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7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO
9

10 MIDCOAST ECO

11 Petitioner and Plaintiff,

12 v.

13 CALIFORNIA COASTAL COMMISSION,

14 Respondent and Defendant.

15 SAN MATEO COUNTY, SAN MATEO
16 COUNTY BOARD OF SUPERVISORS, and
DOES 1 through 20, inclusive,

17 Real Parties in Interest and Defendants.
18
19
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21

Civil Case No. CPF-21-517430

CEQA CASE

Assigned for All Purposes to
Hon. Cynthia Ming-mei Lee, Dept. 503

**PETITIONER'S OPENING BRIEF IN
SUPPORT OF WRIT OF MANDATE**

HEARING DATE: February 23, 2023

TIME: 1:30 P.M.

DEPT.: 503

ACTION FILED: APRIL 21, 2021

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SUMMARY OF ARGUMENT

1 The California Coastal Commission (“Commission”) adopted a San Mateo County LCP (Local
2 Coastal Plan) Amendment (hereinafter “the LCP Amendment”) in furtherance of a specific site plan
3 and specific development standards with which any future development “must” comply. The grading,
4 number and size of buildings, minimum number of parking spaces, and roads and sidewalks are
5 specified in the LCP Amendment.

6 The Staff Report fulfills a critical information disclosure role in the LCP Approval process. By
7 law, it is intended to serve as both the functional equivalent of an EIR by analyzing impacts, and the
8 purveyor of the Commission’s findings *explaining* its decisions and *tracing the findings to substantial*
9 *supporting evidence*. In the Commission’s approval process, the Staff Reports are to the public and to
10 Commissioners what EIRs are to the public and decision-makers in any other CEQA context. Here the
11 Commission’s February 26, 2021 Staff Report (“Staff Report”) is found in the Certified Administrative
12 Record at AR4557-81 and the March 12, 2021 Staff Report Addendum (“Addendum”) at AR4623-32.

13 That the LCP Amendment “better encourages affordable housing in the coastal zone than the
14 existing LCP” (AR4624), does not exempt, or lower the bar, for the Commission’s full CEQA and
15 Coastal Act compliance. The legislative mandate of these environmental statutes is not whether the
16 housing density “can be accommodated on the site” (AR4624), but whether the Staff Report adequately
17 discloses the LCP Amendment’s reasonably foreseeable impacts and whether the LCP Amendment
18 violates Coastal Act policies.

19 This is not a case about affordable housing. One only has to look around in the world to see that
20 there is a dire need for housing for all people. Nor is this a case about a downzoning which by its nature
21 inherently can have no significant adverse impacts.

22 Rather than analyze the reasonably foreseeable development which the LCP Amendment was
23 designed to implement, the Staff Report wrongly deferred the analysis to a subsequent CDP process.
24 Further, the Staff Report in evaluating impacts improperly compared the LCP Amendment to allowable
25 density under a never-implemented PUD-124 zoning approved in 1986, rather than to existing physical
26 conditions as required by CEQA. The Staff Report avoids the required impact analysis, repeatedly
27 relying on its assertion “any project would have impacts.” The Staff Report conclusion of no significant
28 impacts is contradicted by the evidence, and the Commission failed to conduct any analysis of
mitigations or alternatives despite that mitigations were proposed and considered necessary by the
consultants hired by the developer to review the project.

1 The LCP Amendment also violates the Coastal Act, which is designed to protect coastal zone
2 resources, in regards to hazardous soils, sensitive habitat areas, fire evacuation, traffic, and adequate
3 public services.

4 A writ of mandate should be issued. The Staff Report omitted the required analysis of impacts
5 and mitigations, its conclusions are contradicted by the evidence, and its Coastal Act consistency and
6 CEQA findings are not supported by reasonable explanation. Because these errors impaired informed
7 decision making and coastal resource protection, the Commission prejudicially abused its discretion.

8 STANDARD OF REVIEW

9 In deciding whether to issue a peremptory writ of mandate, the question is whether the
10 Commission committed a prejudicial abuse of discretion. (Code of Civ. Proc., § 1094.5; Pub. Res.
11 Code § 21168.5.) An agency may abuse its discretion either by failing to proceed in the manner
12 provided by law or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5;
13 Code Civ. Proc., § 1094.5 (b).)

14 Judicial review of these two types of error differs significantly. While the Court reviews *de*
15 *novo* whether the agency employed the correct procedures, “scrupulously enforc[ing] all legislatively
16 mandated CEQA requirements” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d
17 553, 564), the court accords greater deference to the agency’s substantive factual conclusions.
18 (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th
19 412, 435.) In evaluating an environmental review document for CEQA compliance, a reviewing court
20 “must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is
21 predominantly one of improper procedure or a dispute over the facts.” (Id.)

22 “The failure to comply with the law subverts the purposes of CEQA if it omits material
23 necessary to informed decisionmaking and informed public participation. Case law is clear that, in
24 such cases, the error is prejudicial.” (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515.)

25 Under the Coastal Act, the Commission must evaluate whether the LCP Amendment
26 conforms with Coastal Act Chapter 3 policies and requirements found at Public Resource Code
27 sections 30200 to 30265.5. (Pub. Res. Code §§ 30512-30514, 30200. These policies are the standards
28 for judging the adequacy of an LCP. (*McAllister v. Cty. of Monterey* (2007) 147 Cal. App. 4th 253,
272.) The standard of review for LUP amendments is that they must be consistent with, and adequate
to carry out, the Coastal Act Chapter 3 provisions. AR4563. The standard of review for
Implementation Plan (IP) amendments is that they must be consistent with, and adequate to carry out,
the policies of the certified LUP. AR4631.

1 **I. THE STAFF REPORT VIOLATES CEQA, THE CALIFORNIA ENVIRONMENTAL**
2 **QUALITY ACT.**

3 “CEQA is a comprehensive scheme designed to provide long-term protection to the
4 environment. [Citation.] CEQA is to be interpreted ’to afford the fullest possible protection to the
5 environment within the reasonable scope of the statutory language.’” (*Mountain Lion Foundation v.*
6 *Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

7 Approval of any LCP Amendment by the Commission must comply with all of CEQA’s
8 substantive requirements. (Pub. Res. Code, §§ 21080.5, 21080.9.) The Commission’s staff reports
9 “serve as a functional equivalent of an EIR.” The staff report must contain “sufficient environmental
10 ... information.” (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170
11 Cal.App.3d 604, 620, 610 (“EPIC”); *Mountain Lion Foundation, supra*, 16 Cal.4th at 113-114, 116.)

12 While the Commission need not prepare a formal EIR, it still “must comply with *all* of
13 CEQA’s other requirements. [Citations.]” (*Mountain Lion Foundation, supra*, 16 Cal.4th at 114,
14 emphasis added; see *EPIC, supra*, 170 Cal.App.3d at pp. 616-618, 620.) These requirements include
15 the fundamental public duties set forth in sections 21000 and 21002 to fully identify and evaluate in
16 its staff reports a project’s adverse environmental effects. (§ 21080.5, subd. (d).)

17 Commission staff reports are to be the centerpiece of this environmental review process,
18 functioning as the equivalent of an EIR. (*Strother v. California Coastal Com.* (2009) 173 Cal.App.4th
19 873, 877-878; Cal. Code Regs., tit. 14, § 13057.) Like all functional equivalent environmental
20 review, the staff report must contain certain basic minimum requirements, including a discussion of
21 impacts, alternatives, mitigation measures, and written responses to comments. (Pub. Res. Code §
22 21080.5, subd. (d); *Strother., supra*, 173 Cal.App.4th at 878.)

23 Crucially, a staff report that does not contain these elements fails to act as the functional
24 equivalent of an EIR and does not comply with CEQA. The Staff Report “must *demonstrate* [in the
25 written documentation available for public review] strict compliance with its certified regulatory
26 program.” (*Mountain Lion Foundation, supra*, 16 Cal.4th at 132, emphasis added.)

27 An adequate functional equivalent environmental review document consists of Commission
28 staff reports, not an applicant’s written and oral arguments in favor of Project approval. (*Strother,*
supra, 173 Cal.App.4th at 877-878; 14 CCR § 13057.) Under CEQA and the Coastal Act, the
reasoned analysis must be found *in* the Staff Report. Thus, the developer’s documents - including the
Supplemental Environmental Evaluation Report (only referenced in the Addendum released on the
day of LCP Approval) - are not the Commission’s Staff Report and can not substitute for the
reasoned analysis required of the Commission. CEQA requires environmental documents to “be

1 prepared directly by, or under contract to, a public agency.” (Pub. Res. Code § 21082.1, subd. (a).)
2 Also, lead agencies are required to “[c]irculate draft documents that reflect its independent
3 judgment.” (Pub. Res. Code § 21082.1, subd. (c).)

4 **I.A. The Commission Violated CEQA by Failing to Analyze the Reasonably Foreseeable
5 Impacts of the LCP Amendment.**

6 The Commission failed to analyze the reasonably foreseeable impacts of the residential
7 development allowed by the LCP Amendment.¹ It was feasible to do so given what is known.

8 The scope of the Commission’s CEQA review of the LCP Amendment was required to be the
9 reasonably foreseeable effects (ie. the site-specific development) on the environment. In *DeVita v.*
10 *County of Napa* (1995) 9 Cal.4th 763, the California Supreme Court explained that general plans
11 “embody fundamental land use decisions that guide the future growth and development of cities and
12 counties,” and amendments of these plans “have a potential for resulting in ultimate physical changes in
13 the environment.” Thus, these amendments are subject to environmental review under CEQA. (Id. at
14 793-794; see also *Black Prop. Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974, 985.)

15 In evaluating project significance, an agency must consider reasonably foreseeable indirect
16 physical changes. (14 CCR § 15064, subd. (d).) Indirect effects are caused by the project, later in time,
17 but are still reasonably foreseeable. (Id. at (d)(2) & (d)(3).; 14 CCR § 15358, subd. (a)(2).) The
18 sufficiency of the information contained in an environmental review document is reviewed in light of
19 what is reasonably feasible. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d
20 692, 733.)

21 San Mateo County characterized the purpose of the LCP Amendment as “in preparation for the
22 future submittal of a coastal development permit application.” AR3478. The LCP Amendment is in
23 furtherance of future development of a “specific site plan and specific development standards.” San
24 Mateo County Amended Answer (“County Answer”), ¶4. In San Mateo County, Planned Unit
25 Development (PUD) Zoning Districts establish a specific site plan for future development. AR3479.
26 Under San Mateo County Zoning Code 6191, a PUD district must be based on a precise plan. AR3566.

27 As far back as 2017 the Commission knew that the project design of the ultimate project was to
28 be “as shown on the Preliminary Site Plan.” AR2585, 2657. The Commission relied on the Cypress
Point Family Community plans (AR4629) which include grading plans and stormwater plans. AR1509,
AR1511. As the Addendum acknowledges, “This is a project-driven LCP Amendment.” AR4631.

¹ Petitioner raised this issue administratively. AR5217, AR5023-24.

1 The Addendum is wrong in claiming that the “precise density, design, and configuration of the
2 future development are not known.” AR4631. Any future development at the site must comply with the
3 LCP Amendment Exhibit 5 site plan. AR0006. See PUD-140 project plans at AR0053. All
4 development must conform to the plans presented to the San Mateo County Planning Commission on
5 January 22, 2020. AR0046. Those plans include project grading for new buildings and roads as shown
6 on the Conceptual Grading Plan (AR0046), construction of 18 two-story buildings (AR0047), a
7 driveway, sidewalk and paths, installation of new water and sewer (AR0048), and a *minimum* of 142
parking spaces as shown on the conceptual plans. AR0047, AR0049.

8 The Addendum would excuse the Staff Report’s deferral of impact analysis because the
9 “precise” details are not known and because the LCP Amendment does not “necessarily result in any
10 development on the subject site.” AR4631. In so doing, the Commission ignores the legal standard requiring
analysis of what is reasonably foreseeable.

11 The LCP Amendment is a fundamental land use decision that will guide the future growth and
12 development of the site and result in reasonably foreseeable physical changes. It directly serves to
13 facilitate the developer’s project, which will result in physical environmental changes onsite and
14 offsite. Despite CEQA’s mandate, the Staff Report failed to analyze the reasonably foreseeable impacts
15 of the residential development allowed by the LCP Amendment. Because this error prevented informed
decision making and public participation, the Commission prejudicially abused its discretion.

16 **I.B. The Commission Violated CEQA by Improperly Deferring Analysis of Project Impacts**
17 **Until After Approval of the LCP Amendment.**

18 Rather than undertaking the analysis of reasonably foreseeable impacts, the Commission
19 impermissibly forestalled the required analysis of reasonably foreseeable impacts from the LCP
20 Amendment to a “subsequent process” including but not limited to foreseeable traffic, biology,
21 hazardous soils, wastewater, and fire risk impacts.²

22 It is a fundamental CEQA principle that project environmental impacts must be analyzed before
23 project approval. “Before granting any approval of a project subject to CEQA, every lead agency or
24 responsible agency shall consider a final EIR or negative declaration or another document authorized
25 by these guidelines to be used in the place of an EIR or negative declaration.” (14 CCR §s, § 15004(a),
emphasis added; *POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 717.)

26 Despite this clear CEQA mandate, the Commission improperly deferred its analysis to the
27 future CDP process which it promises “will assess specific potential coastal resource impacts ...as part

28 ² Petitioner raised this issue administratively. AR5024, AR5026-27, AR5066, AR5224-25.

1 of that CDP process,” including mitigations, alternatives. AR4624. The subsequent CDP - which the
2 Staff Report relies upon to meet its CEQA and Coastal Act obligations - may never even before the
3 Commission in the future. AR0007.

4 The Staff Report promises that a traffic impact analysis and mitigation plan for new
5 development will be addressed through the subsequent process. AR4625, 4626 & 4627.

6 Any environmentally sensitive habitats “issues” can be identified through the CDP process.
7 AR4630.

8 Hazardous soils analysis can be incorporated into a CDP after LCP Amendment approval.
9 AR4628.

10 Potential sewage impacts would be addressed through the CDP process. AR4625.

11 By improperly deferring analysis of the impacts of the LCP Amendment until after Amendment
12 approval, the Commission failed to comply with CEQA and prejudicially abused its discretion.

13 **I.C. The Commission Failed to Analyze the Impacts of the LCP Amendment to the Existing**
14 **Environment.**

15 The Staff Report improperly compared the LCP Amendment to PUD-124, rather than to
16 existing physical conditions as required by CEQA.³ This baseline approach of using allowable but
17 never-implemented PUD-124 density for the impact comparison violated CEQA.

18 The comparison must be “between existing physical conditions without the project and the
19 conditions expected to be produced by the project.” Without a comparison of the project conditions to
20 the existing environment, the Staff Report can not inform decision makers or the public of the project’s
21 significant environmental impacts.

22 To determine if an environmental impact may occur and whether those impacts will be
23 potentially significant, an agency must assess first “existing physical conditions (i.e., baseline physical
24 conditions) and then compare it to the anticipated or expected physical conditions were the project to be
25 completed.” (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.*
26 (2013) 215 Cal.App.4th 1013, 1037l.) The comparison must be “between existing physical conditions
27 without the project and the conditions expected to be produced by the project.” (*County of Amador v.*
28 *El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955.) Without such a comparison the
agency’s environmental review will not inform decision makers and the public of the project’s
significant environmental impacts. (*Communities for a Better Environment v. South Coast Air Quality*
Management Dist. (2010) 48 Cal.4th 310, 328.)

³ Petitioner raised this issue administratively. AR5025-26, AR5221-22.

1 Importantly, allowable conditions defined by a plan or regulatory framework are not the
2 baseline, including where a “plan or regulation allowed for greater development or more intense
3 activity than had so far actually occurred.” (*Communities*, 48 Cal.4th at 321.) Instead, the baseline must
4 be the “existing physical conditions in the affected area, that is the ‘real conditions on the ground,
5 rather than the level of development or activity that could or should have been present according to a
6 plan or regulation.” (Id., citations omitted.)

7 The case of *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229 is
8 particularly instructive. There, a hotel subject to a coastal LUP permitting development of up to 75
9 residential units sought rezoning. The court of appeal expressly rejected the argument that no
10 significant impacts could result because the maximum number of units allowed under the rezoning
11 would be lower - 65. The court explained: “A comparison between what is possible under the LUP and
12 what is possible under the rezoning bears no relation to real conditions on the ground.” (*Id.* at 246.)

13 For coastal resources including traffic, sewer, biology, visual impacts, and fire evacuation
14 impacts, the Commission utilized an improper baseline comparing the LCP Amendment to the prior
15 PUD-124 designation, rather than existing land.⁴

16 In regards to traffic, the Staff Report reasoned that “a reduction in the density of the proposed
17 site *as compared to the existing LCP designation* would reduce the potential traffic generated. ... the
18 existing LCP would allow for a larger project that could result in more traffic impacts than one that
19 would be consistent with the proposed amended LCP. AR4558, emphasis added. “The proposed
20 reduction in density at the site, *as compared to the existing land use designation*, would reduce the
21 potential traffic generated from any subsequent development.” AR4565, emphasis added. “The
22 reduction in overall density will reduce potential traffic generated by the proposed development.”
23 AR4572.

24 So too, the Commission’s comparison was to the PUD-124 density in determining “public
25 access, sensitive habitats, cultural resources, public views, and visual/aesthetic impacts” (AR4558,
26 AR4629), “necessary” water and sewer (AR4557), as well as wildfire evacuation AR4569-70.

27 Belatedly, on the day of the LCP Amendment approval, the Commission released an
28 Addendum which asserted that the Staff Report “compares the potential impacts of the proposed LCP
amendment to ... existing site conditions,” (AR4632), but the Addendum provides no guidance as to
where this analysis can be found.

 Because this impermissible baseline approach resulted in an “illusory” comparison that could

⁴ For Coastal Act consistency the Staff Report used an improper density baseline regarding traffic, reduced energy consumption, vehicle miles travelled, and environmental justice. AR4566. AR4558.

1 only mislead the public as to the reality and significance of the impacts and subvert full consideration
2 of the actual environmental impacts, the Commission prejudicially abused its discretion. (*Communities*
3 at 322, citing *Env't Plan. & Info. Council v. Cnty. of El Dorado* (1982) 131 Cal. App. 3d 350, 358.)

4 **I.D. The Commission's Finding That The LCP Amendment Will Not Result In Any**
5 **Significant Environmental Effects Is Not Supported By Substantial Evidence.**

6 The Commission found that “the proposed LCP amendment is not expected to result in any
7 significant environmental effects.” (AR0024, 4580.) The Commission’s conclusion is contradicted by
8 substantial evidence before the Commission of potentially significant impacts, and the Commission
9 does not explain its analytical route from the evidence to its conclusion.⁵

10 The Staff Report must support its conclusions with “references to specific scientific and
11 empirical evidence.” (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043,
12 1047.) It “must *demonstrate* [in the written documentation available for public review] strict
13 compliance with its certified regulatory program.” (*Mountain Lion Foundation, supra*, 16 Cal.4th at
14 132, emphasis added.) CEQA requires that the agency explain the basis of its significance finding in the
15 document that is circulated for public review. (*Pesticide Action Network N. Am. v. Dep't of Pesticide*
16 *Regul.* (2017) 16 Cal. App. 5th 224, 247 [functional equivalent document circulated for public review
17 was inadequate for failure to explain basis for significance conclusion].)

18 Bare conclusions without explanation of the factual and analytical basis is not a sufficient
19 analysis of an environmental impact. (*Laurel Heights Improvement Assn. v. Regents of Univ. of*
20 *California* (1988) 47 Cal. 3d 376, 404; *City of Maywood v. Los Angeles Unified* (2012) 208
21 Cal.App.4th 362, 393.) Failure to adequately explain the reasons why an impact is insignificant violates
22 CEQA. (*Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th
23 1099, 1111-12.)

24 Along with its finding of no significant impact, the Commission cited to the Preliminary
25 Environmental Evaluation (April 2019), a Biological Resource Assessment, a Traffic Impact Analysis,
26 and a Cultural Resource Evaluation. AR0034. We examine each of these reports in turn.

27 For hazardous soils, the Preliminary Environmental Evaluation found - based on the
28 investigation of toxic substances that could be present on the project site in soils - a significant impact
from transport and use of hazardous materials during construction. AR1692. The Preliminary
Environmental Evaluation also found potential impacts to groundwater and surface water quality both
during construction and project operation, based on increased soil erosion during construction

⁵ Petitioner raised this issue. AR5023, AR3430, AR4283.

1 particularly when it rains, and from construction spills. AR1700.

2 The Biological Resource Assessment found a significant impact to the California red-legged
3 frog, a species federally listed as threatened with extinction. AR1962. This is the Assessment which the
4 Addendum claims it relied on to make its insignificant impact conclusion regarding sensitive habitats.
5 AR4630, fn. 8.

6 The July 2018 Traffic Impact Analysis concluded that, even considering mitigation, the
7 project will result in seven (7) “significant *and unavoidable*” traffic impacts, including *inter alia*:
8 critical traffic delays at Highway 1 and Carlos Street, “the main access point to the Project from
9 Highway 1” (AR1082-85); critical traffic delays at Highway 1 and California/Wienke intersection
10 (AR1079-81); critical traffic delays at Highway 1 and Vallemar/Etheldore intersection (AR1085-86);
11 and critical traffic delays at Highway 1 and 16th Street (AR1086-87). These same significant and
12 unavoidable traffic conclusions were reached again when the Traffic Analysis was updated in April
13 2019 (AR2183-94) and when presented to the San Mateo County Board of Supervisors in July 2020.
14 (AR3826-36). (See map at AR5406.) These are the reports which the Addendum claims it relied on to
15 make its insignificant impact conclusion regarding no traffic impacts. AR4630, fn. 8.

16 Further, Caltrans (California Department of Transportation) found that “the project's impact on
17 state facilities are significant.” AR2653. There is also unrefuted evidence of significant safety impacts
18 related to the project from pedestrians crossing Highway 1 as well as being forced to walk on adjacent
19 streets without sidewalks. AR1077-78, AR2181-82; AR3823-33. As Caltrans pointed out “this
20 development is likely to increase demand for pedestrian and bicycle access to nearby beaches” and
21 crossing the highway. AR2652-53.

22 The Cultural Resource Evaluation determined a significant cultural impact related to an
23 archeological Native American deposit, dated between 1068AD and 1683 AD. AR473-74.

24 The Addendum, released on the date of the LCP Amendment approval, contends that the “staff
25 report and this addendum identify the substantial evidence supporting the staff recommendation”
26 (AR4631), without actually identifying any of that evidence.

27 The Addendum claims that the developer’s Public Services and Utilities report (July 2018)
28 (“Public Services Report”) “provides evidence demonstrating that a project at the scale of one that
could be accommodated by this LCP amendment would not result in a significant impact to coastal
resources.” AR4625. The Addendum does not reference what evidence or what impact it refers to. Id.
The Public Services Report does not specifically reference “coastal resources.” AR1008-1032.

1 The Addendum vaguely claims that the Supplemental Environmental Evaluation Report, which
2 was never released to the public, demonstrates that adequate water is available for firefighting purposes
3 onsite and used this report to draw its fire hazard conclusion. (AR4626-27.) In fact, the Addendum
4 acknowledges that traffic impacts of the planned residential project “may affect future potential
5 evacuations” from wildfire. AR4627. Traffic deficiencies would be exacerbated by any development at
6 the proposed location. AR 4565. Further, the Supplement Report concludes that
7 (1) the project site is located within a Community at Risk zone according to the County's Wildland
8 Urban Interface Fire Threatened Communities Map (AR1722), (2) open space areas one-half mile from
9 the project site are within the High and the Very High Fire Hazard Severity Zones (AR1722), and (3)
10 there is no Emergency Response Plan or Emergency Evacuation Plan for the project area (AR1724).

11 Based on this “evidence” the Addendum claims that the “LCP amendment allows for
12 mitigation that could address [traffic] circulation in an evacuation” (AR4627) but omits any
13 explanation of what this mitigation consists of or why it will work.

14 The Addendum claims that the Supplemental Report was relied on by staff in their assessment
15 of hazardous materials. AR4628. Yet, the Supplemental Report found that “hazardous materials during
16 construction of the proposed project would be a significant impact” for which mitigation would be
17 required. AR1723. This is the same finding the Preliminary Report made in July 2018. AR210.

18 Because the Commission’s findings were not supported by substantial evidence or adequate
19 analyses, it prejudicially abused its discretion.

20 **I.E. The Commission Violated CEQA by Failing to Provide Written Responses to Significant**
21 **Issues Raised by the Public.**

22 The Staff Report and Addendum repeatedly failed to provide written responses to significant
23 environmental issues raised by experts and the public.⁶

24 The CEQA exemption from preparing an EIR in no way obviates the Commission’s CEQA
25 obligation to provide written responses to public comments. The Commission Staff Report must
26 provide written responses to significant environmental points raised. (§ 21080.5, subd. (d)(2)(D); see
27 14 CCR § 13057.) The Commission must evaluate comments on environmental issues and prepare a

28 ⁶ Petitioner raised this issue administratively. AR5027. Midcoast ECO commented to the Commission
on October 16, 2020, February 8, 2021 and March 5, 2021. AR6227-29; AR5216-25; AR5021-5034.
The February 8, 2021 submittal (AR5216) attached copies of comments previously submitted to San
Mateo County on January 22, 2020 (AR3414-31), June 8, 2020 (AR3543-46) and July 21, 2020
(AR4280-84), and the Commission’s comments letters to San Mateo County on this project.
(AR2585-87; AR2656-59, AR5216.)

1 written response describing the disposition of significant issues raised. (14 CCR § 15088) This is
2 particularly important where the agency’s position varies from recommendations and objections raised
3 in public comments. (*King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 882
4 [CEQA violation where agency failed to provide “detailed, reasoned analysis” of why suggested
5 measure was not accepted].)

6 The Addendum released to the public the day of the Commission’s March 12, 2021 approval
7 states that it constitutes a “response to comments.” (AR4623.) CEQA provides that a Staff Report
8 must be available for a reasonable time for review and comment by other public agencies and the
9 general public. (§ 21080.5, subd. (d)(3).) Because the Addendum only came out the day of the
10 hearing, it was not available for review and comment and thus should not be considered a vehicle for
11 the Commission’s responses.

12 The Commission did not adequately respond to comments of Matt Hagemann of Soil/Water/
13 Air Protection Enterprise (SWAPE) related to soil contamination.⁷ AR5159-79. Hagemann commented
14 that (1) lead in surface soil at multiple locations are up to 9 times higher than Regional Water Quality
15 Control Board’s levels (AR5159), (2) “that the horizontal extent of the lead contamination has not been
16 determined” (AR5160), (3) that “additional elevated lead soil concentrations (“hot spots”) may be
17 found if further testing is conducted.” (AR5160) and (4) that the results should be submitted to
18 regulatory agencies. AR5160-61. None of these issues were responded to in the Staff Report or
19 Addendum.

20 The Commission did not respond to comments of wastewater expert Dr. Robert W. Emerick
21 (AR5203-15) related to the history of 65 separate discharges of inadequately treated or raw sewage
22 since 2013 alone, illegally releasing over 557,103 gallons of sewage, the vast majority of it released
23 into the Pacific Ocean and Half Moon Bay. AR5204. Emerick also commented that an adequate
24 analysis of wastewater impacts from the project must include evaluation in light of this history of
25 sewage spills. AR5205. The Addendum vaguely notes concerns raised about “discharge of storm water
26 into Montara Creek and the Fitzgerald Area of Specific Biological Significance” and biological impacts
27 of such foreseeable discharges, and that a prior EIR for the same project site described Montara Creek
28 as within 50 of the project site. (AR4630.) Despite this, the Addendum consistently avoids addressing
any of these issues. (Id.)

⁷ Hagemann commented based on his review of the developer’s Preliminary Environmental Evaluation Report (PEIR) dated April 2019, the Phase I Report dated November 10, 2015 (AR5760-5911), the Additional Subsurface Investigation and Water Well Evaluation dated February 20, 2018, the Groundwater Sampling and Well Destruction Report dated April 9, 2018. These portions of the record may have additional information on these issues.

1 As for traffic, the Staff Report Addendum provides that it “relied on numerous technical
2 traffic studies provided by both the potential future CDP applicant and the County.” AR4626. The
3 Commission failed to address comments of San Mateo County’s traffic engineer that the preliminary
4 traffic impact analysis did not adequately analyze traffic movement, that certain mitigation measures
5 were not acceptable and others not clearly defined, and requesting additional supporting data.
6 AR5407.

7 Nor did the Commission respond to comments by Caltrans that improvements to Highway 1
8 intersections may be necessary, that constraints affecting Highway 1 must be addressed to
9 “accommodate project traffic,” requesting clarification how proposed signalized intersections or
10 roundabouts will affect traffic patterns, requesting evaluation of project impacts on pedestrians and
11 transit users, proposing relocation of bus stops, suggesting ways to reduce VMT, and questioning
12 how mitigations will be funded. AR5413-16, AR2652-2655.

13 The Commission did not respond to comments of Pang Engineers, Inc.⁸ which commented,
14 *inter alia*, that (1) the Transportation Impact Analysis omits daily *weekday* trip generation estimates
15 (AR5190), (2) trip generation estimates and trip distribution estimates are unreliable (AR5191), (3)
16 the planned 142 parking spaces exceeds San Mateo County requirements and will increase project
17 traffic impacts (AR5193), (4) there are likely to be significant adverse traffic impacts at the Carlos
18 Street intersection (AR5194), (5) inadequate sight distance and turning radii have not been
19 adequately analyzed or mitigated (AR5194), (6) mitigation TRAF-1A is incomplete, unfunded and
20 thus its feasibility is unknown (AR5194), (7) the Transportation Management Plan (Mitigation
21 TRAF-1B) “has not been developed or submitted” (AR5196) and “does not resolve” the identified
22 significant traffic impacts. AR5195. Further, traffic consultant Pang Engineers, Inc. commented “of
23 particular concern is that many of the comments from Caltrans and the San Mateo County Civil
24 (Traffic) comments do not appear in to have been included in the revised April, 2019 TIA.” AR5202,
25 5198, 5200-01.

26 Nor did the Staff Report respond to issues raised by the public including petitioner Midcoast
27 ECO that numerous significant and unavoidable traffic impacts at Highway 1 intersections have been
28 identified but not mitigated. AR5218.

26 ⁸ Pang Engineers reviewed the following documents which provide additional substantial evidence
27 related to these issues: Traffic Impact Analysis (TIA) April, 2019 Kittelson & Associates; Caltrans
28 April 9, 2018 letter and August 29, 2018 letter; San Mateo County September 24, 2018 Civil
Engineering comments; Executive Summary of the "Connect The Coastside" Report, January 15,
2020.

1 The Commission did not respond to the comment of biologist Steve Powell of BioMaAs that
2 there has been no analysis if the project will violate the Endangered Species Act, the Clean Water
3 Act, or California's Wetlands Conservation Policy, despite that endangered species and habitat may
4 be present (AR5182); or the comment that project drainage “which likely will adversely impact
5 wetlands.” AR5183.

6 The Commission did not respond to the comment of Bryan Jessop that the developer’s
7 “Vegetation Assessment was “incomplete and understates the native flora that would be impacted by
8 development.” AR5154-55.

9 By failing to provide written responses to significant issues raised by the public, the
10 Commission failed to comply with CEQA and prejudicially abused its discretion. (*Mountain Lion
11 Foundation, supra*, 16 Cal.4th at pp. 122-123, 133; *EPIC, supra*, 170 Cal.App.3d at pp. 627-629.)

12 **I.F. The Commission Violated CEQA by Failing to Evaluate Mitigation Measures.**

13 The Commission found it “unnecessary” to even “suggest modifications,” including mitigation
14 measures. AR0025, AR4581. The Commission failed to proceed as required by law in omitting this
15 critical CEQA analysis, and its conclusion was contradicted by substantial evidence.⁹

16 Discussion and analysis of mitigation measures are expressly required of functional equivalent
17 documents. (Pub. Res. Code § 21080.5, subd. (d)(3)(A); *Strother, supra*, 173 Cal.App.4th at 878;
18 *Schoen v. Dep’t of Forestry Protection* (1997) 58 Cal.App.4th 556, 572.)

19 Contrary to the Staff Report’s finding on mitigations, there were numerous mitigations
20 previously considered necessary by the Commission, and the developer’s environmental consultants.

21 The Commission commented in 2018 that significant traffic and transportation impacts would
22 result and the “project's impact to traffic along Highway I must be avoided, reduced, and/or mitigated.”
23 AR2657. The developer’s Traffic Impact Analysis proposed Mitigation Measures TRAF-1A, TRAF-1B
24 and Mitigation Measure TRAF-5A. AR2183-84, AR2193.

25 The Preliminary Environmental Evaluation proposed mitigations to address significant impacts
26 from hazardous materials during construction. AR1692. In its Addendum, the Commission revealed
27 that “there are feasible mitigation measures available to address any potential hazardous materials
28 issues that might be ...allowed under the proposed LCP amendment.” AR4628. These include
29 “methods for ensuring that ...Montara Creek and the Fitzgerald Marine Preserve are protected from any
30 contaminated soils. Id.

31 The Biological Resource Assessment proposed Mitigation Measures Bio-2 and Bio-3 to address

⁹ Petitioner raised the issue of improper deferred mitigation (AR5225) and the absence of
transportation management plan. AR5220.

1 significant impacts to the California red-legged frog. AR1962, 1967-68.

2 The Cultural Resources Report proposed mitigation measures CUL-1, CUL-2, and CUL-3 to
3 reduce the significant cultural impacts. AR474-76.

4 Regarding Fire Hazards, the Addendum states that the “LCP amendment allows for mitigation
5 that could address [traffic] circulation in an evacuation and also for future development to be designed
6 with defensible space in case of fire. AR4627. However, the Addendum doesn’t explain what this
7 mitigation is or evaluate why it will work.

8 Rather than identify and analyze any of the above mitigations, the Staff Report and Addendum
9 improperly deferred the required analysis until after the LCP Amendment is adopted. AR4624 [CDP
10 process will assess necessary project mitigations]; AR4626 [future CDP will require mitigation for
11 traffic impacts].

12 Further, the case law is clear that deferred mitigation is improper, particularly where as here the
13 mitigation is based on a plan that has not been formulated, subject to analysis in the CEQA document
14 and for which there are no performance standards. (*Communities for a Better Environment v. City of
15 Richmond* (2010) 184 Cal.App.4th 70, 93-94; *POET*, 218 Cal.App.4th at 698-99; *see also* 14 CCR §
16 15126.4(a)(1)(B).) For these reason, the Site Management Plan under Mitigation Measure HAZ-1
17 (AR1692) and the Transportation Demand Management Plan under Mitigation Measure TRAF-1B
18 would be improper under CEQA. Here, however, the Commission has avoided considering or adopting
19 the mitigations proposed by the developer’s consultants.

20 By failing to properly evaluate mitigation measures, the Commission failed to comply with
21 CEQA and prejudicially abused its discretion.

22 **I.G. The Commission Violated CEQA by Failing to Evaluate Alternatives.**

23 The Commission found it “unnecessary” to even “suggest modifications,” including
24 alternatives. AR0025, AR4581. Thus, there was no consideration of an alternative site, or an alternative
25 number of residential units, or a no project alternative.

26 “Section 21080.5(d)(3)(A) requires a plan submitted in lieu of an environmental impact report
27 to include alternatives to the proposed activity and mitigation measures to minimize any significant
28 adverse environmental impact.” (*Schoen, supra* 58 Cal.App.4th at 572.) The Supreme Court has held
that in a review conducted under a certified regulatory program, “the public agency bears the burden of
affirmatively demonstrating that, notwithstanding a project’s impact on the environment, the agency’s
approval of the proposed project followed meaningful consideration of alternatives.” (*Mountain Lion
Foundation, supra*, 16 Cal.4th at 134.) Indeed, consideration of alternatives is one of the hallmarks of

1 CEQA analysis. (Id. at 245.)

2 Without meaningful analysis of alternatives, neither the courts nor the public can fulfill their
3 proper roles in the CEQA process. (*Preservation Action Council v. City of San Jose* (2006) 141
4 Cal.App.4th 1336, 1350-1351.) If an agency concludes there are no feasible alternatives, it must explain
5 in meaningful detail the basis for that conclusion. Id.

6 By approving the LCP Amendment without adequate analysis of alternatives, the Commission
7 has furthered the reasonably foreseeable site-specific residential development while foreclosing other
8 alternatives. By failing to evaluate alternatives, the Commission violated CEQA and prejudicially
9 abused its discretion.

10 **II. THE STAFF REPORT VIOLATES CALIFORNIA COASTAL ACT POLICIES AND** 11 **REQUIREMENTS.**

12 The LCP (Local Coastal Plan) Amendment changes the LUP (the LCP's Land Use Plan) and
13 the LCP's Implementation Program. AR4562. The Commission Staff Report must evaluate whether
14 the LCP Amendment conforms with Coastal Act sections 30200 to 30265.5 policies and requirements,
15 and then make findings to support its determination. (Pub. Res. Code §§ 30512, 30512.2, 30200.)
16 These policies are designed to protect against hazardous materials (§ 30232), minimize fire risks to
17 persons (§ 30253), minimize Vehicle Miles Travelled (§30253), protect sensitive habitat areas (§§
18 30230, 30321, 30240], and ensure adequate public services. (§30250.)

19 The Commission's evaluation must (1) achieve the Coastal Act's goals to protect and restore
20 the quality of the coastal zone environment and its resources, and maximize public access to and
21 along the coast as well as (2) be consistent with the permanent protection of the state's natural and
22 scenic resources and prevent deterioration of the coastal zone ecological balance. (Pub. Res. Code §§
23 30512.2, 30200, 30001.5, 30001)

24 The Staff Report must be supported by adequate findings and analysis of Coastal Act
25 conformity with references to specific scientific and empirical evidence. (14 CCR § 13057.)

26 **II.A. The Commission Improperly Made its Consistency Act Determinations and Findings.**

27 As an initial matter, for the reasons stated above under CEQA, the Staff Report also violated the
28 Coastal Act in making its Coastal Act consistency determinations and findings by (1) avoiding
29 considering the reasonably foreseeable impacts of the LCP Amendment in making its Coastal Act
30 consistency determinations and findings, (2) improperly comparing the LCP Amendment to the current
31 but never implemented PUD-124 designation - rather than to the existing environment, and (3) by
32 failing to support with substantial evidence or analysis its finding that the LCP Amendment includes all

mitigation measures.¹⁰

II.B. The LCP Amendment is Inconsistent with Coastal Act Sections 30232, and the Staff Report Did Not Consider Consistency.

The Commission is required to protect against hazardous substances for any development. (Pub. Res. Code § 30232.) Hazard containment and cleanup must be considered. Id. Yet, the Staff Report omits any analysis of Coastal Act section 30232. AR4557.

The Addendum, without reference to Section 30232, asserts that the developer’s Supplemental Environmental Evaluation Report (Supplemental Report) provides this analysis.¹¹ AR4628. This Supplemental Report was never released to the public and should be excluded from the administrative record. See Section III *infra*. Further, the developer’s arguments in favor of Project approval do not constitute Commission Staff Reports. The requirements for Commission staff reports are specified in 14 CCR 13057. (*Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 877.) Thus, the Commission can rely upon the Supplemental Report for evidence to support a conclusion, but not for analysis of impacts.

If the Court were to review the Supplemental Report for evidence it would find that the developer’s consultant concluded that given the soil investigation to date (AR1722, 1721), “hazardous materials during construction of the proposed project would be a significant impact” for which mitigation would be required. AR1723. This is the same finding the Preliminary Report made in July 2018. AR210.

Further, the limited site investigations conducted to date found lead in surface soil at 230 mg/kg and 290 mg/kg. AR5632, AR5589, AR5160, County Answer, ¶27. These levels are up to nine (9) times higher than the Regional Water Quality Control Board’s (RWB) Environmental Screening Level (ESL) of 32 mg/kg for lead in residential shallow soil based on terrestrial habitat exposure. AR5159-60, County Answer, ¶27. A November 1989 letter from Triad Environmental Systems, Inc reveals that despite some asbestos abatement, additional asbestos was detected on the property. AR5912, County Answer, ¶ 25. The soil is severely subject to erosion. AR201.

Contamination expert Matt Hagemann of Soil/Water/ Air Protection Enterprise (SWAPE) noted

¹⁰ Petitioner administratively raised the issue of LUP inconsistency. AR5220, AR5216, AR6227-29, AR5153-5215. The Commission raised this issue in 2017. AR2656-57. San Mateo County and the developer also evaluated consistency. AR3547-3565; AR161-195.

¹¹ Petitioner raised Pub. Res. Code § 30232, soil hazards and lack of testing. AR5224-25, AR5030-31, 5220, 4276.

1 that the prior investigations showed “that the horizontal extent of the lead contamination has not been
2 determined.” AR5160. “[A]dditional elevated lead soil concentrations ("hot spots") may be found if
3 further testing is conducted.” Id

4 Neither the Staff Report nor the Addendum disclose to the Commissioners and the public the
5 potentially significant hazardous soil impact, the evidence of lead and asbestos, and the extent of the
6 contamination hasn’t been yet determined.¹² Nor did the Commission require further analysis of the
7 degree and extent of the contamination. Thus, the Commission has not protected against hazardous
8 substance or considered hazardous soil containment and cleanup. Id. The Commission failed to
9 evaluate Coastal Act section 30232 consistency, supported by findings and substantial evidence before
10 the LCP Amendment was approved.¹³ The Commission violated the Coastal Act and prejudicially
11 abused its discretion.

12 **II.C. The LCP Amendment is Inconsistent with Coastal Act Section 30253, and the Staff**
13 **Report Did Not Adequately Analyze Fire Risks.**

14 The Commission is required to ensure that new development minimize risks to life in areas of
15 high fire hazard. (Pub. Res. Code §30253.) The Commission failed to adequately analyze minimizing
16 risks to life through evacuation in this high fire hazard area.¹⁴

17 First, there is no dispute that this is a fire hazard area and the site could be vulnerable to
18 wildland fires. AR5376, AR5444. The Commission and San Mateo County admit that “Regarding fire
19 risk, the site is located within a Community at Risk zone according to the County's Wildland Urban
20 Interface Fire Threatened Communities Map.” AR4569; AR4627, fn. 6; County Answer, ¶28.

21 Despite the high fire hazard, there is no Commission analysis of minimizing risks to life by

22 ¹² One geologist, ignoring the “tot lots” and community garden (AR0048), took solace in the fact that
23 the planned low-income housing will “not have private yards or gardens,” and thus “exposure would
24 be “across the larger development, not concentrated in an individual smaller yard area where
25 exposure to a localized hot spot.” AR2133.

26 ¹³ The Staff Report touts the adoption of an environmental justice policy. AR4566. “Environmental
27 justice” is (1) a healthy environment for all people, and (2) the elimination of pollution burdens so that
28 pollution is not disproportionately borne. § 30107.3. The policy commits the Commission to consider
soil health impacts in disadvantaged communities. AR7625. The policy is supposed to “ensure that
low-income communities and communities of color, and other disadvantaged communities are not
disproportionately affected” by a diminished environment. Id. The Staff Report avoids any consistency
analysis of “healthy environment”, “pollution burdens” or disproportionate pollution effects on the low
income households. AR4564-65. Petitioner raised Coastal § 30107.3 compliance. AR5032-33.

14 Petitioner administratively raised this issue. AR5220; AR5222, AR5031-32.

1 evacuation. Instead, the Commission engaged in a different analysis of how the LCP Amendment
2 compares to the prior, but never-implemented zoning from 1986. AR4569-70. The Coastal Act does not
3 require an analysis of “greater opportunities for defensible space” or comparison to prior, never-
4 implemented zoning to evaluate fire evacuation. (Pub. Res. Code § 30253.) The Staff Report was
5 required to analyze consistency with the legislative mandate to “minimize” risks to life and property,
6 but failed to. Instead, the Staff Report and Addendum impermissibly skip that analysis, and promise it
7 will be provided later after LCP Amendment approval. AR4558, 4627. The Addendum claims the LCP
8 amendment allows for “mitigation that could address circulation in an evacuation and also for future
9 development to be designed with defensible space in case of fire” (AR4627), but the Commission did
10 not adopt any mitigation.

11 The Commission does not explain the minimization of fire risk given its own admissions that a
12 future residential project at the site through traffic “may affect future potential evacuations” from
13 wildfire (AR4627) while traffic deficiencies would be exacerbated by any development at the proposed
14 location. AR 4565. In Montara, 47% of the population uses the main street in an evacuation. AR5375.
15 Highway 1 is a 2-lane road with the only access in or out of the area for residents evacuating. While
16 there is evidence in the record of water to fight fires, fire services, fire resistant materials and wildfires
17 (AR5454, 5439, 5441) there is no discussion of fire evacuation. There is no adopted Emergency
18 Response Plan or Emergency Evacuation Plan for the project area. AR1724.

19 By failing to properly evaluate LCP Amendment consistency with Coastal Act Section 30253,
20 the Commission violated the Coastal Act and prejudicially abused its discretion.

21 **II.D. The LCP Amendment is Inconsistent with Coastal Act Sections 30230, 30231, and 30240**
22 **and LUP Policy 7.3, and the Staff Report Did Not Adequately Consider Consistency.**

23 Coastal Act section 30230 requires that marine resources be maintained and enhanced, and that
24 special protection shall be given to areas of special biological significance (ASBS). (Pub. Res. Code §
25 30230.) Coastal Act section 30231 requires that that the quality of coastal streams and wetlands be
26 maintained and restored by minimizing adverse effects of waste water discharges and controlling runoff.
27 (Pub. Res. Code § 30231.) Coastal Act section 30240 requires that Environmentally Sensitive Habitat
28 Areas (ESHA) be protected against any significant disruption of habitat values, and that development in
areas adjacent to ESHAs be designed to prevent impacts which would significantly degrade those areas.
(Pub. Res. Code § 30240.)¹⁵

LUP Policy 7.3 likewise prohibits any development which would have significant adverse

¹⁵ Petitioner administratively raised the issue of discharge of stormwater to Montara Creek ESJA and the ASBS in violation of Coastal section 30230, 30231, 30240. AR5219, AR5222-23; AR5029-31.

1 impact on sensitive habitat, including development adjacent to sensitive habitats shall be designed to
2 prevent degradation to sensitive habitats.

3 The Montara Creek riparian corridor, which runs parallel to the site's northern border, is an
4 Environmentally Sensitive Habitat Area (ESHA). AR4568; County Answer, ¶¶7, 32, 33. A 1985 EIR
5 for a different project at the same site described Montara Creek as 50 feet away. County Answer, ¶32.
6 There are wetlands where Montara Creek meets the Pacific Ocean within the James V. Fitzgerald Area
7 of Specific Biological Significance (ASBS). County Answer, ¶36. The project site slopes from 10
8 percent to 50 percent. AR5458, County Answer, ¶34. There is no existing storm drain infrastructure on
9 the property. Id. Stormwater from the entire project site "discharges to Montara Creek within the James
10 V. Fitzgerald Area of Specific Biological Significance (ASBS) watershed area." AR5458; County
11 Answer, ¶37.

12 The Staff Report and the Addendum do not even address Coastal Act sections 30230 or 30231.
13 AR4557, AR4623. For Coastal Act section 30240, rather than evaluate whether the LCP Amendment
14 will prevent ESHA degradation, the Commission impermissibly punts the entire analysis to a
15 subsequent CDP analysis. AR4569, 4630, 4628. While Coastal Act sections 30230, 30231, 30240 and
16 LUP 7.3 mandates consideration of areas adjacent to sensitive areas, the Staff Report only considers
17 whether ESHA or sensitive species or wetlands are present "on the property." AR4568, AR4576,
18 AR4630.

19 The Staff Report did not discuss the expert comments and evidence before it. Matt Hagemann,
20 P.G, Chg. commented that the developer's review did not consider "the protection of terrestrial habitat
21 in the adjacent Montara Creek from the erosion of lead-contaminated soils upon soil disturbance during
22 the Project's construction period. AR5161.

23 As discussed above, there is soil contamination at the site. AR5632, AR5589. AR5159-60. As
24 the developer's consultant found, potential impacts to surface water quality could occur both during
25 construction and operation of the project. AR1700. Construction would disturb a significant portion of
26 the 10.875-acre project site. Id. On-site soils are subject to "severe" water erosion hazards. AR1700,
27 206. Erosion of exposed soils during construction could result in off-site water quality impacts,
28 particularly when it rains during project construction. Id. It was reasonably feasible for the Commission
to consider these impacts now; it had grading plans and stormwater plans before it. AR1509, 1511.

Further, Dr. Robert W. Emerick, a wastewater expert, who reviewed¹⁶ the project commented

¹⁶ Dr. Emerck reviewed the Stevens Consulting Public Services and Utilities Report, July 2018, the Project Cumulative Impacts Analysis (2nd County Review Draft, April 2019, the Preliminary Environmental Evaluation Report (2nd County Review Draft, April 2019, the Carollo Engineers

1 that “it is reasonably likely that a new pump station will be required to adequately remove wastewater
2 from the Mid Pen project site to a neighboring sewerage conveyance system. Pump stations have the
3 potential to overflow into waters of the United States if not adequately designed and maintained. Thus,
4 there is a potentially significant adverse wastewater impact that should be evaluated further before
5 project approval.” AR5206.

6 Dr. Emerick’s concern about sewage discharge to local waters was based on the history of this
7 sewer system, which had at least 65 separate discharges of inadequately treated or raw sewage since
8 2013. AR5204. “Over 557,103 gallons of sewage have been illegally released, the vast majority of it
9 released into the Pacific Ocean and Half Moon Bay.” Id. See also AR7275-7312 [history of sewer
10 overflows on the San Mateo County Midcoast from January 2011 through May 2017]. Pursuant to a
11 court order, the system used to accommodate the reasonably foreseeable wastewater will not be able to
12 guarantee compliance with Regional Water Quality Control Board regulatory requirements associated
13 with sewage spills until June 30, 2024 at the earliest. AR5205.

14 Based on the projected grading, lead and asbestos contamination on site, the severe soil erosion,
15 identified potential impacts to surface water quality during construction and operation from storm water
16 runoff to Montara Creek, that a new sewage pump station is reasonably likely, and the adjacency of the
17 Montara Creek ESHA, wetlands and the Fitzgerald Area of Specific Biological Significance, it was
18 incumbent upon the Staff Report to consider these issues in evaluating consistency with Coastal Act
19 Sections 30230, 30231, and 30240 and LUP Policy 7.3. (Pub. Res. Code §§ 30230, 30231, 30240) The
20 Commission failed to evaluate, or provide findings supported by substantial evidence, to address these
21 critical Coastal Act and LUP policies.

22 **II.E. The LCP Amendment is Inconsistent with Coastal Act Section 30253 by Not Minimizing
23 Vehicle Miles Travelled, and the Staff Report Did Not Adequately Consider Consistency.**

24 Coastal Act section 30253 requires that new development must minimize vehicle miles traveled
25 (VMT).¹⁷ The Commission’s Environmental Justice program also commits the Commission to decrease
26 vehicle miles travelled. AR7262.

27 The Staff Report failed to conduct any analysis of whether the reasonably foreseeable
28 development will minimize vehicle miles traveled. The Commission only summarily concludes that

(1999) Sewer Authority Mid-Coastside Wet Weather Flow Management Program Facility Plan
Report DRAFT and other documents. See AR5203.

¹⁷ The public raised the lack of VMT analysis. AR150, 1560, 2592, 2621, 3422, 5224, 6096, 5031.
One commentor noted that the development “may reduce” VMT for those few workers who find
local housing rather than commuting. AR194.

1 reduced density “should only serve to better address traffic issues as compared to the existing LCP
2 (including associated with reduced energy consumption and vehicle miles traveled).”¹⁸ AR4566.

3 The lack of analysis and any explanation of how the facts support this conclusion contrasts with
4 the facts the Commission had before it.

5 Traffic/transportation consultant Pang Engineers, Inc., after review of the developer’s Traffic
6 Impact Analysis, commented that there has been no analysis of VMT. AR5200.

7 The California Department of Transportation (Caltrans) submitted comments on the LCP
8 Amendment in April 2018 (AR5413) and August 2018 (AR2652) suggesting a Transportation Demand
9 Management Program “to reduce VMT and greenhouse gas emissions” and suggesting additional
10 measures to “reduce regional VMT.” AR2653-54. Caltrans also commented that reducing parking
11 supply can “reduce regional VMT.” AR2654.

12 In August 2020 the consultant who prepared the Traffic Impact Analysis wrote to the County
13 that new state law required analysis of VMT to evaluate traffic impacts. AR2543-44.

14 The Commission makes no mention of this input from Caltrans or traffic experts in its VMT
15 consistency determination.

16 By failing to properly evaluate Coastal Act consistency with Coastal Act section 30253, the
17 Commission violated the Coastal Act and prejudicially abused its discretion.

18 **II.F. The LCP Amendment is Inconsistent with Coastal Act Section 30250 and LUP Policy**
19 **1.18(c).**

20 The LCP Amendment is inconsistent with Coastal Act section 30250 as the reasonably
21 foreseeable development (1) will not be located in close proximity to areas able to accommodate it, (2)
22 will not be served by adequate public services and (3) will have significant effects on coastal resources.
23 (Pub. Res. Code § 30250.)¹⁹

24 Coastal Act section 30250 requires that new residential development must be located within,
25 contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where
26 such areas are not able to accommodate it, in other areas with adequate public services and where it will
27 not have significant adverse effects, either individually or cumulatively, on coastal resources. The Staff
28 Report interprets this Coastal Act provision as requiring “adequate public facilities and services

¹⁸ The Staff Report failed to provide any standard or threshold to find consistency with Coastal Act Section 30253.

¹⁹ Petitioner administratively raised the issues of proximity, public services and significant impacts. AR5031; AR5217-18; AR5220-21; AR5223-24.

1 (including water, sewer, and traffic capacity) where coastal resources will not be significantly
2 impacted.” AR4564.

3 LUP Policy section 1.18(c) allows some future growth to develop at relatively high densities for
4 affordable housing in areas where public facilities and services are or will be adequate and where
5 coastal resources will not be endangered.

6 As the Sierra Club commented, “our primary problem here is not the buildings or the intent or
7 the rental of the project, it's location. It is seven miles from major amenities that are not present in Moss
8 Beach. That's the junior high school, the high school, two shopping centers, two drug stores, the Boys
9 and Girls club, the library, the County medical center. This is all seven miles to the south. And this is
10 not going to be good for kids relative to attendance, because basically there really isn't any transit here.”
11 AR7397-80.

12 For road and traffic capacity, the Staff Report summarily concludes that “reduction in density at
13 the site, as compared to the existing land use designation, would reduce the potential traffic generated
14 from any subsequent development.” AR4565. Rather than undertake the analysis of traffic capacity and
15 impacts, the Staff Report asserts that instead traffic impact and mitigation analysis “can be adequately
16 addressed through any such subsequent [CDP] process. Id.

17 In evaluating Section 30250 consistency, the Staff Report fails to mention or evaluate Caltrans’
18 conclusion that “the project's impact on state facilities are significant.” AR2653. “[I]mprovements to
19 and reconfiguration of” Highway 1 intersections may be “necessary to accommodate increased vehicle,
20 transit, pedestrian, and bicycle trips associated with the project.” AR2652, 5413-14.

21 Nor does the Staff Report mention the Traffic Impact Analysis conclusion – in 2018, 2019 and
22 2020 - that, even considering mitigation, the project will result in seven (7) “significant and
23 unavoidable” traffic impacts at four separate Highway 1 intersections. AR1079-1087, AR2183-94,
24 AR3826-36. In 2018, the Commission commented that “The Applicant's analysis in this submittal
25 identifies significant traffic and transportation impact that would result” noting four Highway 1
26 intersections. AR2657. Despite this the Staff Report discloses only vague “existing noted traffic
27 deficiencies in the surrounding area,” mentioning only one of the four significantly impacted Highway
28 1 intersections. AR4626. The Staff Report improperly excuses the need for analysis by asserting that
“These deficiencies could be exacerbated by *any* development at the proposed location.” AR4626,
emphasis in original.

The Staff Report also fails to evaluate the unrefuted evidence of significant safety impacts
related to the project from pedestrians crossing Highway 1 as well as being forced to walk on adjacent

1 streets without sidewalks. AR1077-78, AR2181-82; AR3823-33. As Caltrans pointed out “this
2 development is likely to increase demand for pedestrian and bicycle access to nearby beaches” and
3 crossing the highway. AR2652-53.

4 For sewer impacts, the Staff Report likewise evaluates consistency by comparing an “overall
5 reduction in density” and assuming that this would “reduce the potential demands on these public
6 services.” AR4565. The Staff Report omits that the developer’s Public Service and Utilities Report
7 concluded no significant sewer impacts only with the “condition of approval” of “project-specific
8 upgrades necessary to connect to the existing system.” AR5457. The Staff Report omits that there “is
9 no existing sanitary sewer infrastructure on the project site.” AR5456. New sewer pipelines will be
10 needed to connect the project site with the existing sewer lines in adjacent roadways. Id.

11 Further, in evaluating adequate public services the Staff Report does not evaluate the comments
12 of wastewater expert Dr. Robert W. Emerick, that “it is reasonably likely that a new pump station will
13 be required to adequately remove wastewater from the Mid Pen project site to a neighboring sewerage
14 conveyance system. Pump stations have the potential to overflow into waters of the United States if not
15 adequately designed and maintained. Thus, there is a potentially significant adverse wastewater impact
16 that should be evaluated further before project approval.” AR5206. The Addendum notes these
17 concerns, but simply writes them off as “speculative” without any reasoned analysis. AR4625.

18 As for whether the new residential development will have significant effects on coastal
19 resources, the Staff Report does not disclose (1) the significant impact from transport and use of
20 hazardous materials during construction reported in the Preliminary Environmental Evaluation
21 (AR1692), (2) the potential impacts to groundwater and surface water quality both during construction
22 and project operation (AR1700), (3) the significant impact to the California red-legged frog disclosed in
23 the Biological Resource Assessment, or (4) the significant cultural impact disclosed in the Cultural
24 Resource Evaluation (AR473-74).

25 Because the LCP Amendment is inconsistent with Coastal Act section 30253 and LUP Policy
26 1.18(c), and the Commission failed to adequately evaluate consistency, the Commission violated the
27 Coastal Act and prejudicially abused its discretion.

28 **II.G. The Commission Improperly Found that San Mateo County’s LCP Certification
Submittal Was Complete.**

The Commission found LCP Amendment complete in November, 2020. AR4558. San Mateo’s

1 submittal failed to meet the completeness requirements of 14 CCR § 13552.²⁰

2 San Mateo County's LCP Amendment certification submittal was incomplete as San Mateo
3 County did not provide the Commission with

4 (1) a discussion of the amendment's relationship to and effect on the other sections of the
5 certified LCP (14 CCR § 13552(c)),

6 (2) an analysis that meets the requirements of Section 13511 or an approved alternative pursuant
7 to Section 13514 and that demonstrates conformity with the requirements of Chapter 6 of the Coastal
8 Act (14 CCR § 13552(d)), and

9 (3) copies or summaries of significant comments received by the County, nor of San Mateo
10 County's response to those comments. 14 CCR § 13552(a). AR5216.

11 By improperly determining that San Mateo County's certification submittal was complete, the
12 Commission violated the Coastal Act and prejudicially abused its discretion.

13 **III. The Commission, By Relying On A Supplemental Report Not Made Available to the**
14 **Public Failed to Provide a Fair Hearing in Approving the LCP Amendment.**

15 A writ is appropriate where the petitioner has been deprived of a fair hearing. (Code Civ.Proc.,
16 § 1094.5, subd. (b).

17 The Commission released a Staff Report Addendum on March 12, 2021 - the day of its
18 approval of the environmental review document for the LCP Amendment and approval of the LCP
19 Amendment in reliance thereon. County Answer, ¶165; AR4623-32. The Addendum relied upon a
20 Supplemental Environmental Evaluation Report. AR4625. This report was never made available to the
21 public, including Petitioner.²¹ By reliance upon a Supplemental Environmental Evaluation Report
22 which was never made available to Petitioner, the Commission deprived Petitioner of a fair hearing on
23 March 12, 2021.

24 **CONCLUSION**

25 For all of the above reasons, Petitioner respectfully requests that the Court grant the petition
26 for writ of mandate based upon CEQA and Coastal Act violations, set aside the Commission
27 approvals, direct the Commission to fully comply with CEQA and the Coastal Act prior to any
28

29 _____
30 20 The Commission raised this issue in 2017. AR2656-57. Petitioner raised the issue. AR5216,6227-
29, AR5153-5215.

31 21 Petitioner raised this issue administratively. AR7400.

1 subsequent LCP Amendment approval and enjoin Respondents and Real Parties from proceeding
2 with the LCP Amendment pending the Commission's compliance with the law.

3 Respectfully submitted,

4 Dated: October 31, 2022

LAW OFFICES OF BRIAN GAFFNEY APC

5
6 By: 

7 Brian Gaffney
8 Attorneys for Petitioner
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PROOF OF SERVICE

MIDCOAST ECO v CALIFORNIA COASTAL COMMISSION et al
San Francisco Superior Case No. CPF-21-517430

I am over the age of 18 years and not a party to the above entitled action. My business address is 2370 Market Street, Suite 103-318, San Francisco, CA 94114 and I am a resident of or employed in the County of San Francisco, California.

On October 31, 2022, I served **PETITIONER’S OPENING BRIEF IN SUPPORT OF WRIT OF MANDATE**

attached hereto by transmitting a true copy via File&ServeXpress to the following:

Aarti S. Kewalramani
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For Respondent / Defendant California Coastal Commission

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For Real Parties in Interest/Defendants San Mateo County, San Mateo County Board of Supervisors

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 31, 2022 at San Francisco, California.



Brian Gaffney