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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

EAST BAY REGIONAL PARK DISTRICT, a Special District; and ANGELA FAWCETT,

Petitioners and Plaintiffs,

vs.

CITY OF ALAMEDA and CITY OF ALAMEDA CITY COUNCIL,

Respondents and Defendants.

Case No. RG12 655685

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

(California Environmental Quality Act; Violation of City Charter; Violation of State Planning & Zoning Law; Code of Civ. Proc. **§§ 1060, 1085, 1094.5**)

INTRODUCTION

1. Through this Petition for Writ of Mandate ("Petition"), Petitioners and Plaintiffs East Bay Regional Park District (the "District") and Angela Fawcett ("Fawcett") (collectively, "Petitioners") seek to compel Respondents and Defendants CITY OF ALAMEDA ("City") and

the CITY COUNCIL OF THE CITY OF ALAMEDA ("City Council") (collectively, "Respondents") to properly analyze, disclose and mitigate the significant adverse environmental impacts associated with Respondents' decisions to approve the adoption of certain amendments to the City's Housing Element of its General Plan as well as amendments to zoning provisions of its Municipal Code (the "Project"), and to rescind action in conflict with the City's Charter and General Plan. Specifically, Petitioners assert that Respondents violated the California Environmental Quality Act, Pub. Resources Code, §§ 21000 et seq. ("CEQA") and the CEQA Guidelines, Title 14, California Code of Regulations, §§ 15000 et seq. ("CEQA Guidelines") and failed to proceed as required by law by failing to conduct any specific review or prepare an adequate environmental impact report ("EIR") for the Project, and by approving the Project on the basis of findings that are not supported by substantial evidence. Further, City violated its Charter and General Plan by adopting amendments to its General Plan Housing Element and Municipal Code that conflicted with the Charter and General Plan, and without a vote of the City's electors.

2. In connection with these approvals, the City purported to rely upon preparation of an addendum to previously adopted environmental documents in order to comply with the requirements of CEQA, but impermissibly deferred required environmental review while adopting zoning amendments that rezoned certain sites from non-residential to residential uses that allow for residential "use by right" and prohibit additional discretionary approvals or CEQA review.

3. On July 3, 2012 and July 16, 2012, the City took several actions to approve the aforementioned amendments and CEQA addendum. These actions included:

a. Resolution No. 14718 approving amendments to the Housing Element of the General Plan including the Neptune Point site (APN 74130502600) from Administrative Office to R-4/Planned Development with Multifamily Overlay on July 3, 2012; and

b. Ordinance No. 3054 amending various sections of the Alameda Municipal Code contained in Chapter XXX (Development Regulations) to ensure consistency between the State Housing Element Law, the City of Alameda General Plan and City of Alameda Municipal

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Code, including adopting a Multifamily Residential Combining Zone overlay on July 17, 2012. (Resolution No. 14718 and Ordinance 3054 are collectively referenced herein as, the "Project".)

PARTIES

4. Petitioner East Bay Regional Park District is a special district which owns, operates and/or maintains regional and local parks, trails and open space within Alameda County and Contra Costa County, California.

5. For almost 50 years, the District has managed Robert W. Crown Memorial State Beach for the State of California as well as over one mile of beach for the City. Combined, the two beaches make up Crown Memorial State Beach, the largest beach on the San Francisco Bay, with over 1.3 million annual visitors. The District has spent millions of dollars operating and managing the beach, the Crab Cove visitor center and maintenance facilities. The Neptune Point site is located on McKay Avenue in the City and adjacent to Crown Memorial State Beach and the District's facilities. (See Attachment 1, Vicinity Map.) As an operating entity of a park within the City, the District has a direct interest in compliance with environmental laws such as CEQA, and potential environmental impacts resulting from land use changes within the City.

6. Petitioner Angela Fawcett is a resident of the City of Alameda. Ms. Fawcett has a beneficial interest in this Petition for Writ of Mandate because she will be negatively impacted by the project's impacts and because Ms. Fawcett seeks to enforce a public duty.

7. Respondent City of Alameda ("City") is, and at all relevant times was, a charter city and municipal corporation incorporated within and existing pursuant to the laws of the State of California. The City is responsible for administering and carrying out its laws and has a duty to comply with applicable federal and state laws, including CEQA. The City has the principal responsibility for carrying out or approving the Project, and is therefore the "lead agency" for the Project under CEQA.

8. Respondent City Council of the City of Alameda ("City Council") is, and at relevant times was, the duly elected legislative body of the City. As the decision making body for the Project, the City Council was charged with responsibilities under CEQA for adopting the CEQA addendum for the Project and granting various approvals necessary for the Project.

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9. Petitioners are entitled to recover attorneys' fees pursuant to Code of Civil Procedure 1021.5 if either prevails in this action because, it is informed and believes, and on that basis alleges, its prosecution of this action will confer a significant benefit on the general public or a large class of persons, and that the necessity and burden of enforcement is such as to make an award of fees appropriate.

JURISDICTION AND VENUE

10. The Alameda County Superior Court has jurisdiction over the matters alleged herein pursuant to Code of Civil Procedure sections 1085, 1087 and 1094.5 and Public Resources Code sections 21168 and 21168.5.

11. Venue for this action lies in the Alameda County Superior Court pursuant to section 394 of the Code of Civil Procedure because, among other things, the City is situated in Alameda County. Venue is also proper under Code of Civil Procedure section 393(b), because the Alameda City Council is comprised of public officers especially appointed to execute the duties of a public officer, and this suit challenges acts done by the Council members in virtue of the office.

STANDING AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

12. The District and Fawcett each have standing to assert the claims alleged in this Petition because Petitioners have a direct and substantial beneficial interest in the subject matter of this action, and have a clear, present, and beneficial right to performance of Respondents' duties under CEQA relative to the Project. The District operates park property in the City and said operations will be directly affected by the significant environmental impacts of the Project. Fawcett owns property near Neptune Point and will also be directly and immediately affected by the Project's impacts. For these reasons, Petitioners have a special interest to be served or protected over and above the interest held in common with the public at large.

13. Petitioners are interested in having the laws of the State of California executed, and the duties imposed on the City under such laws enforced. Fawcett, who received notice of the administrative proceedings, actively participated in said proceedings involving the Project, and has an interest in protecting the environmental resources in the vicinity of the Project site,

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including Neptune Point.

14. The City failed to provide legally required and adequate notice to the District and the public regarding the administrative proceedings. The District sought notice of land use approvals regarding Neptune Point, and the City indicated that it would provide such notice to the District but failed to do so. In addition, the posted public notice provided by the City was misleading in that failed to notify the public that the City intended to adopt a CEQA addendum in connection with its approval of the Project, or that it was relying on prior CEQA documents. As such, there is no exhaustion requirement under Public Resources Code section 21177 because the public was not alerted as to the City's purported CEQA compliance.

15. In addition, pursuant to the public rights exception to the exhaustion requirement, the District brings this action on behalf of the public and the District had no notice of the proceedings; the posted public notice provided by the City was defective, the District did not participate in the proceedings as a result; and injury to the public interest will be irreparable if the petition is not heard.

16. Fawcett has standing to assert the claims alleged in this Petition pursuant to Public Resources Code section 21177 because she objected to the approval of the Project orally prior to the close of the public hearing on the Project.

17. Petitioners have performed any and all conditions precedent to filing the instant action and have exhausted any and all available administrative remedies to the extent possible and required by law.

18. To the extent it was required in light of the City's insufficient notice, all of the grounds for noncompliance with CEQA, the City Charter, and the State Planning and Zoning Law alleged herein were presented to the City orally or in writing prior to the close of the public hearing on the Project.

STATUTE OF LIMITATIONS

19. Petitioners are informed and believe, and thereon allege, that on or after July 17, 2012, Respondents filed an Notice of Determination ("NOD") for the Project with the Alameda County Clerk but that the NOD was legally deficient in that, among other things, it failed to

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identify the Project's specific location and failed to state whether any mitigation measures, a statement of overriding considerations or findings were adopted.

20. The statute of limitations for a CEQA challenge to the Respondents' decision to approve the Project expires 30 days after the filing of a valid the NOD. Where no valid NOD is filed, the statute of limitations is 180 days after the Respondents' decision to approve the Project. Therefore, the statute of limitations period to file this action expires no sooner than January 14, 2013.

NOTICE OF CEQA ACTION

21. Prior to filing this petition and complaint, Petitioners served the City with notice of intention to commence a proceeding against it for violation of CEQA in connection with its approval of the Project. A copy of the notice, together with a proof of service, is attached to this petition and complaint and incorporated herein by this reference. By serving the notice, petitioners have complied with California Public Resources Code section 21167.5. (See Attachment 2.)

FACTUAL AND PROCEDURAL BACKGROUND

22. In or about March of 1973, voters within the City approved Measure A, an initiative which amended the City's Charter by adding a prohibition on the construction of all "multiple dwelling units" within the City as Article XXVI ("Article 26") within the Charter. In 1991, City amended Article 26 to further provide that the maximum density for any residential development within the City shall be one housing unit per 2,000 square feet of land. Article 26 as amended, consisting of Sections 26-1, 26-2 and 26-3, is commonly known as "Measure A" within City.

23. In 2009, the City submitted a draft Housing Element for review by the California Department of Housing and Community Development (HCD). In June 2009, HCD provided the City with comments on the adequacy of the draft Housing Element. While the draft Housing Element including certain sites in the City for proposed rezoning to residential uses, it did not identify the Neptune Point site which is located across McKay Avenue from the District's visitor's center for Crown Memorial State Beach.

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24. Starting in 2010, the District repeatedly informed the City regarding its concerns regarding potential development of housing at Neptune Point. That property is owned by the United States General Services Administration, but was ultimately put up for auction in June 2011, and a housing developer, Tim Lewis Communities (TLC), was the highest bidder. At the time of the auction, the site was designated in the City's General Plan as "Federal Facilities" and zoned "Administrative Professional."

25. In November 2011, the City's community development director assured the District in writing that it would be encouraged to share its concerns regarding each phase of review of the Neptune Point site for any development approvals process for the property, and noted that no residential development could occur without general plan and zoning amendments. The City acknowledged the District's interest in the site and that it was adjacent to Crown Beach. In reliance on these assurances, the District believed that the City would provide direct notice of any land use actions regarding Neptune Point. This was not done.

26. City's stated policy is to enhance partnerships with the District to develop and manage parks, enhance access to parks and open space, and to acquire additional parkland. Despite this policy statement, the City did not consider an alternative park use for the Neptune Point site.

27. In December 2011 and March 2012, the City held workshops to discuss the draft Housing Element. Although, the District receives mail at two addresses located on the Crown Beach property adjacent to Neptune Point but was not provided any direct notice of either meeting. The staff report for the December 2011 workshop noted that prior to review and adoption of the Housing Element that staff would prepare either an updated negative declaration or environmental impact report. This was not done.

28. On June 11, 2012, the City's Planning Board held a meeting to consider the draft Housing Element. The District was again not provided any direct notice of the Planning Board meeting held on June 11, 2012. Posted public notice provided for that meeting failed to specifically mention that the Neptune Point property.

29. On July 3, 2012, the draft Housing Element was considered and adopted by the

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City Council through the passage of Resolution No. 14718, and conforming zoning amendments were introduced. These actions changed the Land Use designation of three sites from non-residential to residential or mixed use and changed the zoning designation of 10 sites. Also included as part of the Project was the creation of a new Multi-family zoning district that would permit 30 units per acre (and up to 40.5 units per acre with a density bonus) on such sites. It included redesignation of the Neptune Point site to multifamily residential. Although the City's Sunshine Ordinance requires notice to be provided to all owners and residential and commercial tenants in the immediate vicinity of such proposed changes that may impact the environment (Municipal Code section 2-92.4(f)), and although the City sought input from other interested parties including the Sierra Club, Greenbelt Alliance and TLC, the City did not provide the District any direct notice of the July 3, 2012 meeting.

30. With respect to its obligations under CEQA in connection with these approvals, the City did not prepare an initial study to examine potential environmental impacts resulting from the General Plan and zoning changes to residential uses for the Neptune Point site, as well as other sites within the City. Instead, the City Council purported to adopt an addendum to a 2003 negative declaration adopted for its previous Housing Element and a 2009 environmental impact report relating to its General Plan Transportation Element. The posted public notice provided for the July 3, 2012 Council meeting did not mention CEQA at all, nor did it state that the City intended to rely on former environmental documents or adopt an addendum to such documents.

31. On July 17, 2012, the City Council finally adopted Ordinance No. 3054 to amend the zoning provisions of the City's Municipal Code to conform it to the changes made to the Housing Element, including rezoning the Neptune Point site to permit up to 126 housing units. Again, the posted notice provided for the July 17, 2012 Council meeting did not mention CEQA at all, nor did it state that the City intended to rely on former environmental documents or adopt an addendum to such documents. Again, the District was not provided direct notice of the July 17, 2012 meeting.

32. Fawcett made comments against the Project to the City Council at the July 3, 2012

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hearing. Fawcett, along with others, raised issues concerning the Project's compliance with CEQA and its failure to address potential impacts, as well as noting that the Project conflicted with Measure A contained with the City's Charter and conflicted with other provisions of the City's General Plan.

33. Under the Housing Element Law (Gov't Code § 65580 et seq.), when a public agency rezones sites in its Housing Element inventory to residential to accommodate its share of the regional housing need, those sites allow residential "use by right." Once rezoned to residential uses, the local government's review of owner-occupied or multifamily residential use *may not* require further discretionary review that would constitute a project under CEQA unless a subdivision map is required. (Gov't Code § 65583.2(i).) For example, an apartment building proposed on a rezoned site would not require any discretionary review.

34. Further, Ordinance No. 3054 approved amendments to Chapter XXX of the City's Municipal Code including the creation of a Multifamily Residential Combining Zone, and the amendments provided that multifamily, among other residential uses, "shall be permitted by right" without any further discretionary review. (Municipal Code § 30-4.23.)[1] As such, the City has virtually no ability to prescribe/limit/condition/disapprove, or even require environmental review, let alone mitigate potential significant environmental impacts, on the type of development allowed on the rezoned sites.

35. Despite this clear directive that no further discretionary review could be required, City staff and members of the Council repeatedly told the public during both the July 3 and July 17 hearings, that -- despite the adoption of the Housing Element update, amendments to the General Plan and zoning that created residential use by right -- all future projects would undergo further CEQA analysis including mitigation of impacts as they came forward.

36. Following the July 17, 2012 meeting, the City prepared an NOD pursuant to CEQA. The notice of determination failed to identify which areas in the City were rezoned or redesignated. It states that the Project would result in significant environmental impacts, but does

[1] The City staff report stated that the City could satisfy the requirements of Government Code section 65583 by placing the multifamily overlay district on 10 sites, not including Neptune Point. However, Ordinance No. 3054 applied the overly district to the Neptune Point site as well.

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not state that any mitigation measures were adopted, that any findings were made or that any statement of overriding considerations was adopted.

37. The District first learned of the adoption of the Project and the rezoning of the Neptune Point site following the July 17, 2012 meeting. It entered a tolling agreement with the City to extend the limitations period for filing an action to challenge the Project to November 9, 2012.

38. The Project will create increased traffic, noise, air pollution and greenhouse gas emissions, and impacts on City services, among other significant environmental impacts, to an already densely developed and/or heavily utilized area, including the recreational and natural resources managed by the District in the immediate area of Neptune Point. Petitioners are informed and believe, and thereon allege, that the Project will result in significant and adverse traffic, noise, and greenhouse gas impacts, City services, biological resources, and poses a significant risk to other environmental resources in the vicinity of the Project site.

39. Proximate to the Project site are tidal mudflats which provides habitat for sensitive species. Crab Cove is a designated marine reserve where all plant and animal life is protected. To the east of Crown Beach is Elsie Roemer Bird Sanctuary which provides habitats utilized by aquatic and salt marsh bird and mammal species. The sedimentary habitat offshore Crown Beach supports an eelgrass (Zostera sp.) bed, which is considered a sensitive resource and provides nursery habitat for a variety of juvenile fish and food source for aquatic birds). There is an active nesting colony of the endangered California least tern located at the former Alameda Naval Air Station. Neptune Point is within the forage range for this colony of least terns. Project impacts on these natural resources should have been, but were not, analyzed in connection with the City's approval of the Project.

40. As the lead agency for the Project under CEQA, the City prepared and adopted an addendum for the Project, which concluded that no subsequent or supplemental EIR should be required, including that none of the events that would trigger such review as set forth in CEQA Guidelines section 15162, were present. In all other respects, the addendum concluded that the potential environmental effects of the Project would be less that significant, or would be reduced to

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a less than significant level through the imposition of specified mitigation measures or compliance with adopted policies.

41. The City abused its discretion and failed to proceed in the manner required by law. Among other things, the addendum for the Project is fundamentally flawed and inadequate as a matter of law in various respects, including, but not limited to, the following:

a. The addendum's description of the Project is incomplete and highly misleading. Among other things, the addendum does not include any site-specific analysis whatsoever regarding impacts resulting from residential use, nor discuss the change in densities allowed by the Project at the various sites. The addendum did not even identify the location of the sites themselves, their surrounding uses or whether they had been analyzed in any meaningful way in earlier CEQA documents to which the addendum purported to relate. The City improperly assumed that it could postpone meaningful CEQA analysis despite the prohibition against requiring future CEQA review under the State Housing Element Law.

b. Even though the Project changed the land use designation of three sites from non-residential to multi-family residential and rezoned 10 sites, the addendum did not conclude that there had been any substantial change proposed in the project analyzed in the 2003 Housing Element Mitigated Negative Declaration, or the 2009 General Plan Transportation Element EIR Instead, the addendum merely contained conclusory statements without any analysis as to whether any new or more severe land use impacts would occur.

c. The addendum's assumptions regarding the number of traffic impacts and vehicle trips generated by the Project and associated air emissions, including greenhouse gas emissions, are based on old information that did not include site specific analysis, including intersections in the vicinity of the Project sites, and as such are not supported by substantial evidence or adequate analysis. For example, the addendum simply assumes that further environmental review will occur to address greenhouse gas issues: "The environmental evaluation that will be undertaken at the project level would look at each individual project's contribution (if any) to climate change caused by greenhouse gases." As noted above however, in most cases, State Housing Law prohibits additional project-level review. Instead, such analysis

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should have been done in conjunction with consideration of the Project.

d. The addendum failed to consider impacts to nearby natural resources, sensitive species and habitats located within the vicinity of the Project, including Neptune Point.

e. The addendum failed to meaningfully address the Project's cumulative impacts, and reached a nonsensical conclusion that the project cumulative impacts would be reduced since additional (unspecified) projects had been approved and/or built out. This, as well as many of the addendum's other conclusions, including that no additional CEQA analysis should be conducted, are not supported by substantial evidence. Further, the addendum does not explain how future by-right residential projects will be required to incorporate any mitigation measures contained in the earlier CEQA documents when such projects will not be subject to discretionary approvals.

f. The City presented a false justification for its lack of CEQA review. The City staff report warned that failure to adopt the Project might subject the City to lawsuits like those brought against the City of Pleasanton over its Housing Element. However, in rezoning sites to residential use in connection with its Housing Element, Pleasanton prepared an EIR containing over 500 pages of site specific analysis, whereas the City -- in its rush to adopt a Housing Element – only prepared six-page addendum with no substantive site-specific review. The City provided no justification for failing to fully comply with one portion of State law (CEQA) while attempting to adopt a legally sufficient Housing Element.

g. The NOD identifies the presence of significant, unavoidable impacts but the addendum failed to identify or adequately discuss potentially feasible mitigation measures relative to the Project's significant individual and cumulative impacts.

42. Given the deficiencies in the addendum, the NOD and the improper assumption that the City can do additional CEQA review despite the residential use by right designation that expressly prohibits such review summarized above and described in more detail below, Respondents' decision to adopt the addendum was an abuse of discretion. Petitioners therefore respectfully request that the Court issue a peremptory writ of mandate commanding Respondents to rescind, set aside, and void any and all resolutions and ordinances adopting the addendum, and

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granting legislative, quasi-adjudicatory, and other discretionary or ministerial approvals of the Project or any portion thereof.

PETITION FOR WRIT OF MANDATE

FIRST CAUSE OF ACTION

(Writ of Mandate – Abuse of Discretion for Violations of CEQA)

43. Petitioners hereby reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

44. CEQA was enacted to require public agencies and decisionmakers to document and consider the environmental implications of their actions *before* formal decisions are made. (Pub. Resources Code, §§ 21000, 21001.) Under CEQA, the term "project" means the "whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (14 Cal.Code Regs. § 15378(a).) CEQA review cannot be deferred to a later stage of a project where – as here – the present agency action serves as an essential step for a development project. CEQA mandates environmental review as early as feasible in the planning process, and agencies are forbidden from taking action which gives impetus to a foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review. (14 Cal.Code Regs. § 15004(b)(2)(B).) Here, the City did just that by approving the Project which allows residential use by right and excludes further CEQA review.

45. This fundamental purpose of CEQA is implemented primarily by the requirement that agencies must prepare an EIR whenever the approval of a proposed project *may* cause significant adverse effects on the environment. (Pub. Resources Code, § 21100.).The EIR is the "heart of CEQA." (14 Cal. Code Regs., § 15003(a); *Sierra Club v. State Board of Forestry*, 7 Cal. 4th 1215, 1229 (1994).) Its purpose "is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." (Pub. Resources Code, § 21002.1(a).) In carrying out this purpose, the EIR informs the public and its responsible officials of the environmental consequences of the project before they occur. An EIR is an "informational

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document" (14 Cal. Code Regs., § 15121), which serves as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*Sierra Club*, *supra*, 7 Cal. 4th at 1229; *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 810 (1973).) Thus, the EIR "protects not only the environment but also informed self-government." (*Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990).) The City abused its discretion and failed to proceed in the manner required by law by approving the Project *prior to* undertaking any environmental review.

46. Following preliminary review of a project, lead agencies are required by CEQA to prepare an initial study for non-exempt projects to determine whether such projects may have a significant effect on the environment so as to require preparation of an EIR. The initial study must consider all phases of project planning, implementation and operation, and preparation of a negative declaration for a project is proper under CEQA only if there is no substantial evidence that the project or any of its aspects may, either individually or cumulatively, cause a significant direct or indirect adverse effect on the environment. (14 Cal. Code Regs., §§ 15063(a)(1), (b)(l), (2).) The City failed to proceed in the manner required by law when it failed to prepare an initial study, and instead improperly decided to adopt an addendum to a nine-year old negative declaration and a three-year old EIR that did not contain any site-specific analysis related to the General Plan and zoning amendments accomplished by the Project.

47. If the lead agency is presented with a "fair argument," based on substantial evidence in the record, that a project may have a significant effect on the environment, the lead agency is required to prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. (14 Cal. Code Regs., § 15064(g)(1); *Friends of B Street v. City of Hayward*, 106 Cal. App. 3d 988, 1002 (1980); *No Oil. Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 75 (1974).) It is the local agency's burden to conduct environmental review in the first instance.

48. Respondents' actions in predetermining not to conduct an initial study, in wrongly determining that the addendum was adequate, in failing to conduct any meaningful CEQA review

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and in approving the Project in violation of CEQA, constitute prejudicial abuses of discretion because Respondents failed to proceed in the manner required by law, and because their decisions are not supported by any substantial evidence in the light of the whole record.

Inadequate Evaluation of Project Impacts

49. CEQA is intended to provide decisionmakers and the public with detailed information about how a Project will impact the physical environment, the City, and its residents, and the extent of those impacts *before the Project is approved.* When a project may have significant effects, an EIR must be prepared in order to provide sufficient analysis to support informed decisionmaking. The addendum's assertion that this Project will have no environmental impacts when its intended effect is to change allowable use and establish high-density residential use by right is overly simplistic, legally unsupportable and cites no independent analysis or studies to support this position. An agency conclusory statement, such as this, unsupported by any evidence or factual information, does not constitute substantial evidence of no significant environmental effects. (See e.g., *City of Livermore v. LAFCO*, 184 Cal. App. 3d 531, 541 (1986) [analyzing such a statement contained in an initial study].)

50. Under CEQA, a lead agency must prepare an EIR if there is any substantial evidence in the light of the whole record to support a fair argument that any aspect of the project may have a significant adverse environmental impact. (*No Oil*, *supra*, 13 Cal. 3d at 75; Pub. Res. Code, §§ 21100, 21151; 14 Cal. Code Regs., §§ 15064(a)(1), (f)(1); 15070(a).) CEQA applies to all discretionary projects, either approved or proposed to be carried out by a public agency. (Pub. Res. Code, § 21080(a).) Moreover, if there is any substantial evidence to support a fair argument that the project may have an adverse environmental impact, an EIR must be prepared, even if there is also substantial evidence in the record to the contrary. (*Friends of "B" Street*, *supra*, 106 Cal. App. 3d at 1001.) In other words, if the agency is so much as presented with substantial evidence in the record to support a "fair argument" that the project may have a significant effect on the environment, then it must prepare an EIR. (14 Cal. Code Regs., § 15064(f)(1); *No Oil*, *supra*, 13 Cal. 3d at 75.)

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51. This "fair argument" standard creates a very "low threshold" for requiring preparation of an EIR. (*Citizens Action to Serve All Students v. Thornley*, 222 Cal. App. 3d 748, 754 (1990); *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 310 (1988), quoting *No Oil, supra*, 13 Cal. 3d at 75).) The project "may" have a significant effect on the environment if there is a "reasonable probability" of significant impact. (*No Oil, supra*, 13 Cal. 3d at 83, n.16.) Because substantial evidence to support a fair argument that the Project may have a significant adverse environmental impact was presented to the City by Petitioners and other members of the public, and is otherwise present in the record of proceedings for the Project, the City's reliance on the addendum and prior CEQA review that did not address project-specific impacts and deferral of such analysis is a prejudicial abuse of discretion.

52. A "significant effect on the environment" is a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project." (14 Cal. Code Regs., § 15382.) An effect on the environment need not be "momentous" or even "important" to be considered significant under CEQA. The term "significant" covers a broad range that includes "momentous" and "important," but also includes "appreciable" and "not trivial." *(No Oil, supra*, 13 Cal. 3d at 83.) Although there is no "ironclad" definition of what constitutes a significant effect under CEQA, the agency must consider the direct physical changes in the environment caused by the project, and the reasonably foreseeable indirect physical changes that may result from the project. (14 Cal. Code Regs., §§ 15064(b)-(c).) Additionally, the effects of a project may be significant if the impact is individually limited, but cumulatively considerable, when viewed in connection with the effects of past, current, and probable future projects. (Pub. Res. Code, § 21083; 14 Cal. Code Regs. § 15065(c).) If any aspect of the project may result in a significant adverse impact on the environment, the agency must prepare an EIR even if the overall effect of the project is considered beneficial. (14 Cal. Code Regs., § 15063(b)(1).)

53. The City cannot simply assume that the residential development consistent with earlier projections but placed in different locations in the City will have no environmental impact. For instance, in order to support a negative declaration, CEQA requires the agency to prove, not

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assume, that significant impacts will not occur. (*Sundstrom, supra*, 202 Cal. App. 3d at 311-14.) "CEQA places the burden of environmental investigation on government rather than the public," and an agency "should not be allowed to hide behind its own failure to gather relevant data." (*Id.* at 311.) Thus, the City has the burden of investigating the potential impacts of the Project. If any aspect of the project may result in a significant impact on the environment, the lead agency must prepare an EIR, even if the overall effect of the project is considered beneficial. (14 Cal. Code Regs., § 15063(b)(1).)

54. The City failed to perform site specific analysis or even gather site specific data regarding the sites that were re-zoned and re-designated from non-residential to residential uses. Failure to gather site-specific information and undertake an adequate environmental analysis is itself fatal to the adequacy of a CEQA document. (*Lighthouse Field Beach Rescue v.City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1201-1202.) Further, the City based its action on the incorrect assumption that it could require later site-specific environmental review despite the provisions of Government Code section 65583.2(i).

55. Respondents failed to provide posted public notice that it would adopt a CEQA addendum and/or was considering prior CEQA documents in connection with the Project's approval.

56. The addendum failed to adequately consider and discuss the significant environmental impacts of the Project. Among other things:

a. Contrary to standard practice, the addendum's conclusions regarding traffic impacts from any of the amended sites are unsupported by any origin-destination surveys or other information regarding the locations where trips would originate that would constitute substantial evidence. The addendum also fails to adequately evaluate the potential safety issues associated with increased traffic resulting from residential uses at the newly identified sites including Neptune Point.

b. The addendum failed to adequately describe or evaluate the Project's inconsistency with the General Plan Land Use Element and its language implementing Measure A in the Land Use Element and the Chapter XXX of the Alameda Municipal Code.

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c. The addendum failed to consider impacts to nearby natural resources, sensitive species and habitats located in and around Crown Beach as well as within proximity of the Project, including Neptune Point.

d. The addendum fails to adequately describe feasible mitigation measures which could minimize the Project's significant adverse impacts. The addendum failed to consider or address specific concerns regarding traffic impacts, which impact both the air quality and traffic analyses.

e. Respondents violated CEQA by failing to prepare a subsequent or supplemental EIR because of the substantial and unanalyzed changes, and changed circumstances to the projects studied under those prior CEQA documents.

f. The one paragraph CEQA findings adopted by Respondents pursuant to Resolution No. 14718 and Ordinance No. 3054 were not supported by substantial evidence, including but not limited to Respondents' finding that the project will not result in any new or more severe environmental impacts than those previously identified.

g. No Statement of Overriding Considerations was adopted by Respondents despite the conclusion contained in the NOD that the Project would result in significant impacts and the addendum contained no discussion of if or how previously adopted mitigation measures would be enforceably applied to the Project.

WHEREFORE, Petitioners pray for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

(Violation of City Charter and California Constitution)

57. Petitioners hereby reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

58. In 1916, City became a charter city pursuant to the California Constitution (Cal. Const. art. XI, §3a). City's current charter ("Charter") was first approved by the City's voters in 1937.

59. As noted above, voters within the City approved Measure A, an initiative which amended the Charter by adding a prohibition on the construction of all "multiple dwelling units"

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within the City as Article 26 within the Charter. Article 26 was amended to further provide that the maximum density for any residential development within the City shall be one housing unit per 2,000 square feet of land.

60. Article XI, §3 of the California Constitution provides that a charter may only be amended by a vote of the City's electors, while Elections Code section 9255 et seq. provides the procedures for such an amendment.

61. Chapter XXX, Article III in the Alameda Municipal Code ("Code") was originally adopted to carry out the provisions of Measure A.

62. Section 30-51 within said Chapter XXX, Article III defines multiple dwelling units, being the type of development that is explicitly forbidden by Measure A, as follows: "Multiple dwelling units shall mean a residential building, whether a single structure or consisting of attached or semi-attached structures, designed, intended or used to house, or for occupancy by, three (3) or more families, or living groups, living independently of each other, located in districts or zones authorized therefor. Each such family or group is deemed to occupy one (1) such dwelling unit."

63. On July 3, 2012, as part of a regular meeting of the City Council, the Council adopted Resolution No. 14718, adopting an amended Housing Element and further amending the text and land use diagram within City's General Plan to change the General Plan's land use designations for three specific sites, including changing the designation of the Neptune Point site from Federal Facilities to Medium Density Residential.

64. On July 17, 2012, as part of a regular Council meeting, the Council gave final approval to Ordinance No. 3053, which made a number of amendments to the Code. In particular, Ordinance No. 3053 added a new subsection 30-4.23 describing and authorizing a Multifamily Residential Combining Zone ("MF District") wherein multifamily residential units were permitted to be developed as of right, notwithstanding the provisions of Measure A.

65. Courts in California and other states have long held that a charter city may not take any action which conflicts with the city's charter, and that "[a]ny act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.

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4th 161, 171 (citations omitted).

66. The City did not conduct an election to amend its charter prior to adopting Resolution No. 14718 and Ordinance No. 3054.

67. In adopting Ordinance No. 3054, the City acknowledged the existence of conflicts between the new MF District and the Charter. In fact, Subsection 30-4.23.b.i., as added to the Code by Ordinance No. 3054, states that in the event of any conflict between Article 26 and the provisions of the Code regarding the MF District, the latter provisions shall govern.

68. It is not possible for the City to paper over the conflict between Ordinance No. 3053 and the Charter merely by stating that Ordinance No. 3053 controls in the event of a conflict. Rather, under the rationale outlined in *Domar* and numerous other cases, it is clear that Ordinance No. 3054 is void as a result of the conflict between Ordinance No. 3054 and the Charter.

69. Accordingly, District is entitled to a peremptory writ of mandate directing the City to set aside its approval of Ordinance No. 3054 in its entirety.

70. In the alternative, District is entitled to a peremptory writ of mandate directing the City to set aside its approval of Subsection 30-4.23 to the explicit conflict with the provisions of the Charter, and further directing City to strike such Subsection from the Code.

WHEREFORE, Petitioners pray for judgment as hereinafter set forth.

THIRD CAUSE OF ACTION

(Writ of Mandate - Abuse of Discretion for Violation of State Planning and Zoning Law)

71. Petitioners hereby reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

72. A general plan must be integrated and internally consistent, both among the elements and within each element. (Govt. Code § 65300.5.) If there is internal inconsistency, the general plan is legally inadequate and the required finding of consistency for land use approvals cannot be made.

73. All "lower tier" zoning regulations, approvals and enactments must be consistent with the governing, "higher tier" general plan. (Govt. Code §§ 65359, 65454, 65860; *DeVita v.*

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County of Napa, 9 Cal. 4th 763, 803 (1995).) "Vertical consistency" between an applicable general plan and the various layers of subordinate land use regulations has been aptly termed the "linchpin of California's land use and development laws" because "it is the principle which infused the concept of planned growth with the force of law." (*DeBottari v. City Council*, 171 Cal.App.3d 1204, 1213 (1985).) In order to be consistent with its governing general plan, a zoning ordinance must "further the objectives and policies of the general plan and not obstruct their attainment." (*Corona-Norco Unified School Dist. v. City of Corona*, 17 Cal. App. 4th 985, 994 (1993).)

74. If a subordinate land use regulation does not further and promote the policies of a general plan, it must be deemed inconsistent. (*Building Industry Ass'n. v. City of Oceanside*, 27 Cal. App. 4th 744, 767 (1994).) A land use decision (zoning ordinance) must be deemed inconsistent with a general plan if it conflicts with a single, mandatory general plan policy or goal. (*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors*, 62 Cal. App. 4th 1332, 1341 (1998).) A local land use decision that is inconsistent with the applicable general plan is invalid when passed, i.e., void *ab initio*. (*Lesher Communications. Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 540 (1990).)

75. General Plan Land Use Element Section 2.4.d includes the policy to "limit residential development to one family detached and two family dwellings, in accord with the provisions of Measure A." The Project's adoption of the Housing Element and land use designation "Medium Density Residential" as well as the Multifamily Residential Combining Zone conflicts with the General Plan Land Use Element since it permits "by right" multifamily residential uses in densities greater than permitted under than the General Plan Land Use Element. In addition, the City failed to adopt a schedule to address these inconsistencies.

76. The City cannot legally approve the Project until the General Plan is amended. A zoning ordinance change that in effect re-zones certain property for higher density residential use, is clearly inconsistent with the existing general plan that precludes such development altogether. (*See, e.g., DeBottari, supra*, 171 Cal.App.3d at 1212.) Here, the Project's zoning amendments

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providing for multifamily residential is directly inconsistent with the General Plan's Land Use Element. This inconsistency alone makes the Project "invalid when passed."

FOURTH CAUSE OF ACTION

(Declaratory Relief)

77. Petitioners hereby reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

78. Actual controversies have arisen and now exist between Petitioners, on the one hand, and Respondents, on the other hand, in that Petitioners contend, and are informed and believe, and thereon allege, that all Respondents and Defendants deny: (l) that Respondents and Defendants failed to comply with CEQA, the CEQA Guidelines, and all applicable federal, state and local laws requiring adequate analysis of a Project's potentially significant adverse environmental impacts; (2) that Respondents and Defendants violated the City Charter in adopting the Project without a vote of the City's electors; (3) that Respondents and Defendants failed to comply with state and local laws requiring horizontal consistency between elements of its general plan and vertical consistency between a zoning enactment and its governing general plan; and (4) that Respondents and Defendants otherwise failed to proceed in the manner required by law with respect to the Project approvals, as set forth in more detail above.

79. It is necessary and appropriate at this time that the Court issue a declaratory judgment so that all parties hereto and the public as a whole may know the illegality or legality of the actions of Respondents and Defendants, and whether the Project approvals are invalid and void *ab initio*, as set forth in more detail above.

WHEREFORE, Petitioners pray for judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION

(Injunctive Relief)

80. Petitioners hereby reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

81. If the Project and related approvals are implemented without benefit of the further and legally required adequate environmental review mandated by CEQA and the CEQA

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Guidelines, the Planning and Zoning Law, and the City Charter, Petitioners and the general public will be irreparably injured by potentially significant adverse environmental impacts and environmental degradation, as well as the land use planning inconsistencies this Project will cause, all as more particularly set forth above. Members of the public at large will also suffer irreparable injury resulting from unidentified, unanalyzed and unmitigated significant adverse environmental impacts on, and damages to, the physical environment that may be caused by the Project, as set forth in more detail above.

82. All Respondents and Defendants must immediately be enjoined and prevented pursuant to Code of Civil Procedure sections 526 and 527, Public Resources Code Section 21168.9, and all applicable law, from implementing or taking any steps to implement the Project, or taking any steps whatsoever in connection therewith, including, but not limited to, applying it to currently pending or newly-submitted development, entitlement and/or permit applications. All Respondents and Defendants must be compelled to perform their mandatory legal duty, and to apply only those ordinances, policies and regulations that were in effect prior to the purported Project approval to currently pending or newly-submitted development, entitlement and/or permit applications, unless and until legally sufficient environmental review of the Project is performed under CEQA and all applicable law, and any new version of the Project is legally consistent with the General Plan and City Charter.

83. Petitioners have no adequate remedy at law to prevent themselves and other members of the public and citizens of the City from suffering this irreparable injury.

WHEREFORE, Petitioners pray for judgment as hereinafter set forth:

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request the following relief and entry of judgment as follows:

1. A peremptory writ of mandate directing Respondents to vacate, set aside and void Resolution No. 14718 and Ordinance No. 3054;

2. A peremptory writ of mandate commanding Respondents to suspend any and all specific Project-related activity or activities that could result in an adverse change or alteration

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to the physical environment until Respondents have taken any and all actions that may be necessary to bring the Respondents' determinations, findings, and decisions concerning the Project into compliance with CEQA and the City Charter;

3. A stay pursuant to Code of Civil Procedure section 1094.5, subd. (g), and/or a preliminary injunction, as appropriate, to maintain the status quo pending the judgment;

4. An order awarding Petitioners its attorneys fees under Code of Civil Procedure section 1021.5 and other applicable authority;

5. Costs of suit; and

6. Such other and further relief as the Court deems just and proper.

Dated: November 9, 2012

WENDEL, ROSEN, BLACK & DEAN LLP

By: _____
Todd A. Williams
Attorneys for Petitioners and Plaintiff
EAST BAY REGIONAL PARK
DISTRICT and ANGELA FAWCETT

Wendel, Rosen, Black & Dean LLP
1111 Broadway, 24th Floor
Oakland, CA 94607

VERIFICATION

I, Ted C. Radosevich, declare that:

I the am the District Counsel of the East Bay Regional Park District ("the District") one of the plaintiffs and petitioners in this action and am authorized to make this verification on behalf of the District and petitioner Angela Fawcett.

I have read the foregoing Verified Petition for Writ of Mandate and Complaint and know the contents thereof; the factual allegations therein are true of my own knowledge, except as to those matter which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on November 7, 2012 at Oakland, California.

Ted C. Radosevich

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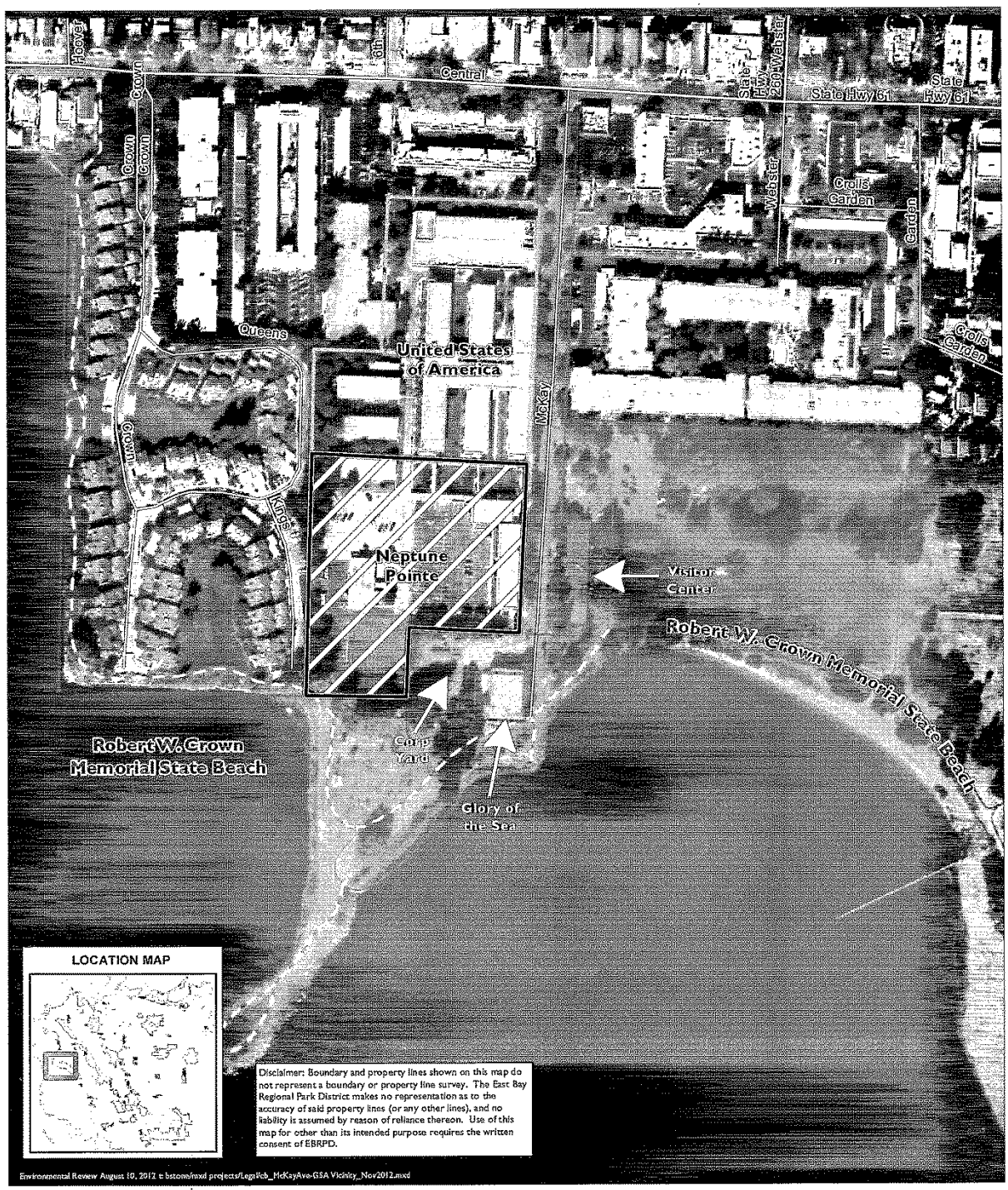
Oakland, CA 94607

Attachment 1

East Bay Regional Park District

ROBERT W. CROWN MEMORIAL STATE BEACH

GSA Property and Vicinity



Disclaimer: Boundary and property lines shown on this map do not represent a boundary or property line survey. The East Bay Regional Park District makes no representation as to the accuracy of said property lines (or any other lines), and no liability is assumed by reason of reliance thereon. Use of this map for other than its intended purpose requires the written consent of EBRPD.

Environmental Review August 10, 2012 e:\bstone\mxd projects\Legal\cb_McKayAve-GSA Vicinity_Nov2012.mxd

Attachment 2

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tawilliams@wendel.com

November 8, 2012

BY HAND DELIVERY AND U.S. MAIL

Lara Weisiger, City Clerk
City of Alameda
2263 Santa Clara Avenue, Room 380
Alameda, CA 94501

Janet C. Kern, City Attorney
Office of the City Attorney
City of Alameda
2263 Santa Clara Avenue, Room 280
Alameda, CA 94501

Re: Notice of Intent to File CEQA Petition
Client-Matter No. 002021.0242

Dear Ms. Weisiger and Ms. Kern:

Please take notice under Public Resources Code section 21167.5, that petitioners East Bay Regional Park District and Angela Fawcett intend to file a petition under the provisions of the California Environmental Quality Act against the City of Alameda and the City of Alameda City Council challenging, among other things, its compliance with CEQA in the approval of the Housing Element of its General Plan through the adoption of Resolution No. 14718 and Ordinance No. 3054, on July 3, 2012, and July 17, 2012, respectively.

The petition will seek a writ of mandate to set aside Resolution No. 14718 and Ordinance No. 3054, including the adoption of an addendum to previously adopted CEQA documents.

Sincerely,

WENDEL, ROSEN, BLACK & DEAN LLP

Todd A. Williams

TAW/cab

002021.0242\2604719.1

PROOF OF SERVICE

I am over 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place. My business address is: 1111 Broadway, 24th Floor, Oakland, CA 94607.

On November 8, 2012, I served from Oakland, California the following document:

Letter to City Clerk and City Attorney, City of Alameda re CEQA Petition

Using the following means of service:

BY PERSONAL DELIVERY – by causing true and correct copies of the document(s) listed above which were placed in a clearly labeled sealed envelope, addressed to the person(s) at the service address(es) set forth above, and giving same to ONE HOUR DELIVERY for same day service who delivered to the receptionist or other person apparently in charge.

BY U.S. MAIL – I served the document by enclosing it in an envelope for collection and mailing following our ordinary business practices. I am readily familiar with this of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid.

The envelope was addressed as follows:

Lara Weisiger, City Clerk
City of Alameda
2263 Santa Clara Avenue, Room 380
Alameda, CA 94501

Janet C. Kern, City Attorney
Office of the City Attorney
City of Alameda
2263 Santa Clara Avenue, Room 280
Alameda, CA 94501

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

Date: November 8, 2012

Carol A. Bagshawe

CAROL A. BAGSHAWE