



PLACER COUNTY PLANNING DEPARTMENT

AUBURN OFFICE
3091 County Center Dr
Auburn, CA 95603
530-886-3000/FAX 530-886-3080

TAHOE OFFICE
565 W. Lake Blvd./P. O. Box 1909
Tahoe City CA 96145
530-581-6280/FAX 530-581-6282
E-Mail : planning@placer.ca.gov

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PLANNING APPEALS

The specific regulations regarding appeal procedures may be found in the Placer County Code, Chapters 16 (Subdivision), 17 (Planning and Zoning), and 18 (Environmental Review Ordinance).

-----OFFICE USE ONLY-----

Last Day to Appeal _____ (5 pm) Appeal Fee \$ 495-

Letter _____ Date Appeal Filed _____

Oral Testimony _____ Receipt # 10-0064516

Zoning C3-UP-DC Received by DU

Maps: 7-full size and 1 reduced for Planning Commission items Geographic Area Central Team

-----TO BE COMPLETED BY THE APPLICANT-----

- Project name Livingston's Concrete Batch Plant (PCPA-20050072)
- Appellant(s) Ophir Area Property Owners Association 916-609-5000 916-609-5001
 Address c/o Kenyon Yeates LLP, 2001 N Street, Suite 100 Telephone Number Fax Number
Sacramento CA 95811
 City State Zip Code
- Assessor's Parcel Number(s): 040-271-042
- Application being appealed (check all those that apply):

<input type="checkbox"/> Administrative Approval (AA-_____)	<input type="checkbox"/> Tentative Map (SUB-_____)
<input checked="" type="checkbox"/> Use Permit (CUP/MUP-_____)	<input type="checkbox"/> Variance (VAA-_____)
<input type="checkbox"/> Parcel Map (P-_____)	<input type="checkbox"/> Design Review (DSA-_____)
<input type="checkbox"/> General Plan Amendment (GPA-_____)	<input type="checkbox"/> Rezoning (REA-_____)
<input type="checkbox"/> Specific Plan (SPA-_____)	<input type="checkbox"/> Rafting Permit (RPA-_____)
<input type="checkbox"/> Planning Director Interpretation _____ (date)	<input checked="" type="checkbox"/> Env. Review (EIAQ-_____)
<input type="checkbox"/> Minor Boundary Line Adj. (MBR-_____)	<input type="checkbox"/> Other: _____
- Whose decision is being appealed: Planning Commission
(see reverse)
- Appeal to be heard by: Board of Supervisors
(see reverse)
- Reason for appeal (attach additional sheet if necessary and be specific):
Please see attached letter for a summary of appeal issues and referenced attached documents.

(If you are appealing a project condition only, please state the condition number)

Note: Applicants may be required to submit additional project plans/maps.

Signature of Appellant(s) *Kenyon Yeates*
behalf of Ophir Area Property Owners Assoc.

CHARITY KENTON
BILL YEATES

kenyon | yeates ^{LLP}

CHRISTINA MORSNER BROWN

2001 N STREET, SUITE 100
SACRAMENTO, CALIFORNIA 95811
916.609.5000 FAX 916.609.5001

February 17, 2010

Placer County Board of Supervisors
c/o Paul Thompson
Assistant Deputy Director
Placer County Planning Department
3091 County Center Drive
Auburn, CA 95603

Re: Summary of APPEAL of Planning Commission approval of Livingston's Concrete Batch Plant Conditional Use Permit (PCPA 20050072)

Dear Supervisors,

On February 11, 2010, the Planning Commissioners approved the above-referenced project and an accompanying Environmental Impact Report ("EIR") and Statement of Findings for a cement batch plant in the Ophir area. These decisions were based on flawed and incomplete information and analysis. On behalf of our client, the Ophir Area Property Owners Association, we appeal the Planning Commission's approval of Livingston's Concrete Batch Plant Conditional Use Permit (PCPA 20050072).

The Ophir Area Property Owners Association requests that the Board set aside the Planning Commission's approval of the project and all related approvals or actions including, but not limited to, the Planning Commission's approval of the project, the Planning Commission's approval of the EIR for the project, and any concurrent or subsequent approvals or entitlements approved or granted pursuant to or in conjunction with the Planning Commission's approval of the project. To the extent that the Board now has original jurisdiction over the project, the EIR, and related approvals, we request that the Board deny the project due to its inconsistency with applicable state and local laws, ordinances and regulations, or, at the very least, that the Board remand the matter to planning staff to revise and reanalyze the project in light of the procedural and substantive requirements of state and local laws, ordinances and regulations.

On behalf of the Ophir Area Property Owners Association, we request that the entire Planning Commission record be transferred to the Board of Supervisors for this appeal. We hereby incorporate by reference and raise as substantive points of appeal, each of the issues raised in the attached written comments regarding the projects' potentially significant adverse environmental

effects and other inconsistencies with state and local laws, ordinances and regulations from Kenyon Yeates dated February 3, 2010 (Attachment A) and the Ophir Area Property Owners Association (Attachment B) as supported and amplified by the evidence (or improper lack thereof) in the County's administrative record for this project.

I. SUMMARY OF GROUNDS FOR APPEAL

A. THE FOCUSED EIR FAILED TO COMPLY WITH CEQA'S ENVIRONMENTAL REVIEW REQUIREMENTS.

The EIR for the project failed to adequately investigate or describe the existing environmental conditions or to acknowledge several potentially significant adverse environmental impacts to the existing environment including, but not limited to, land use, groundwater resources, air quality, noise, aesthetics and road conditions. The EIR is described as a "focused EIR" that analyzed and disclosed the potential impacts only for four environmental resource areas (land use, transportation, hydrology and water quality, and noise). The EIR omitted some resource areas where the initial study identified potential impacts (air quality and aesthetics) by implementing mitigation measures at the initial study phase and concluding no further environmental review was necessary. By limiting the review of these areas, the EIR failed to meet CEQA's requirements to analyze and disclose the project's potentially significant impacts. The burden of providing the necessary information on these potentially significant adverse environmental effects was thereby improperly shifted to the public.

i. INACCURATE PROJECT DESCRIPTION

(a) SIZE OF THE TOWER

The EIR project description must be revised to describe a 45-foot tower rather than a 57-foot tall tower. Although the Conditional Use Permit Application submitted in December 2008 stated that the project will now only use a 45-foot tower, the EIR described a 57-foot tower. The FEIR released in September of 2008 did not revise the Project description to include a 45-foot tower. The Project Description in the EIR must be revised to reflect the change in the tower height.

The area is zoned for a maximum height of 45 feet and a variance is necessary to allow for a 57 foot tower. If the FEIR is approved with the description of a 57-foot tower, there is no assurance that the Project tower will be limited to the 45 feet. It is possible for Livingston's to later apply for the variance for the extra height and claim that no further environmental review is necessary since a certified EIR analyzed a tower up to 57-feet in height. If the EIR description is revised to describe only a 45-foot tower (as the applicants now claim they are planning on building) then, if a variance is requested for additional height, the County must determine whether the additional height constitutes a substantial change to the project and requires additional environmental review under Public Resources Code, section 21166. As the Project Description stands, with a 57-foot tower, there is no assurance that the Project will be limited to a 45-foot tower.

(b) POTENTIAL FUTURE PHASES OF THE PROJECT

The current batch plant conditional use permit application is for a maximum of 300 cubic yards of concrete per day. Other Livingston's batch plants produce from 120 to 230 yards *per hour*. This plant will have approximately 1/4 to 1/8 the capacity of other Livingston's plants. Livingston's president indicated at a public meeting that the company anticipated expanding this facility in the future under favorable business conditions. This is particularly concerning given that the proposed smaller facility will cause potentially significant water, noise, air and aesthetic impacts discussed below. Under CEQA, the EIR must analyze the full anticipated project rather than focusing only on the smaller temporary project.

ii. POTENTIAL IMPACTS TO EXISTING WELLS IN THE AREA

The EIR failed to adequately investigate and disclose the potential of a substantial decrease in the volume of groundwater pumped from nearby wells due to onsite pumping of up to 10,000 gallons of water per day / six days a week for operations of the plant. First, the EIR failed to provide information about the baseline groundwater conditions. Under CEQA, the baseline environmental condition is critical to any meaningful assessment of the environmental impacts of a project because the significance of environmental impacts cannot be determined without first setting the baseline.¹

The EIR also failed to adequately investigate the potential long term effects on neighboring wells. The EIR used the Department of Public Health guidelines for selecting pump capacity of the tested well using a 72-hour aquifer test. This method, however, is only a rule-of-thumb method that provides no information regarding potential third-party impacts to wells in the surrounding area. The limited pump test conducted did suggest the potential to affect nearby wells with a constant linear decline of a neighboring well by nearly one foot in the 72 hours. The EIR failed to follow up with a more thorough investigation and analysis to determine the actual projected long-term effect of the prolonged pumping of 10,000 gallons per day. The EIR failed to incorporate any mitigation measures such as monitoring of surrounding wells or requiring reduced pumping on Livingston property or importing additional sources of water to address potential long-term impacts. Please refer to the technical memos by Parker Groundwater and our letter to the Planning Commission for a more thorough discussion of this issue.

iii. INADEQUATE NOISE ANALYSIS

The EIR relied on a faulty noise analysis to conclude that there would be no impacts resulting from the operations of the batch plant 12 hours a day/ six days a week. The Ophir Area Property Owners Association submitted an expert review of the EIR's noise analysis that detailed the EIR's failure to accurately disclose the potentially significant noise impacts resulting from the concrete batch plant operations. Please refer to the Noise Impact Review and Report by Dale LaForest & Associates and our letter to the Planning Commission for more detail on this issue.

¹ *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.4th.99, 119; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955.

One of the most significant issues is that the existing noise levels in the Project vicinity already exceed the County's Noise Ordinance standards. Under CEQA, where the existing noise levels are already in excess of the maximum acceptable noise level, an EIR needs to consider whether the cumulative noise impacts would be significant with the addition of the project. The Livingston's EIR improperly concluded that the project's impacts would not be significant because it would not exceed 3db which is usually required before most people will perceive a change in noise levels. Under CEQA, the EIR must not merely rely on the 3db level but consider whether this Project will cause a tipping point of cumulative noise problems.

iv. FAILURE TO INCLUDE ANY ANALYSIS OF AIR QUALITY IMPACTS

The EIR contains no air quality section. The initial study for the project identified potentially significant air quality impacts, however, the Planning Department improperly concluded that air quality impacts did not need further study with the implementation of certain mitigation measures based on standards set by the Air Pollution Control District. The EIR lacked any data, evidence or analysis upon which the conclusion of no impacts and the mitigations were based.² In order to fulfill the informational purposes of CEQA, the EIR must disclose the evidence and analysis that supports the agency's conclusion. Here, the unsupported conclusions in the initial study precluded the required detailed information and analysis of the Project's air quality impacts.

Please refer to the expert report prepared by Autumn Wind Associates, Inc and our letter to the Planning Commission which detail the omissions of the EIR with regard to potential project-related emissions and pollutants.

v. INCOMPATIBILITY WITH SURROUNDING LAND USES

The EIR failed to adequately analyze the impacts of a batch plant in this area in light of the surrounding uses. The EIR concluded that the project is consistent with the existing and planned land uses for this area because the site is presently designated for Commercial uses and zoned Heavy Commercial (C3-UP-DC) which allows manufacturing and processing uses. The EIR failed to take account of how the area has actually developed over the last 20 years. Uses surrounding the project site are not large industrial type uses but rather commercial uses that are integrated into the rural character of the area. These uses include a propane company, landscape products and paver stone supplier, a tractor dealership, a cabinet company, a fence company, a door company, a mobile home park, and several rural residences. A cement batch plant will be of greater intensity, density, and generate more environmental impacts than any these other existing commercial uses. Furthermore, the site is designated DC (Design Scenic Corridor). The Design Corridor designation is intended to "protect and enhance the aesthetic character of lands and buildings within public view" and "to minimize any adverse impacts of conflicting land uses."³

² *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111; see also *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171; *Topanga Assoc. for Scenic Community v. County of L.A.* (1974) 11 Cal.3d 506, 515.

³ Placer County Zoning Ordinance, Article 17.52.070.

vi. INCOMPATIBILITY WITH THE OPHIR GENERAL PLAN

The EIR briefly acknowledged the Ophir General Plan but omitted any evaluation of the consistency of a cement batch plant with this community plan level document. The EIR merely stated that the Ophir General Plan “designates the project site for commercial uses.” This omission of any evaluation of consistency with the Ophir General Plan is an omission of information required by CEQA.

vii. SIGNIFICANT AESTHETIC IMPACTS

The EIR excluded any analysis of aesthetic impacts in the EIR. The initial study concluded that there were no potential impacts because the project is located in an “industrial/heavy commercial area” where other structures and equipment are visible from I-80. Photographs submitted to the County by our clients demonstrate that the cement plant will be visible from both I-80 and surrounding residences. Several surrounding residences on hills in the area will look directly down onto the Project site. The EIR should have analyzed these potential aesthetic impacts and recommended enforceable mitigation measures to be incorporated into the project to address these impacts.

B. INCONSISTENCY WITH THE COUNTY GENERAL PLAN POLICY.

The proposed project’s use of well water and onsite septic system is inconsistent with General Plan Policy 1.E.1 which requires new industrial development to have “adequate infrastructure.” The County interprets adequate infrastructure as public water and public sewer connections. The EIR assumed that the inconsistency caused by using well water would be short term only since PCWA was expected to supply public water in approximately 2011. PCWA, however, has recently reevaluated its timeline based on the slow down in the economy and does not expect public water to become available in that area at least until 2018. The approval of this project, which expects to use 10,000 gallons of water per day from a well for at least another 10 years, is inconsistent with the General Plan Policy 1.E.1.

In 1976 this area was rezoned from a minimum of one-acre requirement to 2.3 and 4.6 acres minimum due to the inadequacy of area water wells and soil septic tank problems. (Attachment C.) A typical rural residence uses roughly 1/20th of the amount of water to be used by this project. That is, the project is roughly equivalent to 20 homes on this 5 acre parcel. This heavy use of water on this five acre parcel in this area is clearly contrary to the intent of the rezoning of the area to larger parcels by the Board of Supervisors in 1976 and the General Plan Policy requiring public water hookups for industrial development.

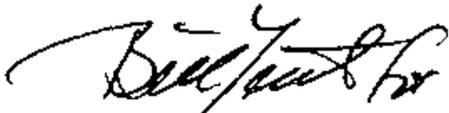
C. ADDITIONAL POINTS OF APPEAL

1. The Change in the Hours of Operation: The EIR evaluated a project based on the hours of operation 5:30 AM to 3:30 PM six days a week. Since the release of the Final EIR, the project

applicants requested the hours of operation be extended to 5:30 PM six days a week. The staff report stated that the staff determined that the extending of the hours of operation would not result in an increase in impacts and no additional environmental review was required. However the EIR lacked analysis to support the staff's determination. The extension of the hours of operation by 12 hours a week must be analyzed in terms of potential impacts to air quality, noise, and traffic.

2. Lack of Analysis of Conditions on Ophir Road. The EIR transportation section evaluated the Level of Service (LOS) at various intersections near the project site. The EIR, however, did not reveal the total number of truck trips per day on Ophir Road. The project applicant revealed at the Planning Commission hearing that between 120 and 160 truck trips per day are expected six days a week. Testimony at the hearing by area residents informed the Planning Commissioners that the condition of the road surface on Ophir Road is currently in very poor condition. The EIR did not evaluate the impacts of 120-160 truck trips on the segment of Ophir Road from the freeway off-ramp to the project site. The planning staff must evaluate the impacts on the current conditions of this segment of the road with the addition of 120-160 heavy cement trucks per day and recommend mitigation measures (such as fair share payment for resurfacing Ophir Road) to be incorporated into the project.

Sincerely,



Christina Morkner Brown

COPIES OF ATTACHMENTS A THROUGH H
ARE AVAILABLE AT THE PLACER COUNTY
PLANNING DEPARTMENT

ATTACHMENTS:

- A - Letter from Kenyon Yeates dated February 3, 2010 with Exhibits A through G.
- B - Comment Letters from Ophir Area Property Owners Association dated September 26, 2008 and March 17, 2008.
- C - Copy of newspaper clipping regarding rezoning of area from September, 10, 1976.

CHARITY KENYON
BILL YEATES



CHRISTINA MORKNER BROWN

2001 N STREET, SUITE 100, SACRAMENTO, CALIFORNIA 95811
916.609.5000 FAX 916.609.5001
WWW.KENYONYEATES.COM

February 3, 2010

Gerry Brentnall, Chair and
Planning Commission Members
County of Placer
3091 County Center Drive, Suite 140
Auburn, CA 95603

Re: **OPPOSE:** Final EIR for Livingston's Concrete Batch Plant.

Dear Chair Brentnall and Members of the Planning Commission:

On behalf of our client, the Ophir Area Property Owners Association, this letter provides comments on the above-titled Final Environmental Impact Report ("EIR"). The Ophir Area Property Owners Association membership includes local citizens that are concerned about the environmental consequences of the proposed Livingston's Concrete Batch Plant in Placer County (the "Project").

The County's EIR failed to meet the requirements of CEQA by omitting certain mandated information in its environmental analysis. The proposed Project also violates State Zoning and Planning Law. For the reasons stated in the remainder of this letter, our client respectfully requests that the Placer County Planning Commission decline approval of the proposed Project at this time, unless or until, the County prepares and circulates for public review and comment a legally adequate EIR that provides the necessary detailed information about the environmental consequences of the proposed Project.

This letter provides comments on the EIR that are in addition to, and do not replace or otherwise supersede, comments that our client and its individual members have previously submitted and may submit orally at the upcoming hearing or under separate cover. The Ophir Area Property Owners Association expressly re-incorporates by reference, as set forth fully herein, every objection that it and its members have made or will make, whether oral or written, throughout the County's review proceedings for the Project.

I. THE PROJECT VIOLATES STATE ZONING AND PLANNING LAW

A. The Use of Groundwater and On-site Sewage for the Project is Inconsistent with the Placer County General Plan

The Placer County General Plan Policy 1.E.1 states:

The County shall only approve new industrial development that has the following characteristics:

1. Adequate infrastructure and services;
2. Convenient connections to the regional transportation network, including connections to existing transit and other non-automobile transportation;
3. Sufficient buffering from residential areas to avoid impacts associated with noise, odors and the potential release of hazardous materials;
4. Minimal significant adverse environmental impacts; and
5. Minimal adverse effects on scenic routes, recreation areas, and public vistas.

Placer County interprets "adequate infrastructure" to include public water supply and public sewer connections. The Project is inconsistent with Placer County General Plan Policy 1.E.1 because no public water supply or sewer service is available in the Project area at the present time. The EIR stated that the Project is expected to use of 7,000-10,000 gallons of water per day from an on-site well until treated water becomes available in the Project area. The Project will also dispose of wastewater in an onsite septic system to be constructed as part of the Project. The use of groundwater and an onsite septic system for an indefinite period of time conflicts with the County's General Plan goals and policies related to the provision of utility services. Therefore, the Project violates the requirement under State Zoning and Planning Law that a project be consistent with the County's General Plan.¹

II. THE COUNTY'S EIR FOR THE PROPOSED PROJECT FAILED TO MEET THE REQUIREMENTS OF CEQA.

A. Applicable Standards Under the California Environmental Quality Act.

The "heart of CEQA" is the preparation of an EIR that identifies the significant impacts of a project on the environment and ways those effects can be mitigated or avoided, including feasible alternatives to the project.² Where an EIR fails to "provide certain information mandated by CEQA and to include that information in its environmental analysis, [courts have] held the agency 'failed to proceed in the manner prescribed by CEQA,'" with no deference afforded to the agency's determination.³

¹ Government Code § 66473.5.

² *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.

³ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; see also *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236-1237.

B. The EIR Failed to Adequately Analyze Impacts to Groundwater Resources.

i. The EIR must revise the analysis of groundwater impacts based on a long-term use of groundwater.

Under the CEQA Guidelines, an EIR must discuss "any inconsistencies between the proposed project and applicable general plans and regional plans."⁴ While the EIR acknowledged that the Project is inconsistent with the General Plan policy, it concluded that impacts resulting from this inconsistency alone are less than significant. This conclusion is based on the assumption that the reliance on groundwater and an on-site septic system would be short-term only. This short-term assumption in the DEIR released in February of 2008 was based on a projection by Placer County Water Agency ("PCWA") that treated water would be available to the site as soon as 2011.

However, with the ensuing decline in the economy many infrastructure projects have been delayed. In August of 2009 our clients attended a PCWA Board meeting and were informed that due to the downturn in new development, PCWA anticipates that the Ophir Road area will not receive treated water until at least 2018. PCWA stated that this date depends on a turn around in the economy and the project could be delayed beyond 2018 if economic conditions do not improve. (See Exhibit A.)

The County must update the water analysis based on the projection of treated water only becoming available 2018 or later. The reliance on groundwater is no longer an interim water source, but a longer term water source. The County must reassess the impacts of reliance on groundwater by the Project for at least eight years and likely longer. The EIR must discuss the impacts of the long term inconsistency with the General Plan Policy 1.E.1.

Furthermore, the Placer County Health and Human Services Department submitted a letter regarding the Project in 2004 discussing the incompatibility of the Project with the General Plan Policy 1.E.1, the inadequacy of the sewage disposal plans and the lack of analysis of the potential impacts on groundwater in the area. (See Exhibit B.) These comments are incorporated herein fully. The EIR did not adequately address these inadequacies raised by the County agency already back in 2004 and must be addressed before the EIR is certified.

ii. The EIR failed to adequately investigate potential impacts to groundwater resources and existing wells in the vicinity.

The analysis in Chapter 6 of the EIR failed to provide critical information about potentially significant impacts to local groundwater, particularly privately owned wells in the vicinity of the project. Impact 6.3 discussed potential operational impacts to groundwater including the results of a 72-hour constant head and recovery pump test by Diamond Well Drilling. Based on the 72 hour test, the EIR concludes there will be no significant impacts on groundwater resources.

⁴ CEQA Guidelines, § 15125, subd. (d).

The Diamond Well Drilling test, however, focused only on pump capacity and did not provide any information about the baseline groundwater conditions. Under CEQA, the baseline environmental condition is critical to any meaningful assessment of the environmental impacts of a project because the significance of environmental impacts cannot be determined without first setting the baseline.⁵

Please reference Technical Memo No.1 by Parker Groundwater Hydrogeologic Consulting (Exhibit C) which was previously submitted to the County and is incorporated fully herein by reference. The Parker Groundwater Memo provides further detailed discussion of the technical aspects in which the EIR failed to provide adequate information and, thereby, failed to adequately assess the potential impacts on groundwater resources and wells in the vicinity.

The Response to Comments Regarding Groundwater Resources prepared by Engeo Inc. (dated January 11, 2010) did not adequately address the critical omissions identified in the Parker Groundwater Memo. Mr. Parker's written response to the Engeo Response will be submitted later.

The Engeo Response did not address the failure to identify a baseline. The Engeo Response merely states that no water budget evaluation is required because Placer County does not require a water budget evaluation for a private water supply. Although Placer County and the Water Code may not require a water budget evaluation, CEQA does require that the existing physical baseline conditions be described.⁶

Of particular relevance to this omission of the required baseline information in the Project's EIR is the decision in *Cadiz Land Company, Inc v. Rail Cycle, LP* (2000) 83 Cal.App.4th 74. In *Cadiz*, the appellate court determined that an EIR was inadequate because it failed to discuss the estimated volume of groundwater contained in the aquifer underlying the proposed project. The court stated that in order to assess the potential impacts to the groundwater from contamination, the agency must first understand the volume of groundwater at stake. Similarly here, in order to assess the potential impacts resulting from a long-term reliance on groundwater by this large commercial project, the groundwater basin must first be quantified and described. Only against this baseline can the potential impacts to the groundwater resource and surrounding wells, which are relied upon as the primary source of water for local residents, be measured. This lack of information in the Livingston EIR regarding the groundwater resources violated the requirements of CEQA by failing to disclose to the public and the decision makers critical information necessary to evaluate the significance of the concrete plant's impact on this valuable resource.

⁵ *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.4th.99, 119; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955.

⁶ CEQA Guidelines, § 15125, subd. (a).

C. The EIR's Noise Analysis Failed to Disclose Significant Noise Impacts.

Please refer to the attached expert review of the EIR's noise analysis by Dale LaForest & Associates. (See Exhibit D.) This expert review was previously submitted to the County in October 2009 and is resubmitted here for your convenience.

The Dale LaForest & Associates Report ("DL&A Report"), incorporated fully herein by reference, details the failures of the County's noise study and the EIR's failure to accurately disclose the potentially significant noise impacts resulting from the concrete batch plant operations. One flaw detailed is the EIR's use of the incorrect noise standards. With the correct noise standards applied, the DL&A Report concludes that the plant operations and the trucks will generate noise levels that are clearly noticeable at times to nearby neighbors. Additionally, the DL&A Report describes how the EIR fails to analyze and mitigate for significant sleep disturbance impacts to residents on Ophir Road, truck traffic impacts during all hours of operation, and fails to disclose noise emissions from project equipment.

Perhaps most significantly, as the DL&A Report points out, the EIR improperly ignored that existing noise levels in the Project vicinity that already exceeds the County's Noise Ordinance standards. The EIR improperly applied a standard of significance of 3db to reach its conclusion of no significant noise impacts. This misapplication of a 3db standard is similar to the factual situation in *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099. In that CEQA case, the appellate court held that where the existing noise levels were already in excess of the maximum acceptable noise level, the EIR needed to consider whether the cumulative noise impacts would be significant with the addition of the project. That is, the EIR must consider whether the project will "cause a tipping point of noise problems for the general public." The court rejected the EIR's "bare conclusion" that the project's impacts would not be significant based on the assumption that 3db is usually required before most people will perceive a change in noise levels.

Similarly here, the County may not simply apply the 3db level where the baseline noise conditions already exceed the County's Noise Ordinance standards. Under CEQA, the more severe an existing environmental problem is, the lower the threshold is for treating the project's contribution to cumulative impacts as significant.⁷ The County must revisit the noise analysis and consider whether this Project will cause a tipping point of cumulative noise problems.

In addition to the critical technical flaws and omissions identified by Dale LaForest & Associates, the EIR failed to disclose potentially significant noise impacts associated with the cement transit-mix trucks. The EIR based its estimate of truck trips on the assumption that the trucks would be filled to capacity. However, based on the operations of other Livingston's concrete plants, cement trucks typically are not uniformly loaded to full capacity because of highway weight limitations. With trucks loaded to less than full capacity, then the Project will require substantially more truck trips at peak capacity than the EIR estimated. The EIR must be revised to reflect how the trucks will actually be loaded in practice based on highway regulations

⁷ *King County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721.

rather than full truck capacity and the noise analysis with these increased truck trips must be adjusted accordingly.

Furthermore, based on the operations of other concrete plants, the first loads of aggregate in the early morning generate substantially more noise than operations later in the day. The first loadings are louder because the aggregate is not immersed in mixed concrete while being loaded. Rather it is loaded dry and the concrete is mixed within the transit-mix trucks. The dropping of the dry materials from the elevated silo into the trucks generates substantially more noise. The noise generated by this early morning practice was not described, disclosed or analyzed in the EIR and must be revised.

D. The EIR Omitted the Required Analysis of Potentially Significant Air Quality Impacts.

The EIR is critically flawed in that it contains no air quality section. The EIR included mitigation measures but without any analysis. The EIR lacks any data, evidence or analysis upon which the mitigations or conclusions are based. The mere conclusion that impacts will be less than significant with the identified mitigation measures is not supported by evidence in the record and therefore does not meet the requirements of CEQA.⁸

Please refer to the expert report prepared by Autumn Wind Associates, Inc. incorporated herein by reference. The Autumn Wind Associates, Inc. Report ("AWA Report") was previously submitted to County staff in October but is resubmitted here for your convenience. (See Exhibit E.)

The AWA Report points out that the EIR fails to analyze Project-related emissions of NOx, PM, DPM, CO₂ and other pollutants. The Report details how the EIR fails to provide any baseline information for air quality in the Project area. The EIR failed to disclose to the public that the region is a nonattainment area for ozone at both the state and federal levels and failed to analyze and disclose how the Project-related trucks and equipment will affect local ozone air pollution. Of particular concern are the emissions from the numerous diesel cement trucks trips that create CARB-declared toxic air contaminant emissions which could cause air quality in the area to exceed acceptable health-risk thresholds.

The AWA Report also discusses how the EIR omitted any analysis of green house gas (GHG) emissions. An assessment of a project's impacts on global climate change is now a common component of a CEQA document after the passage of AB 32, the Global Warming Solutions Act. AB 32 effectively classifies GHGs, the primary cause of global warming, as an environmental threat subject to the provisions of the California Environmental Quality Act (CEQA). Mr. Gilbert's letter details the requirements under CEQA to address GHGs.

⁸ *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111; see also *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171; *Topanga Assoc. for Scenic Community v. County of L.A.* (1974) 11 Cal.3d 506, 515.

Furthermore, the EIR omitted any discussion of the amount of dust that is expected to be produced from the materials transfer and storage and mixer loading. The EIR does not disclose the contents of the dust and how far these particles will travel. Every bag of cement has a Proposition 65 warning because cement contains substances listed by California as causing cancer or birth defects or other reproductive harm. The EIR failed to disclose what listed substances are in the cement used in the batch plant process and what the risk of exposure is for people in the area. The initial study simply concluded, without any evidence, analysis or disclosure of information, that the amount of dust is not expected to exceed the local air quality management district's thresholds of significance, and therefore, did not warrant discussion in the EIR.

For all of these reasons, further detailed in the AWA Report, the Project's EIR failed to meet the requirements of CEQA to disclose to the public and the decision makers the potentially significant air quality impacts caused by this project.

E. The EIR Failed to Disclose the Incompatibility of the Project with Surrounding Land Uses.

The *Placer County Zoning Ordinance* assigned the project site a zoning designation of C3-UP-Dc. A cement batch plant is incompatible with the existing land uses in the vicinity of the Project, the Design Scenic Corridor designation and the Ophir General Plan (a community plan document).

i. The EIR failed to analyze or disclose how a cement batch plant is an allowable use for the C3 zoning of this parcel.

The C3 "heavy commercial" zoning is for "intensive service commercial uses." A concrete manufacturing batch plant is not specifically listed as one of the allowable land uses under Article 17.24.010. The only allowable use listed that mentions concrete is "concrete, gypsum and plaster products." The use of the word cement "product" suggests the manufacture of cement stepping stones, cement fountains and other such cement products, not the large scale manufacture of ready-mix concrete that is transported to other locations in the county.

Article 17.02.050 states that if a proposed use of land is not specifically listed, then:

The planning director may determine that a proposed use not listed in Articles 17.06 through 17.52 is allowable if the director finds all of the following:

- a. The proposed use will be consistent with the goals, objectives and policies of the general plan;
- b. The proposed use will meet the purpose and intent of the zoning district that is applied to the site;
- c. The proposed use will share characteristics common with those listed in the zoning district, and will not be of greater intensity, density, or generate more environmental impact than the uses listed in the district.
- d. If the use of land involves an agricultural or related use, the director shall consult with the agricultural commissioner.

There is no analysis in the EIR of whether a cement batch plant meets these criteria, nor any mention of the Planning Director's findings. According to the County's zoning ordinances, these findings are required to determine that a cement batch plant is an allowable use under C3. The County has therefore failed to follow the procedure set out in the zoning ordinances by failing to make the findings necessary to find that a cement batch plant is an allowable use on this C3 zoned property.

A leading Land Use Practice treatise states, "commercial use is generally defined as a business use or activity that involves the buying and selling of commodities and services at a scale greater than a home industry." For industrial zones it states these "generally include the manufacture, fabrication, processing, reduction, or other treatment of articles, substances, or commodities."⁹ Under this description, a batch plant, which involves the manufacture and transport of ready-mix concrete is better described as industrial than as commercial.

The EIR also lacked any analysis of the impacts of allowing this use in this area in light of the surrounding uses. For "Compatibility with Surrounding Land Uses" Impact 4.3 simply states:

The County has planned for development of the site with heavy commercial uses, including manufacturing and processing activities as specified in the Zoning Ordinance. Uses similar to the proposed project — light industrial and other heavy commercial businesses — currently exist to the west and northwest of the project site, while all other property adjacent to the project site is designated for heavy commercial development. The current and planned uses are considered mutually compatible and the potential for conflicts between the proposed project and adjacent land uses is considered less than significant.

Under a heading "Consistency with Land Use and Zoning Designations" the EIR states:

Development of the project would establish a concrete batch plant and accessory uses on a site that is presently designated for Commercial uses, and zoned Heavy Commercial (C3-UP-DC), which allows manufacturing and processing uses. The proposed project is consistent with these land use and zoning designations. Surrounding land is also designated for heavy commercial or business professional/industrial land uses. Therefore, the proposed concrete batch plant would be consistent with the existing and planned land uses for this area.

The EIR provided conclusions that are unsupported by any evidence or analysis. The EIR failed to list all the uses near the Project and describe how these uses are compatible with a cement batch plant. Uses surrounding the project site include a propane company, a landscape products and paver stone supplier, a tractor dealership, a cabinet company, a fence company, a door company, a mobile home park, and several rural residences. A cement batch plant will be of greater intensity, density, and generate more environmental impact than any these other existing commercial uses. The EIR, therefore, lacks

⁹ Lindgren & Mattas, Land Use Practice I, Continuing Education of the Bar 2009, pp. 185-186.

evidentiary support and the required analysis to support the conclusion that a cement batch plant will be compatible with the surrounding land uses.

ii. The cement batch plant is incompatible with the parcel's designation as a Design Scenic Corridor.

The site is designated DC (Design Scenic Corridor). The Design Corridor designation is intended to "protect and enhance the aesthetic character of lands and buildings within public view" and "to minimize any adverse impacts of conflicting land uses."¹⁰ The Land Use section of the EIR states, "the project site carries this designation because it is adjacent to I-80 and because it is adjacent to Ophir Road, which is a heavily traveled corridor between Ophir and Auburn and forms a portion of historic Route 40." (DEIR, 4-2.)

The EIR omitted any consistency determination between the Design Scenic Corridor designation and the Project. The EIR omitted an analysis of the impacts on the aesthetic character of the lands and buildings within public view along Ophir Road and I-80.

iii. The EIR failed to discuss compatibility with the Ophir General Plan.

Under CEQA, an EIR must evaluate any inconsistencies between the proposed project and applicable regional plans.¹¹ In the Land Use section, the EIR acknowledged the Ophir General Plan and stated that "[a]ll activity within the Ophir General Plan area is required to be consistent with the provisions of that plan." (DEIR 4-6.) A significance criteria listed under Impacts is "[i]nconsistency with local and regional land use plans and policies." (DEIR 4-7.)

Although the EIR briefly acknowledged the Ophir General Plan, it omits any evaluation of the consistency of a cement batch plant with this community plan level document. The EIR merely states that the Ophir General Plan "designates the project site for commercial uses." This omission of any evaluation of consistency with the Ophir General Plan is an omission of information required by law.

A review of the Ophir General Plan suggests that the Project is not consistent with the Community Plan despite the designation of this parcel as commercial. For example under Land Use:

- Goals 1 prioritizes maintaining and enhancing the rural character of the area.

As discussed more below on the section on aesthetics, a cement batch plant does not maintain or enhance the rural character of the area.¹²

¹⁰ Placer County Zoning Ordinance, Article 17.52.070.

¹¹ CEQA Guidelines, § 15125, subd. (d).

¹² Ophir General Plan, p. 31.

- Goal 2 is to provide a pattern of commercial growth that serves the needs of Ophir residents.¹³

The objective of the batch plant is to provide ready-mix concrete to the regional Auburn area, therefore the Project, (arguably not even commercial) is not designed to serve the needs of Ophir residents.¹⁴

Throughout the rest of this section of the Ophir General Plan, the priority is the promotion and preservation of a rural environment.

- Under the Transportation and Circulation Element, a Goal states, "to preserve, enhance and protect the scenic resources visible from the scenic routes in the Ophir Area."¹⁵ For Interstate 80 is specifies that "[t]he General Plan designations of Industrial on Ophir Road create a potential conflict with the scenic highway concept. New projects should be restricted as to the type of use permitted within view of I-80." As discussed more below, the batch plant is proposed on a parcel along the interstate. It will be visible and is not compatible with this goal to preserve the scenic routes in the Ophir Area.

Over 62% of property owners in the area responded to the questionnaire distributed by the County in the Ophir General Plan planning process.¹⁶ These residents expressed their desires regarding growth and development in the area which were carried forward in the planning document. Allowing a cement batch plant in this location will frustrate the important goals that many area residents participated in establishing and relied upon when the Ophir General Plan was adopted.

F. The EIR Failed to Disclose Significant Aesthetic Impacts.

- i. **The EIR's Project Description must be revised to describe a 45-foot tower rather than a 57-foot tall tower.**

Although the Conditional Use Permit Application submitted in December 2008 stated that the project will now only use a 45-foot tower, the EIR described a 57-foot tower. The FEIR released in September of 2008 did not revise the Project description to include a 45-foot tower. The Project Description in the EIR must be revised to reflect the change in the tower height.

The area is zoned for a maximum height of 45 feet and a variance is necessary to allow for a 57 foot tower. If the FEIR is approved with the description of a 57-foot tower, there is no assurance that the Project tower will be limited to the 45 feet. It is possible for Livingston's to later apply for the variance for the extra height and claim that no further environmental review is necessary since a certified EIR analyzed a tower up to 57-feet in height. If the EIR description is revised to describe only a 45-foot tower (as the applicants now claim they are planning on building) then, if

¹³ Ophir General Plan, p. 31.

¹⁴ DEIR, p. 3-6.

¹⁵ Ophir General Plan, p. 46.

¹⁶ Ophir General Plan, p. 2.

a variance is requested for additional height, the County must determine whether the additional height constitutes a substantial change to the project and requires additional environmental review under Public Resources Code, section 21166.

As the Project Description stands, with a 57-foot tower, there is no assurance that the Project will be limited to a 45-foot tower.

ii. The EIR must analyze the Project's aesthetic impacts.

The County erred in excluding any analysis of aesthetic impacts in the EIR. An analysis of aesthetic impacts was excluded from the EIR because the County's initial study determined that the project does not have the potential to result in significant impacts to aesthetics. The initial study stated that because the tower's location is down from an adjacent upslope of I-80, a 57-foot tower will be only 20 feet higher than the edge of the pavement and therefore there are no significant impacts. Following this logic, a 45-foot tower would still be 8 feet higher than the pavement. The initial study also asserted that there are no impacts because the tower is located in an "industrial/heavy commercial area, where other structures and equipment are visible from I-80. Therefore, the addition of the plant tower to this view shed is considered a less than significant impact." The Project also includes a 15,000 gallon water tank that is expected to be between 12 and 20 feet in height.

Please refer to the photos in Exhibit F. One page shows a photo of the Project site as it is now and photos with a simulated view of the proposed batch plant from I-80 and the neighborhoods around the project site. The other photos show other Livingston batch plants. Our clients will be providing more photos of the Ophir Road area either before or during the hearing. Relevant personal observations of neighbors, including photographs, can constitute substantial evidence of the potential significant effects.¹⁷

These photos demonstrate that the cement plant will be visible from both I-80 and surrounding residences. Even though I-80 has an upslope adjacent to the Project site, drivers will still see 5 acres covered with concrete and heavy industrial type equipment. The statements in the initial study only mean that a tall tower will not obstruct views of the hills because the plant is placed lower than the pavement of the interstate. Furthermore, the surrounding residences are on hills that look directly down onto the Project site. If anything, the location of the residences higher up increases their visibility of the plant.

These photos demonstrate that the EIR erred in omitting any analysis of the potential aesthetic impact of placing this industrial type use in this location. The photographs demonstrate that a concrete batch plant does not fit in with the surrounding uses, is not compatible with the Scenic Design Corridor designation, is incompatible with the goals of the Ophir General Plan and will cause potentially significant aesthetic impacts.

¹⁷ *Oro Fino Gold Mining Corporation, supra*, 225 Cal.App.3d at p. 882.

The County must revise the EIR to include an analysis of the potentially significant aesthetic impacts caused by Project because the EIR's conclusion of no significant impacts is not supported by substantial evidence.

G. The EIR Must Analyze all Foreseeable Phases of the Project.

The EIR's project description stated that the Project will produce approximately 300 cubic yards of concrete per day. According to the company's own information, other Livingston's batch plants produce from 90 to 120 yards *per hour*. (See Exhibit G.) Therefore, the current batch plant under consideration is considerably smaller than other Livingston operations.

However, a Livingston's employee indicated at a public meeting in Auburn on August 25, 2009 that the company anticipated expanding this facility in the future under favorable business conditions. That is, Livingston's is planning this smaller facility initially (possibly to minimize the appearance of environmental impacts) and once the facility is approved and operational, will seek entitlements to expand operations. It is, therefore, reasonably foreseeable that Livingston's is planning future phases of the Project that would increase operations from 300 yards *per day* up to 230 yards *per hour*.

CEQA requires that an EIR provide an accurate project description.¹⁸ An EIR's project descriptions and analysis must include all reasonably foreseeable long-term future uses.¹⁹ According to the California Supreme Court in *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 396, future phases must be assessed as part of an initial project EIR when "(1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects."

Here, Livingston's has stated that a larger concrete plant is contemplated as a future phase. Above, the letter discussed the ways the proposed smaller facility will cause potentially significant water, noise, air and aesthetic impacts. A significantly larger facility, like other Livingston's plants, will cause more water use, more noise, more air emission and greater aesthetic impacts. Therefore, under *Laurel Heights*, the EIR must analyze the larger project instead of focusing only on the smaller temporary project.

III. Conclusion.

The Livingston EIR is legally inadequate. It failed to provide sufficient analysis to allow the Planning Commission to intelligently consider the environmental impacts of this Project. The EIR provided bare conclusions without explanation of its factual and analytical basis and thereby failed to provide sufficient analysis of the environmental impacts including impacts to groundwater, noise impacts, air quality impacts and aesthetic impacts.

¹⁸ CEQA Guidelines § 15124.

¹⁹ *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438.

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On behalf of our client, Ophir Area Property Owners Association, we respectfully request that the Planning Commission decline approval of the proposed Project at this time. The EIR for the Project must be revised and recirculated for public comment.

Sincerely,



Christina Morkner Brown

Attachments: Exhibits A through H.