location, height, and dimensions of buildings, including color and materials on all elevations. The floor area, number of stories, and number of units and bedrooms (when applicable) shall be given. Proposed uses shall be indicated including floor area devoted to each use;

H. Parking layout, including dimensions, number of stalls, and circulation flow;

I. Location, height, and size of signs proposed on the property;

J. All Landscaped Areas. Such areas shall be defined with a written proposal outlining the landscaping concept, as well as the proposed method of irrigation. In addition, all existing trees on the site shall be identified with a note as to proposed disposition;

K. Lighting, including the location, type and hooding devices to shield adjoining properties;

L. Location and design of recreational areas. (Ord. 1632 § 2, 1972).

19.56.043 P precise plan modifying district – Plan review.

Plans shall be reviewed by the planning commission with recommendations forwarded to the city council in accordance with the provisions of CVMC 19.14.570. (Ord. 1632 § 2, 1975).

19.56.044 P precise plan modifying district – Exceptions.

Exceptions to the code requirements of the underlying zone may be granted by the city council; provided, that these exceptions are so noted in the public hearing notice and findings are made as specified in CVMC 19.14.570. (Ord. 1632 § 2, 1975).

19.56.045 P precise plan modifying district – Density.

The P modifying district may be used to limit densities within the underlying zone range. However, densities may not be increased above the maximum range within the underlying zone. When the city council deems it necessary to establish a density limitation in conjunction with the P modifying district, the density established shall be expressed by a number following the P designator. The number assigned will represent the maximum number of dwelling units allowed per net acre of land. ("Net acreage" is the total land area remaining after dedication of a public right-of-way.) (Ord. 1632 § 2, 1975).

19.56.046 P precise plan modifying district – Phasing.

Precise plans may be submitted in phases for projects within the P district. However, the submission of the first phase must include all of the required submissions for site plan approval for that portion of the project included within the boundaries of Phase I. The submission of elevations and proposed building materials may be deferred in the first phase until specific architectural concepts are developed.

In addition, a skeletal plan of closely related future phases must be submitted and approved concurrent with the submittal of Phase I. Such skeletal plans shall indicate circulation, building locations, preliminary grading, areas devoted to landscaping, density, and parking.

The submission of each phase of the precise plan will require a new application and fee together with the required site plans. (Ord. 1632 § 2, 1975).

19.56.047 P precise plan modifying district – Scope of planning commission and city council action.

In carrying out this section the planning commission and city council shall consider the principles set forth in CVMC 19.14.470 (Site plan and architectural approval – Principles to be observed) appropriate to the review of a precise plan. (Ord. 1632 § 2, 1975).

19.56.048 P precise plan modifying district – Plan review of multiple-family dwellings and commercial or industrial projects.

Notwithstanding the provisions of CVMC 19.56.047, plans for multiple-family dwellings and commercial or industrial projects in areas governed by the P precise plan modifying district shall be reviewed by the design review committee, and shall be considered by the planning commission and the city council only upon appeal, pursuant to CVMC 19.14.583. (Ord. 1893 § 1, 1980; Ord. 1771 § 2, 1977).

19.56.100 E equestrian modifying district – Establishment procedures.

There is established a supplemental district designated as the E equestrian modifying district, which may be attached to any of the existing single-family residential or agricultural zones in the city. Said district may be formed or initiated by a petition signed by 66-2/3 percent of the property owners within the area proposed to be designated as an equestrian modifying district. Said petition shall be submitted to the planning commission, which shall proceed to hold public hearings in accordance with the provisions of this title for the rezoning of property. In addition, the establishment of such a district may be initiated by the planning commission or the city council and said district may from time to time have the boundaries thereof adjusted in accordance with the changed conditions.

The E equestrian modifying district shall be subject to the requirements and conditions set forth in CVMC 19.56.110 and 19.56.120. (Ord. 1364 § 1, 1971; Ord. 1212 § 1, 1969; prior code § 33.601 (A)(5)).