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VIA EMAIL (clerk@cityofsanmateo.org) AND OVERNIGHT MAIL

Honorable Mayor and City Councilmembers
c/o City Clerk
City of San Mateo
330 West 20th Avenue
San Mateo, CA 94403

RE: Pulte Homes' Opposition to Appeal filed by Laurianna Ceja Diaz Regarding the Planning Commission's Approval of PA-2020-043 (Modifying PA-2018-013) – 1, 2 3 Waters Tech Drive (the One90 Project)

Dear Honorable Mayor and City Councilmembers:

We represent Pulte Home Company, LLC ("Pulte"). This letter is to oppose the appeal ("Appeal") filed by Laurianna Ceja Diaz ("Appellant"), dated November 5, 2020.[1] As set forth below, the Appeal fails as a matter of law, and Pulte respectfully requests that the Appeal be denied.

The Appeal argues that the One90 project ("Project") should be completely re-analyzed under the California Environmental Quality Act ("CEQA") for the following reasons: (1) The Planning Commission issued a discretionary approval in approving Modification to PA-2020-043 (modifying PA-2018-013) (the "Modification"); (2) COVID-19 has substantially changed the Project; (3) construction impacts are more severe than "what was considered previously"; (4) Pulte has "refused" to adopt mitigation measures to reduce project impacts; (5) design changes, height increases, and changes to garbage facilities cause greater Project impacts; (6) replacing an attached unit with a detached unit increases the Project's environmental impacts; and (7) a reduction in bike racks will cause increased traffic impacts. Based on these allegations, Appellant incorrectly argues that either an Environmental Impact Report ("EIR") should be prepared, or the Project's Mitigated Negative Declaration ("MND") should be "recirculated" and a "subsequent MND" should be prepared. (See, generally, the Appeal.)

The Appeal should be denied because, among other things, it completely ignores and/or misstates the law and facts. First, the Project has already been analyzed under CEQA, and an MND was approved by the City Council and mitigation measures were imposed on the Project a part of that MND. The challenge period for the Project's MND expired almost two years ago (in March 2019). The Appeal must be limited in scope to the discretionary action or decision being

[1] We request that this letter be included in the administrative record for this matter.

appealed (i.e., the Modification), and cannot seek to re-open the entire Project or previously-issued Project approvals, as discussed in more detail below.

Further, the Appeal misstates facts (for instance, alleging the building heights were increased as part of the Modification when no building heights were increased, and in fact were *decreased* as part of the Modification). Also, Appellant's argument that COVID-19 triggers new CEQA review directly contradicts well-established case law that CEQA is meant to analyze a project's impacts on the environment – not the environment's impacts on a project, as discussed below. Additionally, replacing one attached unit with one detached unit does not create any new or increased environmental impacts from what was analyzed under the Project MND, as it does not increase unit count, density, traffic, or anything else that is required to be analyzed under CEQA. A more detailed discussion on Pulte's opposition to the Appeal is below.

I. The Appeal must be limited to the scope of the discretionary approval that is being appealed (i.e., the Modification), and not the Project as a whole.

a. The statute of limitations to challenge the Project's MND and mitigation measures expired almost two years ago and cannot be reopened.

The MND for the Project was approved in February 2019. Under CEQA, the period to challenge the MND (including the mitigation measures contained therein) expired 30 days after the timely filing of the Notice of Determination. (Pub. Res. Code, § 21167, subd. (a).) If no Notice of Determination is filed, then the challenge period is 180 days from the approval of the MND. (*Id.*, at subd. (a).) Here, an NOD was timely filed on February 19, 2019, so the challenge period expired in March 2019. But even if an NOD had not been timely filed, the time period to challenge the Project's MND and mitigation measures still expired in 2019. Either way, the Project's MND and mitigation measures were not challenged by anyone, and the Appellant cannot reopen those previous approvals and challenge periods now simply based on the Planning Commission's recent approval of the Modification. The Appeal must be limited to the discretionary approval that was issued – the Modification - not discretionary approvals that occurred almost two years ago.

b. Any CEQA analysis must be limited to analyzing any potential incremental changes in the Project based on the Modification, not the Project as a whole as Appellant incorrectly contends.

Appellant cannot argue the City must re-analyze the entire project as modified by the Modification. Such an interpretation of CEQA would require lead agencies to repeat their CEQA review of previously approved projects whenever new circumstances necessitate project changes, in direct contravention of Public Resources Code § 21166 and CEQA Guidelines § 15162(c)). The law abhors such statutory interpretations or applications. (*Molena v. Dep't of Motor Vehicles* (2009) 172 Cal.App.4th 974, 992-93.)

In-depth CEQA review has already occurred for the Project, the time for challenging the sufficiency of the Project's MND and mitigation measures has long since expired. "The event of a change in a project is not an occasion to revisit environmental concerns laid to rest in the original analysis." (*Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1296.)

Similarly, in *Temecula Band of Luiseno Mission Indians v. Rancho California Water Dist.* (1996) 43 Cal.App.4th 425, 439, a water district adopted a mitigated negative declaration for a supplemental water supply program. After commencing construction, the water district proposed rerouting and redesigning one of the pipelines, and adopted a negative declaration regarding the changes. (*Id.,* at pp. 429-31.) The court found that a challenge to the original mitigated negative declaration was barred, and held that "[J]udicial review of the Project's environmental effects is limited to the incremental effects of the Project as compared to the 1984 Program." (*Id.,* at pp. 435 and 439.)

Here, the City made the correct CEQA determination that the Modification does not change any of the conclusions contained in the Project's MND or implicate any of the factors contained in CEQA Guidelines section 15162, and therefore no additional CEQA review is required. The Modification consists of architectural changes necessary to comply with the California Building Code (and architecture revisions do not cause environmental impacts), *reductions* (not increases, as Appellant incorrectly states) in building heights, the relocation of a previously analyzed and approved trash enclosure (*per the City Council's request*), and removing one attached unit and replacing it with one detached unit (which results in no increased unit count, density, traffic, or any other increased impacts since the unit count remains the same as what was analyzed under the MND). Moreover, the relocation of the trash enclosure moves the trash enclosure *further* from the residences. (See Planning Commission Staff Report, dated October 27, 2020, pp. 1-3.) City Staff also correctly determined that the 0.002% increase in floor area ratio included in the Modification results in no measureable environmental impacts that would trigger subsequent CEQA review, and Appellant has provided no evidence to the contrary.

Based on the foregoing, The Planning Commission's approval of the Modification cannot be construed as a "project" that independently triggers CEQA review because the Modification has no potential to cause a direct physical change, or a reasonably foreseeable indirect change in the environment. (Pub. Res. Code, § 21065; CEQA Guidelines § 15378.) Appellant's attempt to persuade the City Council that the entire Project should be re-analyzed under CEQA based on the Modification approved by the Planning Commission is contrary to well-established CEQA case law, and should be denied outright.

II. CEQA is not required simply because a discretionary approval was issued as Appellant incorrectly contends.

Appellant states that the City "must conduct additional CEQA review because it is

conducting an additional discretionary approval." This is flat out wrong and contrary to CEQA. Supplemental or subsequent MNDs or EIRs are only required if certain specific criteria are met under Public Resources Code section 21166. Here, none of those criteria are met by the Modification, and Appellant has provided no evidence of any kind to show that one or more of the criteria under section 21166 are met to justify the preparation of an EIR for the Modification. If the criteria under Section 21166 are not met to trigger a subsequent or supplemental MND or EIR, then performing additional CEQA review is *prohibited*. In fact, *there is a statutory presumption against additional environmental review under CEQA*. (Pub. Resources Code, § 21166; CEQA Guidelines, § 15162.)

Under Section 21166, public agencies are prohibited from requiring additional CEQA review except under very specific circumstances — e.g., when there are "*substantial* changes in the project," or circumstances that require "*major* revisions" to the MND. (Emphasis added.) The presumption against further CEQA review under Section 21166 comes into play "precisely because in-depth review has already occurred" and "[t]he question is whether circumstances 'have changed enough to justify repeating a substantial portion of the process.'" (*Id.*, quoting *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073 [emphasis added].)

For the reasons stated above, the approval of the Modification clearly does not meet the criteria under Public Resources Code section 21166 to trigger the preparation of a subsequent or supplemental MND, and therefore additional CEQA review is prohibited as a matter of law. Reducing building heights and moving a trash enclosure further away from residents actually *reduces* impacts. Further, replacing an attached unit with a detached unit and making changes in architecture results in no increases in unit count, traffic, construction timing, circulation, or anything else that could trigger the criteria under Public Resources Code section 21166 and trigger the requirement for a subsequent MND or an EIR.

We should also note that the Appeal incorrectly states the standard for when an EIR should be prepared. The Appeal states, "There is a fair argument that the project will have a significant impact on the environment, therefore, the City must conduct an EIR." (Appeal, ¶ 3.) However, this only a part of the test, and Appellant conveniently omits the most important part of the test for when an EIR must be prepared. Under CEQA, an EIR is required when "it can be fairly argued *on the basis of substantial evidence* that the project may have significant environmental impact." *California Building Industry Association v. Bay Area Air Quality Management District* (2015) *62 Cal.4th 369*, quoting *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110.) Here, Appellant has provided no evidence whatsoever to support her allegations. The Appeal contains nothing more than conclusory statements and opinions, which are not "substantial evidence" that is required to support Appellant's claims. In fact, conclusory statements, opinions and unsubstantiated argument are not "evidence" under CEQA or any other circumstance. (Evid. Code, § 350; Public Resources Code, § 21080, subd. (e)(2).)

Moreover, as discussed above, the Appellant cannot legally open up the entire Project based on the limited scope of the Planning Commission's approval of the Modification since the time period to challenge the Project's MND and mitigation measures expired in 2019, and the Appeal must be limited to the scope of the discretionary approval being appealed (i.e., the Modification).

III. The Appellant is attempting to argue improper "reverse-CEQA."

By taking the position that the entire Project should be re-analyzed under CEQA because of the COVID-19 pandemic, Appellant is asking the City to engage in conduct that the courts have held to be inappropriate. Pursuant to well-established case law, the purpose of CEQA is to analyze a project's impacts on the environment, not the environment's impacts on a project. The latter has been found by the courts to be improper, and is commonly referred to as "reverse CEQA."

As stated by the California Supreme Court in *California Building Industry Association v. Bay Area Air Quality Management District*, (2015) 62 Cal.4th 369, "[S]ection 21083 [of the Public Resources Code] does not contain language directing agencies to analyze the environment's effect *on* a project. Requiring such an evaluation in all circumstances would impermissibly expand the scope of CEQA." (Emphasis included.) The California Supreme Court went on to state, "Indeed, the key phrase 'significant effect on the environment' is explicitly defined by statute in a manner *that does not encompass the environment's effect on the project*." (*Id* [emphasis added].)

Here, Appellant argues that the entire Project should be re-analyzed under CEQA because of the COVID-19 pandemic. This position flies in the face of CEQA and the California Supreme Court's holding in the *California Building Industry Association* case, and therefore is not a proper basis for appeal.

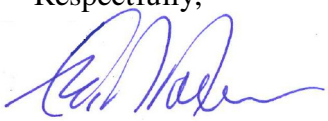
IV. The Appeal contains no legal basis for its various allegations, and consists solely of unsubstantiated arguments and conclusory statements which are not admissible evidence.

CEQA requires that objections be made with specificity, and be supported by some level of evidence or support beyond just conclusory statements and arguments. Conclusory statements are not sufficient for appeal based on California law. Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative. (Evidence Code, § 350; Public Resources Code, § 21080, subd. (e)(2).) The Appeal contains no evidence whatsoever. It only contains conclusory statements, narrative and argument, which does not meet the mandatory threshold for "substantial evidence" under CEQA, and cannot be considered evidence under the Evidence Code. (*Id.*) Therefore, the Appeal should be denied.

V. Conclusion.

Based on the foregoing, it is clear that Appellant misstates, mischaracterizes, and takes out of context various provisions of CEQA in support of the Appeal. Further, Appellant has provided no evidence to support Appellant's claims, and instead has just provided unsubstantiated conclusory statements, which cannot be considered evidence under CEQA or the Evidence Code. There is no evidence in the Appeal, or anywhere else, that the Modification approved by the Planning Commission results in new or increased environmental impacts, and City staff and the Planning Commission were correct in making that determination. The scope of the modification (i.e., changes in architecture, moving a trash enclosure further away from residences pursuant to the City Council's request, lower building heights, and replacing one attached unit with one detached unit) results in lesser environmental impacts, if anything. Appellant has not met her burden under CEQA to justify her request to make the Project subject to further CEQA review. Finally, the Appellant has asked this City Council to engage in improper "reverse CEQA." Therefore, Pulte respectfully requests that the City Council deny the Appeal and uphold the Planning Commission's approval of the Modification.

Respectfully,



Gregory P. Powers

cc: Donald Sajor, Pulte Area General Counsel and Vice President*
Daniel Carroll, Vice President of Land*
Aaron Head, Pulte Div. Vice President of Land Planning and Development*

*via email only