

March 15, 2017

VIA E-MAIL AND U.S. MAIL

Dawn G. Abrahamson
City Clerk
City of Vallejo
555 Santa Clara Street, 3rd Floor
Vallejo, CA 94590
Email: dawn.abrahamson@cityofvallejo.net

**Re: Appeal of Planning Commission Action Adopting Resolution No. PC 17-03
Refusing to Complete and Certify Final EIR for Vallejo Marine Terminal/Orcem
Applications for Major Use Permits and Site Development Permits**

Dear Ms. Abrahamson:

This letter appeals the Vallejo Planning Commission decision of March 6, 2017 adopting Resolution No. PC 17-03 on behalf of applicants Orcem California (Orcem) and Vallejo Marine Terminal, LLC (VMT). The applicants have spent the past four (4) years processing their City applications, and have paid the City over \$1,000,000 to prepare and certify a complete and accurate environmental impact report (EIR) to analyze their proposed projects and serve as the basis for informed and rational decision-making with respect to the projects' potential environmental effects. On March 6, 2017, the Planning Commission refused to complete and certify a Final EIR for these projects, and arbitrarily denied the applicants' requested permits based on the projects' purported unmitigated and significant adverse environmental effects without a legally sufficient evidentiary basis for making such findings. This appeal therefore seeks City Council action to:

- a) **Overturn the Planning Commission's adoption of Resolution No. PC 17-03;**
- b) **Direct completion of specific technical and factual corrections of errors in the uncertified Draft Final EIR improperly relied on by the staff and Planning Commission;**
- c) **Schedule a separate Council hearing to certify the amended Final EIR; and finally**
- d) **Make an informed decision to approve the Orcem and VMT applications, and concurrently accept the appeal filed on March 22, 2016, overturning the action of the AHLC to designate 6 structures as City Landmarks.**

The applicants request that this matter be heard by the Vallejo City Council in accordance with Vallejo Municipal Code §§ 16.102.020. The basis for this appeal of the Planning Commission action is summarized in the following 14 points, and detailed in the supporting materials included in **Attachments A through L**:

1. **Violation of California Environmental Quality Act (CEQA) Requirement to Prepare and Certify an EIR.** The Planning Commission did not have authority to take any action on the projects themselves, without first correcting and certifying the Draft Final EIR, based on the requirements of: (a) CEQA Guidelines § 15064 (see **Attachment A**), which requires the preparation and certification of an EIR for all defined “*projects*” with potentially significant effects; and (b) CEQA Guidelines § 15270(b) (see **Attachment A**), which provides an exemption from the requirement to prepare and certify a project EIR only “*to allow an initial screening of projects on the merits for quick disapprovals prior to the initiation of the CEQA process where the agency can determine that the project cannot be approved*”. Here, the Commission deliberated on the record purporting to “consider” the projects and whether it “had enough information” to make a decision regarding them, yet never required a certified Final EIR, which was legally necessary and critical to be able to consider actually approving the projects.
2. **Violation of Contractual Reimbursement Agreements.** The Planning Commission violated the contractual Reimbursement Agreements which the City executed jointly with both applicants, by collecting and spending in excess of \$1 million in funds for the express purpose of preparing and certifying a complete and accurate EIR, and then specifically refusing to direct the staff to finish the document and bring it before them for certification prior to holding a hearing on the projects. The Reimbursement Agreements clearly obligate the City to have their consultants prepare a complete Final EIR and submit it to the decision-making body to guide their consideration of environmental effects and consideration of the projects, as further documented in our letters of October 3, 2016 (**Attachment B**), October 17, 2016 (**Attachment C**), and January 17, 2017 (**Attachment D**). The Commission’s action precluded completion and certification of a complete and accurate Final EIR.
3. **Violation of City of Vallejo Guidelines for Implementation of CEQA.** As required under CEQA Guidelines § 15022 (see **Attachment A**), the City of Vallejo adopted certain local guidelines for implementation of CEQA entitled “*Environmental Review, Planning Handout No. PH-13*” (attached as Exhibit “C” to Miller Starr Regalia’s February 7, 2017 letter to the Planning Commission, **Attachment E**). These relevant official Guidelines require that “*Following the [DEIR] review period a Final EIR is prepared consisting of amendments to the draft and written responses to the comments received ... A certification hearing is then scheduled before the Planning Commission and/or City Council. Action on the project can follow certification if all other City requirements have been satisfied.*” The Planning Commission violated these City Guidelines and CEQA by: (a) Refusing to complete the EIR; (b) Refusing to schedule a hearing to then certify the EIR, as detailed in our letters of October 3, 2016 (**Attachment B**), October 17, 2016 (**Attachment C**), and January 17, 2017 (**Attachment D**); and (c) Taking action on the projects (by denying them) prior to EIR certification.

4. **Error in Failing to Conduct Hearing on Appeal of Administrative Decision Refusing to Complete and Schedule Hearing to Certify FEIR.** The Planning Commission took action on the applicants' permits without first conducting a hearing, as required under Vallejo Municipal Code § 16.102.030, to consider the February 8, 2017 appeal of Andrea Ouse's staff-level decision to refuse to complete and certify the Final EIR for the projects (**Attachment F**). This timely appeal provides direct evidence that the staff's action to refuse to schedule a hearing on certification of the Final EIR in advance of considering the permit applications was in violation of: (a) CEQA; (b) The contractual Reimbursement Agreements; (c) The City's own CEQA Implementation Guidelines; and finally, (d) Basic common sense. The appeal was further supported by a February 16, 2017 legal opinion from Miller Starr Regalia (**Attachment G**). Our request that the Council overturn the Planning Commission's action and direct the correction, completion, and certification of the Final EIR (requested actions (a), (b) and (c) above) would remedy this error by the Commission.

5. **Violation of CEQA Guiding Principle to Use Certified EIR to Evaluate Projects.** The Planning Commission rejected the Draft Final EIR, along with its science-based measurement and mitigation of environmental effects, and identification of thresholds of significance, and instead relied exclusively on a series of subjective and arbitrary judgments about the projects' purported but unsubstantiated environmental impacts. These judgments: (a) Were made as a result of an unfair hearing process orchestrated by a biased staff (where approval was never an option); (b) Lacked foundation and supporting substantial evidence; (c) Lacked any quantifiable measurement or identified thresholds; (d) Disregarded uncontradicted expert evidence on technical subjects; and (e) Failed to conduct required analysis or make any determination of significance as to the nature and extent of environmental effects. The Commission's actions were all in direct violation of CEQA Guidelines § 15002(f) (see **Attachment A**) which requires that an EIR be prepared and certified as the authoritative source for such evidentiary documentation:

“An Environmental Impact Report (EIR) is the public document used by the governmental agency to analyze the significant environmental effects of a proposed project, to identify alternatives, and to disclose possible ways to reduce or avoid the possible environmental damage.”

These actions were also in clear violation of CEQA Guidelines § 15093(a) (see **Attachment A**), which provides:

“CEQA requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project.”

While the Commission expressly purported at the March 6, 2017 hearing to “consider” the projects and to deliberate on whether it “had enough information” to make a decision on them, the balancing required by CEQA Guidelines § 15093(a) as part of such deliberation and consideration cannot occur without a certified Final EIR analyzing and assessing the

severity of the projects' significant and unavoidable impacts (as opposed to those that can be avoided or rendered less than significant through required mitigation). Simply put, neither the existence nor the relative severity of significant and unavoidable impacts can be determined in legal vacuum that is devoid of any complete, accurate and certified Final EIR produced as the result of a complete and lawful CEQA process. The Commission and its staff violated and deliberately short-circuited the required CEQA process here, both making a mockery of CEQA and disregarding the applicants' due process rights to a fully informed, fair and unbiased hearing on their projects.

6. **Violation of CEQA-Mandated Three-Step Process for Evaluation of Discretionary Projects:** CEQA Guidelines § 15002(k) (see **Attachment A**) was violated by the Planning Commission's interruption of the state-mandated *Three-Step Process*, which requires:
- a) First, the City must make a determination as to "*whether an activity is subject to CEQA before conducting an initial study*", as further required by Guidelines §§ 15060 (see **Attachment A**): The City completed and affirmatively determined that **CEQA is applicable** with its completion of an Initial Study on May 20, 2014 (**Attachment H**).
 - b) Second, the City must prepare and post a Notice of Preparation (NOP) for an EIR: On May 20, 2014, the City issued a NOP which states that "*The City of Vallejo (City) will be the lead agency under the California Environmental Quality Act (CEQA) and will prepare a EIR for the project*" (see Draft EIR Appendix A-1, **Attachment H**); and
 - c) Third and finally, the City must prepare and certify an EIR based on the Initial Study determination that the projects may have a significant effect: The City completed and circulated a Draft EIR (State Clearinghouse # 2014052057) on September 3, 2015, and prepared and posted a Draft Final EIR on February 6, 2017, but then **arbitrarily and abruptly stopped work on the Final EIR and refused to present a completed Final EIR to the Planning Commission for consideration and certification** on March 6, 2017 in violation of: (1) CEQA; (2) The City CEQA Guidelines (see No. 3 above); and (3) The City's contractual Reimbursement Agreements.
7. **Violation of CEQA-Mandated Process for Determining if a Project is Exempt.** Guidelines § 15061(a) (see **Attachment A**) mandates that "*Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA*". The **City of Vallejo determined on May 20, 2014 that the Orcem and VMT Project is a "Project" under CEQA and is "not exempt"** (see **Attachment H**) under any of the statutory or categorical exemptions provided for in the Guidelines (including § 15270 – see **Attachment A**). The Planning Commission action violates § 15061(a) (see **Attachment A**) by retroactively altering the determination made three years earlier in the NOD that the projects are not exempt, after both the Draft EIR and Draft Final EIR were prepared and published, and after over \$1 million in City fees were paid to complete and certify the EIR.

8. **Violation of CEQA-Mandate to Evaluate Impacts Based on Defined Thresholds of Significance.** Guidelines §§ 15064.7 and 15065 (see **Attachment A**) obligate the City as lead agency to “develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects” for such projects. These sections also require that “an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that ... a project may have a significant effect on the environment.” Consistent with these CEQA requirements, the Draft Final EIR’s prepared for the projects identified specific objective and measurable thresholds of significance for each of the potentially significant project impacts. However, the Planning Commission violated §§ 15064.7 and 15065 by refusing to use the objective thresholds published in the DEIR and FEIR as the basis for evaluating the significance of the projects’ potential effects. Rather, the Commission refused to certify and consider the EIR, and ignored the published thresholds, and instead relied on the vague, arbitrary and subjective judgments of individual commissioners as the basis for its vote to deny the projects.

9. **Planning Commission Determination Based on False Assumptions about Environmental Impacts and Errors in Draft FEIR.** The Commission’s refusal to direct the correction, completion and certification of the Final EIR for use in informing themselves as to the **actual** project effects on air quality, noise, traffic, roadway damage, commuters, land use compatibility, consistency with the Bay Plan, and degradation of the waterfront, all led to arbitrary, false, and grossly exaggerated speculation about the significance of impacts. The Commission’s resolution, along with the staff report which recommended its adoption, reflect the Commission’s misunderstanding of project impacts, as well as their reliance on these false and speculative assumptions as the basis for denial of the applicants’ permits. As an example, the Commission’s action was punctuated by one commissioner’s statement that that he “*couldn’t live with himself or sleep at night*” if he were “*to vote to approve ‘industry’ on this site*”. Adopted Resolution PC No. PC 17-03 (a copy of which is included as **Attachment I**) contains the following listed false and misleading findings and conclusions (many of which are repeated in several places in the resolution), upon which their action was based. As summarized below, these false conclusions are based, in part, on the Commission’s reliance on a series of critical errors in the Draft FEIR and accompanying staff report, both of which were explained to the Commission in written documentation (see **Attachment J**) and oral testimony by project experts on February 27th and March 6th:
 - a) **Air Quality:** The adopted resolution relies (in several places) on vague and unsupported claims that the projects would result in “*negative conditions ... such as air emissions*” and “*air emissions that would alter the character of the existing residential neighborhoods along Lemon Street and Sonoma Boulevard and would have a harmful effect on the desirability of the neighborhoods and their character*”. One commissioner stated his conclusion that the projects would result in “*harm to local residents caused by significant NOx emissions ... we can’t prove this but we don’t need to*”. These arbitrary judgments were made in the absence of an accurate, complete, and certified EIR, and clearly contradict the body of scientific evidence contained in the Draft FEIR showing no significant air quality impacts whatsoever.

The foregoing incorrect air quality conclusions were predicated on erroneous statements contained in the staff report and Draft FEIR stating that the Orcem Mill is a “*cement manufacturing facility*” which will utilize a kiln with resulting “*temperatures in excess of 1800 degrees Fahrenheit*”, rather than as a mill for production of GGBFS. As clearly documented in the project applications, unlike an ordinary cement plant, the Orcem Mill has no kiln and does not involve the firing of clinker. The only heat involved is the warming of air in the Mill as GBFS is dried and ground to produce the GGBFS power. This process takes place in a closed system with a high-performance filtration system, and results in no significant pollutant emissions (reference Draft FEIR page 3.7-20, Staff Report pages 1, 28) (see **Attachment J**).

The Commission’s misplaced speculation regarding air quality impacts was again demonstrated through their stated conclusions on March 6, 2017 that: (1) The projects would have “*significant NOx emissions*”; and (2) The NOx emissions would “*cause harm to people living in South Vallejo*”. However, as is documented in **Attachment J** and as was explained during direct testimony on March 6th: (1) NOx does not result in any locally significant impacts (it is only a regional air quality factor, and the Bay Area is not in non-attainment for compliance with NOx thresholds); (2) The component of NOx which has a potential for affecting people locally, NO2, was extensively modeled for both the original and the revised proposed projects and found to be well below the applicable federal threshold of significance; (3) The BAAQMD will provide offsets for all stationary equipment, vessel and rail NOx emissions above the 10-ton annual threshold of significance from its Small Facility Bank program; and (4) Any remaining NOx emissions from trucks will be separately offset through supplemental mitigation measure MM-3.201ROA which obligates the applicants to fund specific programs (such as the replacement of local school bus or City Public Works vehicle engines with low-emission equipment), and for the NOx reductions to be quantified and verified by the BAAQMD, in order to confirm elimination of any remaining potentially significant NOx emissions. Following mitigation, the proposed projects will have no significant air quality impacts of any kind, including NOx impacts.

- b) **Noise and Vibration:** The adopted resolution relies (in several places) on vague and unsupported claims that the projects would result in “*negative conditions ... such as ... noise*” and that the operational noise from the projects “*would likely disrupt the quiet enjoyment of adjacent multi-family housing complexes and single-family residences in the project vicinity*” and “*nearby residences on Sandy Beach in unincorporated Solano County*”. The resolution also makes the vague and unsupported claims that the projects would “*substantially increase noise*” and, as a result, “*would alter the character of the existing residential neighborhoods along Lemon Street and Sonoma Boulevard and would have a harmful effect on the desirability of the neighborhoods and their character*”.

In fact, the detailed noise studies completed by qualified acoustical engineers, and peer reviewed in the Draft FEIR, conclusively show that all operational noise from the proposed projects will remain below the published thresholds of significance, and that therefore the projects will not have any significant noise impacts anywhere, including the transportation corridors, the adjoining industrial and residential neighborhoods, and the Sandy Beach neighborhood (see **Attachment J**). The documentation in **Attachment J** also demonstrates that with the proposed projects' changes in rail operation and timing, and other controls, the resulting vibrational noise impacts will be well below the applicable threshold at the location of one house to the north of the project site (NSL-10), where the original project may have exceeded this threshold. By its refusal to correct, complete and certify a Final EIR for these projects, the Commission has attempted to circumvent the mandates of CEQA for use of clear and quantifiable thresholds of significance, and has substituted in their place, vague and undefined terms and accusations which are belied by the facts.

- c) **Traffic:** The adopted resolution again relies (in several places) on vague and unsupported claims that the projects would result in *“negative conditions ... such as ... traffic, and potential delays in emergency service call response times [that] cannot be lessened to an acceptable level”*. Absent a certified EIR upon which to base its conclusions, the resolution fails to quantify or even define what an “acceptable” level of traffic would be for such industrial land uses. Further, the adopted resolution then jumps to the unsupported assertion that based on *“the generation of traffic”*, the projects would not *“be compatible with adjacent uses, building or structures”*. The resolution also falsely suggests that traffic generated by the projects *“would likely disrupt the quiet enjoyment of adjacent multi-family housing complexes and single-family residences in the project vicinity”*. Finally, the resolution relies on false and grossly exaggerated estimates of the number and frequency of project trucks (see Item (g) below), and false information concerning the proposed reestablishment of local rail service, as the basis for its conclusion that *“the Project would not be compatible with the adjacent residential uses, and would result in harmful effects upon desirable neighborhood character”*. One commissioner summarized these conclusions with his opinion that the projects would result in *“30-minute delays caused by trains at each intersection crossed”*, would further adversely affect the *“level of service along Lemon Street”*, and would compromise the *“safety of pedestrians and children”*.

The foregoing speculative Commission conclusions have no basis in fact, are not supported by any substantial evidence, and have not been documented in a certified EIR. Conversely, the traffic analysis conducted as part of the Draft EIR and Draft FEIR clearly document the following (**see Attachment J**):

- Truck and other vehicular traffic from the proposed projects, as modified in June 2016 (under the proposed Revised Operations Alternative) will not result in *any* significant level of service impact, *anywhere*.

- A maximum of 209 trucks will leave the project site on a daily average basis (418 total inbound and outbound trips). Of these: (a) A maximum of 117 loaded trucks will use Lemon Street east of Sonoma Boulevard, representing an average of 1 outbound truck per 12 minutes, and utilizing a maximum of 1.2% of the total future traffic volume and capacity on Lemon Street; (b) A maximum of 82 loaded trucks will use Sonoma Boulevard south of Lemon Street, representing an average of 1 outbound truck per 18 minutes, and utilizing a maximum of 3.3% of the total future traffic volume and capacity on the southerly segment of Sonoma Boulevard; and (c) A maximum of 10 loaded trucks will use Sonoma Boulevard north of Lemon Street, representing an average of 1 outbound truck per 2.5 hours, and utilizing nearly 0% of the total future traffic volume and capacity on the northerly segment of Sonoma Boulevard. These figures will all be further reduced as barges are fully utilized to fully serve the VMT Terminal.
- The proposed projects are obligated through mitigation measures included in the Draft EIR and Draft FEIR to pay for a complete engineering-level structural and safety assessment of Lemon Street (a designated Truck Route until 2010), and to rebuild the roadway, as well as to complete pedestrian and bicycle safety improvements, in order to safely accommodate all traffic on this industrial arterial-level roadway. The EIR documents the fact that pedestrian safety will be protected by the planned pavement enhancement, sidewalk construction, and crosswalk safety improvements which are part of the project. However, rather than completing and certifying the EIR, in order to base its judgments on science and substantial evidence, the Commission adopted a resolution which relies on false "perceptions" about the number of trucks, the capacity of the City's roadways, and opportunities to protect bicycle and pedestrian safety.
- Absent a certified EIR to provide a reliable, scientific basis for understanding environmental impacts, the Commission resolution reaches the incorrect conclusion that rail delays on both general traffic and emergency services would be "significant". This conclusion is based on an incomplete and uncertified Draft EIR which has not yet fully evaluated all of the mitigation measures included in the proposed project. A corrected and certified Final EIR will document: (a) A reduction from 100 to 50 rail cars as the maximum length of trains intended to serve the project site; (b) A limitation on the scheduling of all rail operations to avoid night time hours, and to minimize movements during peak roadway traffic periods; (c) A resulting reduction in noise, vibration and air quality impacts to a less than significant level; and (d) A 50% reduction in maximum delays at street crossings (from 8 to 4 minutes). The resulting worst-case potential traffic delay would remain "significant" based on the Draft FEIR's threshold of 1 minute, but is comparable to current delays at other local non-rail intersections, and the historic delays occurring when General Mills operated. Furthermore, a corrected and certified Final EIR will also examine the emergency service mitigation incorporated into the proposed project, including: (a) Train

operations, as noted above, will be scheduled to minimize movements during peak-hour periods; (b) A 24-hour advance notice will be provided to fire, police, EMS, and other emergency service providers to alert and allow them to use pre-designated alternate routes during the planned periods when trains will run; (c) Signals at intersections affected by rail operations will be synchronized with non-impacted intersections (on parallel routes) to efficiently handle the re-routing of traffic in order to minimize overall delays; and (d) Real-time operational movement of trains will be made available to emergency service providers and analyzed to make adjustments over time to better improve efficiency and minimize delays. The Draft Final EIR does not currently include evaluation of the beneficial effects of these new measures, and the Commission failed to correct, complete and certify the EIR as a basis to judge the significance of the projects' effects on traffic and emergency services.

Here again, by its refusal to complete and certify a Final EIR for these projects, the Commission has made a mockery of CEQA's mandate for use of clear and quantifiable thresholds of significance, and has substituted in their place, vague and undefined terms and accusations which are belied by the facts.

- d) **Roadway Damage:** The Commission's adopted resolution, and the comments of individual commissioners were based (in several places) on subjective speculation rather than any substantial evidence, or a completed and certified EIR. The commission's conclusions were summarized in the following statement: "*Project trucks will cause damage to Lemon Street, will limit the capacity of Lemon Street, and will cause maintenance costs to exceed project revenues; There is "no answer" to these impacts.*" Unfortunately, the Commission refused to complete and certify the EIR, and to rely on substantial evidence in the EIR showing that the projects are obligated by mitigation measures to pay for a complete engineering-level structural and safety assessment of Lemon Street (a designated Truck Route until 2010), and to rebuild the roadway, as well as to complete pedestrian and bicycle safety improvements, in order to safely accommodate all traffic on this industrial arterial-level roadway. As was explained on March 6th by the deputy City Engineer, the structural evaluation and resulting mandatory reconstruction of Lemon Street is intended to mitigate the potential damage caused by continued use of this roadway by trucks, busses and other large vehicles. Further, as explained in Item (i)(11) below, following reconstruction, any ongoing maintenance costs will be more than offset by the net local revenues these projects will bring to Vallejo.
- e) **Commuters:** The staff report and adopted resolution assert (in several places) that the proposed projects would harm commuters, when the projects would help to improve the City's current jobs/housing imbalance, add jobs directly in South Vallejo, and also would avoid adding substantial traffic volumes during commute periods, thereby actually reducing congestion. The conclusions in the resolution are not supported by any evidence in the currently incomplete and uncertified Draft FEIR, which states that the projects would have "No Significant Impact" on commuters.

- f) **Land Use Compatibility:** The resolution asserts (in several places) that the proposed projects will produce a “*significant amount of truck and rail traffic*” that will “*travel through areas that include sensitive land uses, such as residential neighborhoods*”, and therefore would be “*incompatible with those neighborhoods and would result in incompatibility and potentially an impact on investment in those areas.*” These assertions of “significance” are false and are not supported by a completed and certified EIR. The arbitrary and discriminatory nature of these claims belies the evidence already contained in the Draft FEIR, and fail to establish a legitimate basis for judging “incompatibility”, or use of subjective market assumptions to determine that other public or private property investments in the area would be harmed by the projects (even if that were within the Commission’s statutory authority). As explained under Item (c), (d), and (e) above, subject to the mitigation proposed, the projects’ combined truck traffic will have no significant level of service, capacity, or safety effects, will not adversely affect commuters, and will lead to the estimated expenditure of over \$1 million to upgrade the condition of this industrial arterial-level roadway which has suffered from the City’s deferred maintenance since its status as a through-town “Truck Route” was modified in 2010.

This, again, is the height of arbitrary judgment without reliance on the EIR, and goes so far as to determine that the projects should be denied because they might cause a reduction in the value of private property. As has been documented in the AHLC appeal (see **Attachment K**), and acknowledged by commissioner statements on March 6, 2017, continued retention of the severely deteriorated structures currently existing on the site will result in expansion of the current blighted physical conditions surrounding the site, and exacerbation of the resulting significant and unavoidable environmental effect of denying the projects (**Attachments I and J**).

Further, as explained in the materials presented to the Commission, while all of the EIR technical studies were based on potential worst-case effects on sensitive receptors (including residences), it is well-documented that 75% of the land uses currently in place along the Lemon Street arterial corridor are industrial or service commercial in nature. These EIR technical studies also document the fact that the proposed projects will not result in even one significant impact on the land uses along either Lemon Street or Sonoma Boulevard. Finally, as the Planning Commission has refused to complete and certify an EIR as the basis for determining the environmental effects of these projects, it has failed to consider the very real significant environmental impacts of expanding blight caused by continued decay of buildings and other improvements on the project site which adversely affect surrounding industrial, commercial and residential uses.

- g) **San Francisco Bay Plan Consistency:** The conclusions contained in the Commission resolution (in several places) fail to consider a complete and certified EIR, and therefore fails to incorporate the final correspondence from BCDC, and incorrectly concludes that the proposed projects (verified Water-Related Industrial Uses) may be inconsistent with the Bay Plan, as well as related zoning rules, and general plan policies. Following literally years of preliminary review and six months of meetings, BCDC staff confirmed in writing that the proposed Modified ROA Project is fully consistent with the Bay Plan (see

Attachment J). The projects were modified in June 2016 by eliminating the previous VMT Phase 2 component, to demonstrate full consistency as a Water-Related Industrial Use. The resolution's reference to public access is not a consistency issue at all; Rather it is a reflection of the staff's opinion that the alternative access accommodation supported by BCDC staff, ABAG staff, and interested local groups may not be enough. As clearly documented in the Draft FEIR and stated by BCDC staff, there is a Permit Process in place with BCDC to assure full compliance and consistency, and it is the BCDC Commission's sole authority to determine such consistency.

The staff report relied upon in the Commission resolution also incorrectly states that as mitigation for Bay fill, the project would merely remove "approximately eighty (80) 14-inch-diameter creosote timber piles and deteriorated dock facilities" from the Vallejo Marina. As documented in the Draft EIR and Draft FEIR, the project's mitigation is far more extensive, and includes removal of an additional 440 decaying creosote piles and deck remnants at the project site (for a total of 520 piles). These measures result in enhancement and continued protection of the marine environment for protected fish and invertebrate species (such as Pacific herring), reduced shading of the bottom (mudflat) and water above, reduced restrictions to the flow of water and movement of sediment, and restoration of the ecosystem, including intertidal mudflats, and sand flats. It is the role of BCDC (a responsible agency under CEQA) to confirm the adequacy of this full mitigation program as called for in the proposed project (which has eliminated VMT Phase 2 and reduced Bay fill by two-thirds in comparison to the original project).

The Commission's conclusion of inconsistency with the Bay Plan was therefore based on failure to have completed and certified an EIR for the projects, and was erroneously based by the concluding statement of one commissioner that "*it all comes down to Kayaks do not fit our lifestyle*".

- h) **Degradation of Waterfront:** The Commission's resolution erroneously asserts (in several places) that these industrial uses, located in a heavy industrial zoning district (Intensive Use) and designated on the General Plan for heavy industrial uses (Employment) will "*degrade the waterfront*". As expressed by one of the commissioners, "*we don't need another industrial use along the waterfront which people will see as they take the ferry into Vallejo*". Contrary to a clear determination in the EIR, the staff report also falsely states that the "*second stockpile*" (in reality a fully enclosed Phase 2 Orcem Building) and other unenclosed raw material storage areas on the site would "*detrimentally impact*" the existing viewshed of the abandoned and deteriorated wharf and former mill structures. Evidence in the Draft EIR and Draft FEIR show that the storage areas are screened by landscaping, walls, and other buildings, and would replace old pilings and damaged structures, resulting in a less than significant impact on aesthetics.

Further, in Table 5 of the staff report (relied upon by the Commission), it is incorrectly stated (in contradiction of the Draft FEIR) that the projects are "*not*" in conformance with the Intensive Use District height limits, based on the Mill vent stack and other equipment.

However, the “exception” standard in MC § 16.80.060 is normally approved administratively and is customary for such necessary mechanical or ventilation appurtenances in this Intensive Use District. The staff report also incorrectly concludes that the project is not in conformance with Code Section 16.70.020 “*Required Screening*” because some of the Orcem equipment would be visible from the Mare Island Strait. In fact, the performance standard established by Section 16.70.020 only calls for such equipment to be screened where “*visible from a public street*” and “*along the perimeter of open off-street parking adjacent to residential zoning districts*”. In this case, the Orcem conveyor equipment clearly complies with the standard because it would not be clearly visible from any nearby public street or adjacent residential parking lot.

i) **Remaining False and Unsupported “Findings”:**

- (1) False claim (in Resolution Section I) that the project acted on includes the (current June 2016) proposed project, when the evidence shows that several of the most important June 2016 project modifications were ignored in the staff’s analysis and the Commission’s resolution. The staff has stated that these changes (filed in June 2016) “*were only brought to the staff’s attention last week*”. Once again, these staff and commission errors would have been corrected, had the Commission insisted on correcting, completing and certifying the EIR before rushing to judgment on the proposed projects.
- (2) False claim (in Resolution Section II) that the lead agency is not required to complete and certify an EIR for these projects because of CEQA Guidelines § 15270 (see **Attachment A**). This conclusion improperly relied on the *Las Lomas Land Co.* decision. This, of course, is the subject of Miller Starr Regalia’s explicit letters of 10/03/16 (**Attachment B**), 10/17/16 (**Attachment C**), 1/17/17 (**Attachment D**), 2/07/17 (**Attachment E**), 2/16/17 (**Attachment G**), and 3/02/17 (see attachment to **Attachment J**), and is the procedural basis for this appeal.
- (3) False and grossly-exaggerated claim (in Resolution Section III-2, #A-2) that the “*average truck trips arriving and leaving the site would range from 12 to 32 per hour during day time hours (7:00 a.m. – 10 p.m.) and from 20 to 44 per hour during the overnight hours (10 p.m. – 7:00 a.m.)*.” In fact, the maximum average combined number of trucks arriving and departing the Site (as testified to in detail last night again) would be 209 X 2 or 418 in 24 hours, or an average of under 18 trucks per hour (roughly 40% of the resolution’s worst-case claim) (see **Attachments I and J**).
- (4) False and unsupported claim (in Resolution Section III-2, #3) that the projects “*would likely disrupt the quiet enjoyment of adjacent multi-family housing complexes and single -family residences in the project vicinity*” because of: (a) Its operations; (b) Its noise; and (c) Its traffic. The evidence shows that there is no significant noise, no significant traffic impact, and that the operations are well-separated from any residential use, so as to avoid any other negative effects (see **Attachments I and J**).

- (5) False claim (in Resolution Section III-2, #4) that the physical improvements would be “*visible from the immediately surrounding areas to the south and west and the noise, traffic, etc. generated by the project operations impacts the nearby residences on Sandy Beach in unincorporated Solano County*”. There is no basis or threshold to support this completely inaccurate and arbitrary claim. Commissioner Scoggins explained the Commission’s thinking by stating that when we walked up the hill behind the project site, he could “*tell that the buildings would be visible above the tree heights and would impact the character of the residences behind.*” This subjective and arbitrary conclusion occurred, in part, because the Commission failed to follow the legal requirements for administrative hearings on adjudicatory approvals (like use permits) by: (a) Failing to conduct a fair hearing; (b) Failing to act within its jurisdiction; (c) Failing to make legally sufficient findings; and (d) Failing to make findings supported by substantial evidence (reference Code of Civil Procedure §§ 1094.5 (b) and (c).) (see **Attachments I and J**).
- (6) Misleading assertion (in Resolution Section III-2, #6) that because Lemon Street was reclassified from being an official Truck Route in 2010, the projects somehow are barred from using this (still-designated) Industrial Arterial Road to gain access to market (**Attachments I and J**).
- (7) False claims (in Resolution Section III-2, #7) that the projects would “*substantially increase noise, traffic and generate air emissions that would alter the character of the existing residential neighborhoods along Lemon Street and Sonoma Boulevard and would have a harmful effect on the desirability of the neighborhoods and their character*”. This is based on false representation of truck volumes and undefined “*substantial*” harmful effects in various categories which are belied by the scientific facts established by the expert evidence (see **Attachments I and J**).
- (8) False claims (in Resolution Section III-2, #8) that project traffic would result in incompatibility with adjacent uses based on: (a) A falsely claimed “516” total one-way truck trips (the real number is 209 total trucks, or a combined 418 truck trips both in and out), “289” of which would occur on Lemon Street (the real number is 234), and “202” of which would travel south on Sonoma Boulevard (the real number is 164); (b) A false claim that rail operations would “*change the capacity of the streets to accommodate traffic during peak and non-peak hours*” (when the applicants would attempt to minimize use of peak hours, and when the capacity of local streets to accommodate re-routing of traffic is well-documented with very high level of service or “LOS” values); (c) Failure to consider the mitigation proposed as part of the proposed project to lessen the rail “down time” effects on emergency service providers; and (d) The unsupported claim that after safety improvements are made to Lemon Street, it will be “*unsafe*” for pedestrians and bicyclists (see Items (c), (d), and (e) above, and **Attachments I and J**).
- (9) False claim (in Resolution Section III-2, #9) that the projects would be incompatible with adjacent uses because: (a) The projects would “*change the character*” of

Lemon Street and “*endanger children*”; (b) Truck traffic would damage Lemon Street and cannot be mitigated “*to an acceptable level*” (when the opposite is documented in the EIR); and (c) Some “*290 project trucks on Lemon Street*” (the actual number is 234 one-way total loaded and unloaded trucks) is beyond the physical capacity of the roadway (disregarding the required structural evaluation and reconstruction of Lemon Street as noted under (d) above); and (d) The ongoing maintenance costs have not been mitigated (when the actual costs of maintenance have never been quantified or compared to the revenues which the projects are documented to generate – see (d) above) (see Item 9 below and **Attachments I and J**).

The Commission’s adopted community incompatibility findings are arbitrary, unsupported by substantial evidence, and could have been informed by an accurate, complete, and certified FEIR, had city complied with its legal duty to provide one. Whether the new truck trips on Lemon Street are incompatible with community character is a finding that can only be made in an informed and non-arbitrary way if there is an accurate and documented baseline of the nature and volume of existing conditions, along with a factually-supported analysis of project effects on nearby sensitive receptors, including traffic, noise, vibration, criteria air pollutant, aesthetic, pedestrian and bicycle safety, etc. Had the Commission exercised its legal duty to direct the correction and certification of the FEIR, it would have been able to rely on that document as a factual basis for determining the actual impacts of the two projects. In fact, the Draft FEIR, as corrected based on the substantial evidence presented in **Attachment J**, shows that the proposed projects **would not have any significant effects** on the surrounding neighborhood (the only remaining significant effects a corrected Draft FEIR would find for the proposed projects are limited to cultural, GHG and rail crossing delays). However, the Commission and staff affirmatively rejected the option of completing and certifying an accurate FEIR in favor of making an uninformed and biased decision.

Further, these Commission’s “findings” of incompatibility with the “surrounding residential neighborhoods” are belied by the facts as presented in the Draft FEIR. Had the EIR been corrected and certified for use in the evaluating environmental effects of the projects, it could have provided an accurate baseline to show where the closest residents are, how far they are from project operations on site and off (i.e., project-related rail and truck transportation), whether they are screened from aesthetic impact of tall buildings or other parts of the project (as Mr. Scoggins opined on), and precisely what exposure they will have to noise and vibration impacts, air quality impacts, etc., compared to baseline conditions, and whether that exposure would exceed the established significance thresholds. The Commission’s choice to make judgments about changes in character and compatibility without access to a complete and certified FEIR, and by willfully disregarding all the relevant factual and technical expert information in the record, is the very definition of arbitrary and capricious, was based on an unfair hearing, and made a mockery of CEQA.

As a specific example, how can proposed heavy industrial operations on a site designated and zoned for those uses possibly be incompatible with character of the surrounding area, especially when the city signed a long-term lease on a key part of the property essentially requiring such uses in 2012? Clearly, in its refusal to complete and certify the EIR, the Commission ignored this relevant information concerning the compatibility determination. These Commission conclusions regarding community compatibility are arbitrary and capricious, unfair, resulted from denial of a fair hearing, and lack supporting substantial evidence.

- (10) Illegal reliance on an uncertified EIR which does not constitute substantial evidence (in Resolution Section III-2, #C), and therefore concluding that the project would have cultural resource impacts without any evidence in the record (see **Attachment K**).

10. **The Commission's Determination Was Made without a Certified EIR, and Relied on False Information to Conclude that Project Benefits Would Not Outweigh Impacts.** In addition to refusing to correct and certify the EIR, the Commission relied on false information contained in the unfinished and uncertified Draft Final EIR and staff report to determine that the benefits of the projects would not outweigh their environmental impacts. As explained in Item 5, above, this was a clear violation of CEQA Guidelines §§ 15002(f) and 15093(a). In addition to errors relied upon in the Draft Final EIR and staff report, the Commission failed to consider the substantial job creation and net revenue producing benefits of the combined Orcem and VMT projects. These benefits were presented in the published Draft and Final EIR Appendices B and C (included as Appendices D-9 to the Orcem Application and Appendix E-8 of the VMT Application). Specifically, one of the individual commissioners questioned the credibility of the Fiscal and Economic Impact Study's author, Chris Seals, based on the commissioner's personal inability to reach the author on the telephone for questioning (see paragraph (e) below). Additionally, members of the Commission disputed the conclusions of the Fiscal and Economic Impact Study solely on the basis of a comment letter prepared on behalf of a group representing themselves as opponents of the projects. Rather than seeking answers to questions, the Commission rejected the EIR and the appended Fiscal and Economic Impact Study, and relied instead on the false allegations presented by the project opponents to deny the applicants' permits. The facts with respect to economic benefits of the combined projects, as documented in the record and Draft Final EIR are as follows:

a) **Jobs:** The proposed projects will have the following job benefits:

- (1) The combined projects will add a total of 192 permanent jobs. This includes: (a) 99 direct full-time jobs; (b) 51 indirect jobs; and (c) 42 induced jobs (see **Attachments I and J**).
- (2) In addition, the projects will create 120 union construction jobs while the facilities are being developed over a period of 1-2 years.

- (3) The average wage paid for direct employees at the combined project site will be approximately \$80,445 per year after six years of project operation. The average wage concurrently paid for indirect jobs created at project suppliers is estimated at approximately \$64,275 per year, while that paid for induced jobs is estimated at \$50,659 per year.
- b) **Annual Gross Revenues:** The proposed projects will generate approximately \$9.09 million in receipts to state and local governments over the first six years of operation through direct, indirect, and induced impacts. Thereafter, the projects are expected to generate over \$2 million per year in tax revenue to state and local governments (see **Attachments I and J**).
 - c) **Annual City of Vallejo Revenues:** The proposed projects will have the following major effects on the City of Vallejo (see **Attachments I and J**):
 - (1) City of Vallejo is expected to receive approximately 29% of the taxes and fees paid during the initial six years of project operation, representing a cumulative total of \$2.64 million in revenues to the City alone.
 - (2) In addition, a total of over \$2 million will be generated annually thereafter, \$533,000 of which will go each year to the City of Vallejo.
 - d) **Economic Development Benefits:** The proposed projects (the proposed June 2016 Revised Operations Alternative or ROA) will have far-reaching positive impacts on the local Vallejo economy, as well as that of the surrounding area, including (see **Attachments I and J**):
 - (1) **Gross Domestic Product Production:** In total, after six years of operation, the proposed projects are estimated to contribute \$21.7 million in value added to the local gross domestic product (GDP) based on output (total revenues for the projects, suppliers and local businesses impacted by induced spending) of \$62 million.
 - (2) **Establishment of Vallejo as a Center of International Trade and Commerce:** The proposed project (VMT and Orcem Modified ROA) will re-purpose the old General Mills site, including an upgrade to its rail infrastructure and waterfront, to open an international shipping terminal. As emphasized in the San Francisco Bay Plan, this site is uniquely blessed with a combination of a deep water berth, direct connection to the California Northern railroad, and proximity to the interstate highway network. These attributes provide the opportunity to increase the efficiency of northern California's commercial transportation system, and help establish Vallejo as a center of international trade and commerce.
 - (3) **Green Business Related Job Investment:** The Orcem component, alone, will invest nearly \$50 million in private funds on this green business, thereby creating jobs, increasing local tax revenues, and boosting the economy. As noted above, the City of

Vallejo is expected to receive a substantial tax and fee revenues from the combined projects, helping pay for local services, including police and fire. In addition, the projects will generate a combined total of 192 good-paying permanent jobs within six years of operation, generating an estimated \$13.15 million in annual wages paid to these permanent workers. In addition, the projects will generate tens of thousands of hours in union construction-related work. The combined projects are estimated to contribute \$21.72 million to the local economy during the first six years of operation alone.

- (4) **San Francisco Bay Plan Implementation Benefits:** Consistent with the adopted Vallejo General Plan specific to the South Vallejo Industrial Area, the proposed projects will uniquely help to implement the regional economic and land use policies embodied in the San Francisco Bay Plan, as administered by BCDC, providing sustainable economic and environmental benefits to the region as a whole. These include:
- Accommodate a priority water-related industrial use, thereby serving to implement the Bay Plan major conclusion that: *“Shoreline areas suitable for priority uses—ports, water-related industry, airports, wildlife refuges, and water-related recreation—exist only in limited amount, and should be reserved for these purposes.”*
 - Reestablish a deep-water terminal used to facilitate operation of a water-related industrial land use, thereby advancing the following major proposal of the Bay Plan: *“Waterfront land now used by industries that require access to deep water shipping should be continued in this use, and sufficient additional waterfront acreage should be reserved for future water-related industry”*.
 - Protect and promote use of the subject property for a deep draft shipping terminal, in accordance with the following major finding of the Bay Plan: *“The navigable, deep water sites around the Bay are a unique and limited resource and should be protected for uses requiring deep draft ship terminals, such as water-related industries and ports.”*
 - Efficiently plan for and accommodate use of the subject site for a water-related industrial use, in support of the following Bay Plan major finding: *“Expansion of water-related industry can be accommodated at existing water-related industries. Because waterfrontage with access to navigable, deep water is scarce in the Bay Area, existing and future water-related industrial sites must be efficiently planned and managed.”*
 - Preserve use of the former General Mills site in accordance with the following major finding of the Bay Plan: *“Sites designated for both water-related industry and port uses in the Bay Plan should be reserved for those industries and port uses*

that require navigable, deep water for receiving materials or shipping products by water in order to gain a significant transportation cost advantage.”

- Efficiently reuse and modernize a centrally located, existing deepwater terminal site identified in the San Francisco Bay Plan as a “Priority Use” site, thereby: (1) Avoiding “substantial Bay filling and loss of large natural resource areas” otherwise resulting from use of an alternative site (consistent with Bay Plan Major Conclusion #3); Developing this portion of the Bay and shoreline to their “highest potential”, as called for in the Bay Plan, by accommodating terminal and water-related industrial uses reserved for this purpose in the Bay Plan; and (3) Achieving cooperation between the San Francisco Bay Conservation and Development Commission (BCDC) and local government to cooperatively plan for reuse of this currently “underutilized water-related industrial priority use area” by approval and implementation of the Modified ROA (consistent with Bay Plan Water-Related Industry Policy #6).

(5) **Vallejo Economic Development Strategic Plan Implementation Benefits:** The City of Vallejo has adopted an Economic Development Strategic Plan (dated September 11, 2012) that identifies challenges to the local economy, and establishes economic development goals, objectives and implementation steps designed to strengthen the local economy. The proposed Orcem and VMT projects, will uniquely serve to help implement the following major goals and policies of the City’s Economic Development Strategic Plan (see **Attachments I and J**):

- Stimulate the retention and expansion of existing businesses through the direct import and export of bulk and break-bulk goods utilized or manufactured locally, and through the production of GGBFS as a high-quality and environmentally superior material used in the construction of new buildings, bridges, and infrastructure (Goal #1).
- Contribute to the diversification and strengthening of the manufacturing-related industrial sector by attracting new business investment, and by directly adding new businesses in Vallejo with substantial new employment as quantified under Community Benefits #3 and #4 above (Goal #2).
- Contribute to a highly-skilled local workforce through the training of local workers under the programs articulated in Community Benefit #10 below, and through the direct, indirect, and induced creation of new jobs as quantified under Community Benefits #3 and #4 above (Goal#5).
- Helping to make Vallejo the Bay Area’s premier site for manufacturing, by: (1) Facilitating growth in international trade and export sales through operation of the VMT Terminal and Orcem Mill, thereby creating new jobs and increasing City sales tax and other municipal revenues; and (2) Attracting substantial new

investment from two new businesses (VMT and Orcem) that are both linked to regional manufacturing, and will both provide new high-wage jobs (Goal #7).

- (6) **Community Grant Program:** The proposed projects will establish a new \$1 million Community Grant Program (in addition to funds spent repairing and making Lemon Street structurally sound and safe for all vehicles, pedestrians, and bicyclists) to support the Vallejo community in a wide variety of important and much needed areas. The primary focus of the funds will be to support the South Vallejo community, which is in closest proximity to the project site. The funds will be spent to support local non-profits that provide services in the areas of education, youth, job training, and environmental sustainability. The Orcem/VMT Community Grant Program will spend \$160,000 per year for six years, subject to approval of the Modified ROA project by the Vallejo City Council. Orcem/VMT will establish a process for the selection of grant recipients, based on criteria developed with community input (see **Attachments I & J**).

VMT and Orcem have already committed \$30,000 for the 2016/17 school year to fund an after-school program at the Harbor Park Apartments at 969 Porter Street in South Vallejo to be operated by the Leaven Group. The Leaven Group, based in Fairfield, California, has a proven track record of working in partnership with members of the local community, including businesses, police and fire departments, local government, school administrators and teachers, church groups and concerned neighbors to bring their after-school mentoring and tutoring program to the area as a revitalization tool for the neighborhood.

Additionally, VMT and Orcem have initiated the development of a workforce training and placement program that will initially serve residents in the city's South Vallejo neighborhood. The training and placement process will identify, recruit, and ultimately, train a minimum fifty (50) individuals per year who have historically been underserved in the development of advanced employment skills that lead directly to full-time living wage employment in the fields of transportation and the union building trades.

As it currently stands there are agencies that provide basic employment skills development, but often times they lack the ability to focus their curriculum on particular skills that employers would need to see in order to make substantial employment offers. And conversely those employers really have no way to reach in to a community and directly recruit those that are underserved. VMT and Orcem intend to fill that historic casework service gap.

VMT and Orcem have already reached out to a number of local training and employment development agencies to understand the currently available services and employment opportunities including Michael's Transportation Service (MTS), Sol-Trans, the California State Employment Development Department's (EDD) Workforce Development Project, the Napa-Solano County Building Trades Council and Carpenters Union Local 180; and VMT/Orcem is continuing to broaden the net with

meetings planned with the Solano County's Community Correctional Partnership (CCP), the Vallejo Unified School District's Vocational Training Program, Fighting Back Partnership.

The VMT and Orcem program will put particular focus on participants who possess a basic level of lifestyle functioning who have been, or currently are in the criminal justice system. VMT and Orcem will work with Vallejo's network of treatment organizations in order to initially recruit potential employees. Treatment facilities such as the House of Acts and Genesis House possess the ability and facilities to identify individuals among their client pool perhaps through their Sober Living Environments (SLE's.) Additionally, others in the community who may not be involved in residential treatment services can also be evaluated by those agencies on an out-patient basis, and any potential deficiencies can effectively be determined and addressed.

In summary, the VMT and Orcem training and placement program will be designed to identify, recruit, and, ultimately, train a minimum of fifty (50) individuals per year, with the composition of training opportunities being based on employment opportunities and individual preference (up to forty (40) individuals per year to acquire a commercial driver's license (CDL) and forty (40) individuals per year to complete the Carpenters Union Pre-Apprentice training program). Currently, Michael's Transportation is placing 100% of their CDL graduates. In the case of the Carpenters Union Pre-Apprentice training program, the Carpenters Union will guarantee a minimum of ten (10) graduates to receive membership as Apprentice Carpenters in the union each year. Once the program is established the possibility to expand the offering to other construction trades (for example electricians, plumbers and HVAC technicians) is envisioned.

All told, a minimum of fifty (50) individuals who have historically been underserved in the development of advanced employment skills and job placement will be provided the opportunity to secure full-time living wage employment in the fields of transportation and the union building trades.

- e) **Qualifications of Economic Impact Author:** The author of the Economic Impact Analysis is Chris Seals. Mr. Seals was selected to complete the analysis based on his extensive qualifications which include serving as Principal Economist and Partner of the firm RDA Global, Inc., and author of the *City of Vallejo Economic Development Strategy Plan* dated September 11, 2012 (see **Attachment L**). This effort spanned several years and included work with numerous City of Vallejo and Solano County officials and stakeholders for the Economic Development Strategy Plan, including Robert Bloom of the Solano County Workforce Investment Board, Chuck Eason of the Solano College Small Business Development Center, Marilyn Hopkins of Touro University, Gerald Jakubowski of Cal Maritime Academy, Dale Kaetzel of Six Flags Discovery Kingdom, Dennis Klimisch of the Vallejo Chamber of Commerce, Russell Neilson of Sutter Health, and Ursula Luna-Reynosa, the City of Vallejo Economic Development Department Director. Mr. Seal's experience and track record of acclaimed credible work on Vallejo's Economic

Development Strategy Plan led to the verifiable conclusions in the November 7, 2014 Fiscal and Economic Impact Study prepared for the Orcem and VMT Projects.

11. **Planning Commission Determination Improperly Relied on False Conjecture About Effects on Community Character.** The project's "*community character / neighborhood*" incompatibility, as alleged in the Commission resolution, was based solely on suggested environmental impacts that are belied by the technical and scientific evidence showing no related significant impacts, and was prematurely determined in the absence of a certified FEIR. Public and Commissioner comments lacked foundation, were wholly arbitrary, discriminatory, and not of ponderable legal significance; they were not reasonable, credible or of solid value so as to constitute substantial evidence of the claimed impacts. Rather, it is well established that "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous" does not constitute substantial evidence (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 690, quoting *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 673), nor do "[c]omplaints, fears, and suspicions about a project's potential environmental impacts[.]" (*Id.*, citation omitted.) Further, while members of the public may "provide opinion evidence where special expertise is not required[.]" the "[i]nterpretation of technical or scientific information requires an expert evaluation" and public testimony "on such issues does not qualify as substantial evidence." (*Id.* at 690-691, citation omitted.) "[I]n the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence." (*Id.* at 91, quoting *Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1417.)
12. **Assertion that Heavy Industrial Uses Are Inconsistent with Intensive Use Zoning and General Plan Employment Designation:** Members of the Commission stated that the proposed heavy industrial operations on this site which is designated and zoned for those uses would be "*incompatible with character of the surrounding area*". These comments lack any credibility or evidentiary support. The City signed a long-term lease on a key part of this property in 2012 which essentially *requires* such heavy industrial uses, and no new structures or uses have been established on the properties surrounding the project site or the transportation corridors since the General Mills plant was closed. This false conclusion about effects on community character was punctuated by one commissioner's comment that he "*could never approve 'industry' on a site designated and zoned for heavy industry*". Such a bias against compliance with the city's own laws and rules is indicative of the bias prevalent on the commission that denied any semblance of a fair hearing, not to mention that the hearing was set up in a way such that non-approval was preordained due to the lack of a certified final EIR.
13. **No Substantial Evidence, in Violation of CEQA.** The Commission's refusal to correct, complete, and certify the Final EIR prepared in draft form for these projects has led to the above listed gross exaggerations, misrepresentation of the facts, use of inappropriate and arbitrary standards for evaluation, false conclusions, and ultimately the denial of the applicants' permits. Absent an EIR which has been certified as providing complete and

accurate information as to the environmental consequences of a projects, the Commission's action represents a flagrant violation of CEQA Guidelines §§ 15384, which defines *substantial evidence* as follows:

- (a) *“Substantial evidence as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.*
- (b) *“Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.”*

This rule of relying on “*substantial evidence*” contained in a complete and certified EIR to determine the significance of an environmental effect is underscored in CEQA Guidelines §§ 15064 which states as follows:

“If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR.”

The importance of rejecting arbitrary assumptions and unsupported claims, in favor of the scientific information presented in a certified EIR is further emphasized in §§ 15064 as follows:

“The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data.” (Reference *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988).

“Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion support by facts.”

As was concluded by the Court of Appeal in *California Building Industry Assoc. v. Bay Area Air Quality Management District* (Aug. 13, 2013) 218 Cal.App.4th 1171, the Planning Commission's action here is invalid because it failed to complete and certify the EIR, and instead relied on accusations of environmental impacts related to health risks and other factors which were “**arbitrary or unsupported by substantial evidence**”.

14. Failure to Rely on Thresholds of Significance as Listed in a Certified EIR, in Violation of CEQA. The Commission's arbitrary decision to deny the applicants' permits without first completing and certifying an accurate EIR with clearly written, verifiable and measurable thresholds of significance upon which to evaluate the projects' effects is a flagrant violation of CEQA Guidelines §§ 15064.7 which contains the following directive to local agencies:

"Thresholds of significance to be adopted for general use as part of the lead agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence."

In conclusion, the Planning Commission's action to refuse the complete and certify the EIR, and to rely on that certified EIR as the basis to judge potential environmental effects of the projects, was improper, made a mockery of CEQA, and denied the applicants' fair hearing, due process and equal protection. We respectfully ask the Council to overturn the Commission's decision as first stated above.

Sincerely,

MILLER STARR REGALIA



Arthur F. Coon

LOEWKE PLANNING ASSOCIATES



Richard T. Loewke, AICP

Attachments: A: Excerpts from CEQA Guidelines

B: Miller Starr Regalia Letter of October 3, 2016

C: Miller Starr Regalia Letter of October 17, 2016

D: Miller Starr Regalia Letter of January 17, 2017

E: Miller Starr Regalia Letter of February 7, 2017

F: Orcem & VMT February 8, 2017 Appeal of Staff Decision

G: Miller Starr Regalia Letter of February 16, 2017

H: Notice of Preparation and Determination to Prepare EIR

I: Notated Planning Commission Resolution No. PC 17-03

J: Critical Errors in Draft FEIR & Miller Starr Letter of March 2, 2017

K: VMT March 22, 2016 Appeal of AHLC Decision

L: Vallejo Economic Development Strategic Plan by Chris Seals of RDA Global

Appeal of Planning Commission Decision on Orcem & VMT Projects

March 15, 2017

Page 24

cc:

Mayor Bob Sampayan, Bob.Sampayan@cityofvallejo.net

Vice Mayor Robert H. McConnell, Robert.McConnell@cityofvallejo.net

Councilmember Pippin Dew-Costa, Pippin.Dew-Costa@cityofvallejo.net

Councilmember Jesus "Jess" Malgapo, Jesus.Malgapo@cityofvallejo.net

Councilmember Katy Miessner, Katy.Miessner@cityofvallejo.net

Councilmember Hermie Sunga, Hermie.Sunga@cityofvallejo.net

Councilmember Rozzana Verder-Aliga, EdD, Rozzana.Verder-Aliga@cityofvallejo.net

Dan Keene, city.manager@cityofvallejo.net

Andrea Ouse, andrea.ouse@cityofvallejo.net

Claudia Quintana, claudia.quintana@cityofvallejo.net

Richard T. Loewke, AICP, dick@loewke.com

Clients