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SENT VIA EMAIL
(planning@amadorgov.org)

Amador County Planning Commission
810 Court Street
Jackson, California 95642

RE: Agenda Item 1 of the February 13, 2024 Planning Commission Meeting

Dear Members of the Planning Commission:

These comments are submitted on behalf of the Alberta Hale Land Trust regarding Agenda Item 1 of the February 13, 2024, Planning Commission meeting ("Project"). As explained in more detail below, the mitigated negative declaration ("MND") prepared for the Project suffers from numerous defects and may not be used to support approval of the Project.

1. County's Failure to Consider Public Comments on the MND

CEQA requires, "The lead agency shall consider comments it receives on a . . . proposed mitigated negative declaration if those comments were received within the public review period." (Pub. Resources Code, § 21091, subd. (d).) Further, "Prior to carrying out or approving a project for which a negative declaration has been adopted, the lead agency shall consider the negative declaration together with comments that were received and considered pursuant to paragraph (1) of subdivision (d)." (Pub. Resources Code, § 21091, subd. (f); see also CEQA Guidelines, § 15074, subd. (b).)

These mandates cannot be satisfied here. The public comment period on the MND ends at 5:00 pm on February 13, 2024. This is just two hours before the Planning Commission hearing on the Project. Two hours is insufficient time to meaningfully review and consider public comments. What is more, the County's staff report for the Project has already been prepared and released. Clearly the staff report has not "considered" all comments on the MND that the County has not yet received.

The obvious solution is to continue the County's hearing on the Project to a later date so that the County can prepare a staff report that actually "considers" public comments regarding the MND. The County's failure to do so constitutes a procedural violation of CEQA for which reviewing courts afford no deference to the lead agency when "scrupulously enforcing" CEQA's procedural requirements.

2. Piecemealed Review

The MND is inadequate because it is based on unlawfully "piecemealed" project description that fails to analyze contemplated residential development of the properties.

CEQA's conception of the term "project" is broad to maximize protection of the environment. (*Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 653.) "This big picture approach to the definition of a project (i.e., "the whole of an action") prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 270-271.) All aspects of a proposed project, i.e., the "whole of the action," must be analyzed in an EIR. (See CEQA Guidelines, § 15378, subd. (a) [a project is the "whole of an action" which may result in direct or indirect physical changes to the environment]; CEQA Guidelines, § 15126 [must consider all phases of a project].) While issues of piecemealing typically arise in the context of whether two different physical activities should be analyzed as a single project, improper piecemealing can also occur where an agency fails to analyze reasonably foreseeable future development. (CEQA Guidelines, § 15144 ["While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can"]; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 397 ["there is telling evidence that the University, by the time it prepared the EIR, had either made decisions or formulated reasonably definite proposals as to future uses of the building. At a minimum, it is clear that the future expansion and the general types of future activity at the facility are reasonably foreseeable"].)

Here, the MND fails to analyze the "whole of the action" because it fails to analyze the residential development of the two sites that are unquestionably the "reasonably foreseeable consequences" of the proposed rezoning action. The record reveals:

- The project applicant plainly states, "A proposed use is as a residential parcel." (Applicant letter dated September 14, 2023.)

- A residential property sale listing for the property dating back to 2021 reveals the applicant's intent for the property to be used for a residential dwelling. (See **Exhibit 1**.)

- Consistent with the applicant's longstanding desire to put the properties to use for residential purposes, the applicant recently obtained both a grading permit (#234119) and a building permit for a garage (#234359).

Setting aside that the grading and building permits should not have been issued by the County in the first place (see *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1170-1171 [demolition unlawful "until the entire CEQA process was completed and the overall Project lawfully approved"]; *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1503 [same]) since they are part of the "whole of the action" contemplated by the applicant, such improvements trigger the County's duty to "use its best efforts to find out and disclose all that it reasonably can" about the applicant's underlying project.

The California Supreme Court's decision in *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376 (*Laurel Heights I*) provides important guidance here. In *Laurel Heights I*, the University of California relied on feigned ignorance about its future plans to use a portion of a building in order to avoid adequate analysis of that future use in its EIR. The court saw through UC's ruse, explaining:

> The draft EIR acknowledged that UCSF will occupy the entire Laurel Heights facility when the remainder of the space becomes available. In response to public inquiry as to plans for the facility, UCSF explained that it intends to use the facility for the School of Pharmacy's basic science group and UCSF's Office of the Dean. The EIR even estimated the number of faculty, staff, and students that will occupy the facility until 1995 (a total of 460 persons) and then afterward when the entire facility becomes available (860 persons). Under the standard we have announced, it is therefore indisputable that the future expansion and general type of future use is reasonably foreseeable . . . .
>
> The Regents' contention is only that they have not formally decided precisely how they will use the remainder of the building. That argument is beside the point. They have admitted that they intend to use the entire facility, and, in light of the record before us, it is reasonably foreseeable

> that the facility will be used primarily for the School of Pharmacy, more specifically, as a biomedical research facility . . . .
>
> In short, there is telling evidence that the University, by the time it prepared the EIR, had either made decisions or formulated reasonably definite proposals as to future uses of the building. ***At a minimum, it is clear that the future expansion and the general types of future activity at the facility are reasonably foreseeable***.

(*Laurel Heights I*, *supra*, 47 Cal.3d at 396-397, emphasis added.)

The same is true here. We previously alerted the County to the fact that the applicant was marketing the property for sale as residential properties, and yet that is ignored in the MND. Further, what was the purpose of the grading permit? What was the purpose of constructing a "residential detached garage" on a parcel that does not include any residence? The actions strongly suggest that the project applicant has an underlying plan for residential development of the property — which is precisely why the applicant previously attempted to sell one of the properties for residential development. The law does not allow a lead agency to turn a blind eye to the underlying "whole of the action" in this fashion.

3. The City's Piecemealed Review Is Demonstrated by the MND's Inconsistent Project Description and Resulting Analysis of Impacts and Mitigation

There is no reasonable dispute that residential development on both parcels is a "reasonably foreseeable consequence" of the Project that must be analyzed and disclosed. (*Laurel Heights I*, *supra*, 47 Cal.3d at 376.) Confirming this, the MND purports to analyze and mitigate for that residential development, but only partly. As examples, mitigation measures Cult-1 and Cult-2 include mitigation for historical, archaeological and paleontological resources resulting from construction of residential structures. (MND, pp. 8 – 9.) Mitigation measure Geo-1 purports to address impacts associated with the generation of wastewater from operation of residential structures. (MND, pp. 9 – 10.) Mitigation Measure UTL-1 purports to address impacts associated with extraction of groundwater water resulting from operation of the residential structures.

These examples demonstrate both that the applicant's contemplated residential development is reasonably foreseeable and also may be analyzed and mitigated in the MND. The MND violates CEQA, however, by not following this same approach across all resource areas. With respect to biological resources, the MND identified special-

status species that have the potential to occur onsite. The MND fails to analyze and mitigate for this potentially-significant impact, however, stating in relevant part:

> Though the project area may contain candidate, sensitive, or special status species, there is no impact to Candidate, Sensitive, and Special Status Species because, the project is regulatory in nature, and no development is proposed.

(MND, p. 30.)

The MND takes the same narrow scope with respect to visual impacts, energy consumption, mineral resources, and wildfire. (MND, pp. 25, 33, 43, 51.) This inconsistent definition of the "whole of the action" is the hallmark of arbitrary agency action. It appears that the County is defining the project broadly to include the anticipated future development where the impact can be easily "mitigated" by adopting boilerplate mitigation language; but the project is defined more narrowly to exclude the anticipated future development when analysis and mitigation requires significantly more effort such as on-site surveys for special-status plants and wildlife or other site-specific analysis and mitigation.

The County will need to revise its CEQA analysis to provide a project description that is consistent across all resource areas.

4. The MND Fails to Address a Fair Argument of Onsite Hazards

The MND asserts that the Project's impacts associated with hazards is less than significant without the need for any mitigation. (MND, pp. 38 – 39.) To the contrary, the record supports a fair argument that the Project would exacerbate hazards by exposing residents to potential hazards.

Here, the project applicant acknowledges that the Project site is a former mine site: "The parcel was mined in the early days of the gold Rush period and has naturally reclaimed." The applicant gives no explanation of what is meant by "naturally reclaimed," and so the Project may exacerbate latent environmental issues or hazardous conditions. Indeed, the Environmental Information Supplement discloses, "There is a filled-in adit adjacent to the County road and several shall prospect shafts and adits. The remnant of the historic Volcano Ditch traverse the property from north to south." The fact that the Project site is a former mine site that was only "naturally" reclaimed and still includes unaddressed mine shafts and adits supports a fair argument that the Project would exacerbate existing hazards by bringing residents into the area. This is a

potentially significant hazard impact even if not expressly included in the CEQA Guidelines Appendix G Checklist. (*Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 13 (*Visalia Retail*); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109; *Make UC A Good Neighbor v. Regents of University of California* (2023) 88 Cal.App.5th 656, 686.) As recently explained in *Yerba Buena Neighborhood Consortium, LLC v. Regents of University of California* (2023) 95 Cal.App.5th 779, 802-803:

> The Regents offer no adequate reason for failing fully to analyze the Plan's impact on public transit. The final EIR's initial reason for declining to address the impact on public transit, that appendix G of the CEQA Guidelines does not include a question related to public transit, cannot justify the failure. Appendix G is an "'Environmental Checklist Form' that may be used in determining whether a project could have a significant effect on the environment and whether it is necessary to prepare a negative declaration or an EIR." (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896, fn. 5; see Guidelines, § 15063, subd. (f).) The appendix is not, and does not purport to be, a comprehensive listing of possible significant impacts. To the contrary, appendix G expressly informs users that it is "a sample form that may be tailored to … project circumstances," and that "potential impacts that are not listed on this form must also be considered." (Guidelines, appendix G: Environmental Checklist Form, at p. 1.) Given this limited role, ***the failure of appendix G to mention a particular impact does not justify the failure to discuss it***.

(Emphasis added.)

The MND will need to address the Project's hazard impacts associated with bringing residents to a former mine site that has been only "naturally reclaimed." Even worse, the MND's discussion of mineral resources suggest that the severed surface and mineral rights mean that the applicant or any future purchaser might be <u>without authority to mitigate the open adits and shafts</u> on the property:

> This project will not encroach onto any of the other properties and therefore not interfere with any present or future access to known mineral resource areas. Mineral resources are separately referenced in the deed to the property, therefore ***any separate ownership or mineral rights shall remain unaffected by this project. There are no proposed structures therefore there is no impact to any mineral resources***.

(MND, p. 43, emphasis added.) The MND must address this potentially significant conflict between the reasonably foreseeable residential development of the site and the severed mineral interests that apparently allow for continued mining operations. CEQA does not allow an agency to sidestep such an obvious conflict by asserting "there are no proposed structures" where that agency, as here, knows full well such structures are reasonably likely to occur in the future.

* * *

We encourage the Planning Commission to deny approval of the MND and the Project, and remand environmental review back to staff so that it can analyze the "whole of the action" contemplated by the applicant.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: 
Patrick M. Soluri

PS/mre

cc: Craig Bonneau

Exhibit 1: MLS listing for APN 030-020-108

EXHIBIT 1

Client Full Report - Land

Listings as of 05/05/2023 at 3:21PM

MLS#: 20049758 16360 Charleston Rd, Volcano, CA 95689

LP: $150,000	**Status:** Expired 08/20/21	**DOM/CDOM:** 364/364
Price/Acre: 42613.64	**Area:** 22013	**Lot Sz (Ac):** 3.5200

Pending Date:
Close Date: **Close Price:**
CP % LP:
Special List Cond: None

Additional Pictures (14) Map Mortgage Calculator

Remarks

Public Remarks: How would you like to have a piece of the cute little town of Volcano?This 3.5 acre parcel is perfect to build your home; just a stroll into town.This property has a creek running through it with lots of oaks and conifers. Plenty of space for your new home. Power and Cable running along property line, even a fire hydrant on property to save on fire insurance. Enjoy a light dusting of snow in the winter and cool summer breezes in the summer.Drive by and check out this little piece of Amador County Gold Country.

Directions

Directions to Property: Drive through Volcano, stay Left on Charleston, property about 200' on Right

Cross Street: Consolation St

General Information

Property Subtype: Residential Acreage
County: Amador
APN: 030-020-108-000
Second Parcel Number:
Third Parcel Number:
Zoning: R
Zoning Description: Residential

Number of Lots:
Primary Residence: None

Minimum Bldg SqFt:
Additional Living Unit: No **Desc:**

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School District (County): Amador
Elementary School District: Amador Unified
Middle or Junior School District: Amador Unified
Senior High School District: Amador Unified
Subdivision:

Census Tract: 2.00
Elevation:
Lot Size/Source: 3.5200 (Assessor Auto-Fill)
Lot Size Dimensions:

Disclosures/Restrictions

Disclosures/Documents: None,See Remarks

County Transfer Tax Rate:
City Transfer Tax Rate:
Development Status: Final Map Filed

Bonds/Asmts/Taxes: Unknown **Desc:**

MLS#: 20049758 16360 Charleston Rd, Volcano, CA 95689

Property Information

Community Features:

Other Equipment: None

Other Structures: None

Lot Features: Stream Year Round

Topography: Trees

Frontage Type:
Fencing:

Income Includes: None

Current Use: Vacant

Possible Use: Single Family

View Description:

Horse Property: **Features:**

Soil:
Crops: None

Vegetation: Grassed,Trees Many

Road Frontage Type:

Road Responsibility: Public Maintained Road
Road Surface Type: Paved
Utilities:

Electric:
Water Source:

Well GPM:
Irrigation: None

Sewer: Septic Needed

Perc Test/Septic Design:

Distance to Electric: Electricity To Site
to Gas:
to Phone Service:
to Sewer:
to Water: Public Within 500 Ft

Association

Association: No
Fee:
Fee Includes:

Mandatory:
Frequency:

Name:

Phone: