

29 July 2015

TO: Community Development Director

FR: Michael Howland, Sunnyvale resident

RE: Planning Application 2015-7399 (777 Sunnyvale-Saratoga Road Special Development Permit)

Dear Madam or Sir,

This letter serves as a formal request for appeal of the decision of the Zoning Administrator on Planning Application 2015-7399, granting a Special Development Permit to operate an approximately 11,600 square foot, vehicle-oriented grocer. This request conforms to the requirements of Section 19.98.070 (“Appeals and calls for review.”) of the Sunnyvale Municipal Code.

In this instance, a Special Development Permit was required pursuant to Sections 19.090.010 and 19.26.150 of the Municipal Code to develop a retail establishment over 10,000 square feet in the El Camino Ramon (“ECR”) Precise Zoning District.

We believe this proposed use could have a significant impact on localized air quality, and further study was necessary before a Special Development Permit could be granted.

The proposed establishment not only encourages but relies upon the queuing of vehicles—it is a “grocery drive-through” establishment. No similar uses currently exist in Sunnyvale, and therefore the potential impact on air quality as a result of queuing vehicles is as yet unknown.

The potential impact of queuing vehicles is particularly acute in this instance because the developer is requesting a deviation from the municipal code to allow for significantly less landscaping and tree coverage. (See Attachment 2 of the Agenda Packet, “Project Data Table”). This deviation is not mitigated in the Conditions of Approval (“COA”)—although trees may not be capped, the shading proportion is not mitigated through other means. (See Attachment 4 of the Agenda Packet, “Recommended Conditions of Approval”). This combination of significantly decreased tree coverage and planned queuing of vehicles will almost certainly have a significant impact on the local air quality. Given the novelty of this type of business and the significant departure from the requirements of the municipal code, this project should have received environmental review prior to the granting of this discretionary permit. See California Code of Regulations (“California Environmental Quality Act (“CEQA”) Guidelines”) § 15378 (definition of a “project” for purposes of CEQA). As this is a project for the purposes of CEQA, and none of the categorical or statutory exemptions available under CEQA apply, environmental review is both appropriate and required. See California Public Resources Code § 21083; CEQA Guidelines § 15031.

We also find discrepancies between the nature of the project and the recommended findings in Recommended Findings, Attachment Three of the Agenda Packet. For example, despite the fact that the project not only encourages but in fact requires the queuing of vehicles, the Recommended Findings state that the proposed project will “encourage pedestrian activity along this commercial portion of Sunnyvale-Saratoga Road.” This finding is not supported by substantial—or indeed, any—evidence in the record before the Zoning Administrator or made available to the public. There are no facts in the available public documents that suggest that a drive-through grocer will encourage pedestrian activity.

As a result of the foregoing and other such facts as may become available prior to the hearing before the Planning Commission, we respectfully request that the Planning Commission reverse the approval of the Zoning Administrator, and that appropriate environmental study (i.e., an Initial Study and, if appropriate, an Environmental Impact Report) be prepared be conducted prior to any subsequent application.

Please note that this request for an appeal to the Planning Commission includes the required fee of \$143. This fee is based on the City Council's Fiscal Year 2015/2016 Fee Resolution.

Thank you for your attention to this matter.

Best Regards,

A handwritten signature in black ink, appearing to read "Michael Howland", with a large, stylized flourish at the end.

Michael Howland

1085 Tasman Drive, Space 131

Sunnyvale, CA 94089

September 11, 2015

**By Fax & E-mail**

Russell Melton, Chair  
Members of the Planning Commission  
City of Sunnyvale  
c/o City Clerk  
603 All America Way  
Sunnyvale, CA 94088  
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PlanningCommission@sunnyvale.ca.gov

**Re: Appeal of Zoning Administrator Approval of Planning  
Application 2015-7399 – Special Development Permit,  
777 Sunnyvale-Saratoga Road**

Dear Chair Melton and Members of the Planning Commission:

On behalf of Michael Howland, the appellant in the above-referenced matter, , please accept the following points and authorities in support of his appeal of the Zoning Administrator's July 15, 2015 decision approving a Special Development Permit for a grocery store at 777 Sunnyvale-Saratoga Road ("Project"). The Project, which includes an 11,600 s.f. drive-up grocery distribution outlet, replaces and expands a portion of an existing Orchard Supply Hardware store.

As explained in the body of this letter, the Zoning Administrator's action was based on the erroneous determination that the Project is categorically exempt from the environmental review provisions of the California Environmental Quality Act ("CEQA"). The Project does not qualify for the Class 1 or any other categorical exemption from CEQA, and will in fact generate significant adverse impacts on local air quality, including human health impacts from diesel exhaust emissions.

**I. OBJECTION TO LATE DISCLOSURE OF AIR QUALITY AND  
PARKING OPERATION STUDIES AND REQUEST FOR  
CONTINUANCE.**

The City posted the staff report for this matter to its website at approximately 12:00 noon on Friday, September 11, 2015. Included was a 92-page "Air Quality

Study” prepared by the applicant and dated August 31, 2015. Also included was a letter from the applicant summarizing the Project’s “Proposed Short-Term Parking Configuration for Customer Pick-ups” dated August 26, 2015. These materials purport to contain information and analysis responsive to the concerns raised in Mr. Howland’s appeal, and supporting the City’s determination that the Project is categorically exempt from CEQA. Indeed, the “Air Quality” study in terms of both its form and content constitutes the air quality section of a CEQA initial study which ordinarily would be circulated for public review and comment for a minimum of 20 days pursuant to Section 15073 of the CEQA Guidelines.

Needless to say, the City’s release of substantial information just one business day before the hearing on the appeal, while perhaps nominally consistent with the Brown Act, effectively deprives the appellant of any meaningful opportunity to review the materials to determine whether they appear accurate, analytically sound, and/or factually defensible. Moreover, the fact that the City had this information in its possession for 11 and 16 days, respectively, before releasing it raises questions of basic fairness to the appellant.

Accordingly, we hereby request that the Planning Commission continue the public hearing on this matter to a later date no sooner than 21 days from the date of this letter to afford Mr. Howland sufficient time to review and respond to this new information. If, however, the Commission sees fit to act on the appeal notwithstanding this request, then we ask that it consider the following points.

## **II. THE PROJECT IS NOT CATEGORICALLY EXEMPT FROM CEQA BECAUSE IT CONSTITUTES A SIGNIFICANT EXPANSION BEYOND THE PREVIOUS USE.**

City staff have opted to forego a meaningful environmental review of the Project, claiming it meets the criteria for the Class1 categorical exemption for “Existing Facilities” under CEQA. As explained below, this is incorrect.

The CEQA Guidelines define the Class 1 exemption in pertinent part as follows:

“Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination. . . . The key consideration is whether the project involves negligible or no expansion of an existing use.” § 15301. Emphasis added.

The Project site currently supports a 46,659 s.f. OSH retail hardware store. The Project would demolish 7,599 s.f. of this existing building, and construct a new 11,600 s.f. grocery outlet, for a total net increase of 4,820 s.f. This is a 10 percent expansion of the existing building. Based on raw square footage alone, the Project plainly does not involve “negligible or no expansion” of the existing building. Note also that the Project’s proposed operating hours are from 7 am to 10 pm daily. The current OSH operates from 7 am to 9 pm Monday through Saturday, and 8 am to 8 pm Sundays.

More importantly, the Project constitutes a significant intensification of the existing land use by virtue of the number and nature of customer trips generated. A drive-up grocery outlet will generate substantially more daily vehicle trips per square foot than a hardware store. According to the Institute of Transportation Engineers (“ITE”)’s *Trip Generation* Manual (9<sup>th</sup> ed.), car trips during the PM peak hour for a hardware store average only 4.84 per 1,000 s.f., compared to 9.48 for a supermarket and 34.47 for a convenience store open 15-16 hours.<sup>1</sup> And unlike a hardware store where customers typically park their cars while they shop, this Project’s “drive-through” format will necessarily attract customers who will inevitably queue in their cars with engines running while they wait their turn at the pick-up station.<sup>2</sup> As a combined result, and notwithstanding the late-produced “Air Quality Study” and Parking Configuration report that conclude to the contrary, the Project will generate substantially more car traffic and related air pollutant emissions than the present use.

In sum, the Project manifestly does not involve “negligible or no expansion” of the existing use at the site. It therefore cannot qualify for a Class 1 categorical exemption from CEQA.

### **III. THE PROJECT IS ALSO NOT EXEMPT FROM CEQA BECAUSE IT WILL HAVE SIGNIFICANT CUMULATIVE IMPACTS.**

Even if the Project were to nominally qualify for the Class 1 categorical exemption, it will still likely cause significant cumulative air quality and human health impacts. Under the CEQA Guidelines, no categorical exemption can apply to any project where the cumulative impact of similar projects in the same vicinity over time

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<sup>1</sup> While it is unclear which ITE land use category applies to the Project here, it shares the customer-attraction characteristics of both a supermarket and convenience store. A meaningful environmental review of the Project would presumably produce a more accurate sense of its actual trip-generation rates.

<sup>2</sup> Although the applicant’s “Parking Configuration” report suggests that the operator will act to minimize customer vehicle idling, there is no information before the City demonstrating the feasibility of enforcement of these vaguely described measures.

is or will be significant. *See* Guidelines, § 15300.2 (“All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant”).

A cumulative impact “consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts.” Guidelines, § 15130(a)(1). In other words, “[c]umulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” *Id.*, § 15355(b). Importantly, an agency may not conclude that a cumulative impact is insignificant merely because the project’s own contribution to an existing condition is relatively small or cannot be measured. Courts have squarely rejected this “ratio theory,” which would trivialize a project’s incremental effect if the cumulative conditions without the project are already bad. *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4<sup>th</sup> 98, 117-118, 121.

As a retail grocery outlet, the Project will necessarily generate frequent trips by diesel-powered delivery trucks with top-mounted refrigeration units (“TRUs”), which together emit significant quantities of diesel exhaust, a cancer-causing toxic air contaminant. According to mapping data published by the California Air Resources Board, the 2010 excess cancer risk from airborne toxics in the South Bay area is between 100 and 250 per one million – well in excess of the 10 in one million threshold considered significant for CEQA purposes. Given that the site’s locale already experiences elevated cancer risks from the existing high concentrations of diesel-related toxic air contaminants, the increase in the frequency of daily and/or weekly deliveries by diesel trucks with TRUs as a result of the Project is likely to result in a cumulatively considerable contribution to an existing significant cumulative human health impact. Thus, even if the Project nominally meets the criteria for the Class 1 categorical exemption, it is still not exempt from CEQA per Section 15300.2(b) of the CEQA Guidelines.

#### **IV. THE PROJECT IS ALSO NOT EXEMPT DUE TO SIGNIFICANT IMPACTS FROM “UNUSUAL CIRCUMSTANCES.”**

Separate and independent from the above reasons, the Project also does not qualify for any categorical exemption from CEQA because it meets the exception criteria under Section 15300.2 of the CEQA Guidelines. Subsection (c) of that section provides: “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”

Here, the “unusual circumstances” are that the Project represents a new retail grocery format that is unprecedented in the region if not the state. We are unaware of any prior environmental analysis of an internet-based, drive-through retail grocery outlet. The City would be approving an entirely new land use in a regulatory vacuum. Trip generation rates, traffic impacts, air pollution emissions, noise impacts, are wholly unknown. Many if not most of these are likely to be significant, requiring mitigation. Indeed, as discussed above, there not only is a “reasonable possibility” of a significant environmental effect, there is a virtual certainty. The Project is therefore disqualified from any categorical exemption from CEQA for this additional reason.

## **V. CONCLUSION.**

For all these reasons, the Project does not qualify for any categorical exemption from CEQA. The Planning Commission should therefore UPHOLD the appeal, deny the Special Development permit, and take no further action on the application unless and until staff prepares and circulates an initial study under CEQA.

Thank you for your consideration of these points and concerns.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



Mark R. Wolfe  
On behalf of Appellant Michael Howland

MRW:am

cc: Ryan Kuchenig, Project Planner (by email to: rkuchenig@sunnyvale.ca.gov)



February 22, 2016

**By Fax & E-mail**

Community Development Department  
Attn: Trudi Ryan, Director  
City of Sunnyvale  
456 West Olive Avenue  
Sunnyvale, CA 94086  
Fax: 408-328-0710  
Email: tryan@sunnyvale.ca.gov

**Re: Appeal of Zoning Administrator Decision | Protest of Mitigated  
Negative Declaration for Special Development Permit, 777  
Sunnyvale-Saratoga Road File No. 2015-7399**

Dear Ms. Ryan:

On behalf of Sunnyvale resident Michael Howland, the appellant in the above-referenced appeal, this is to protest the adoption of the above-referenced mitigated negative declaration. As you may recall, Mr. Howland previously objected to the City of Sunnyvale's proposed reliance on a CEQA categorical exemption for this same Project. Although we credit the City for agreeing to conduct an initial study, the proposed reliance now on a mitigated negative declaration ("MND") for this drive-through retail grocery outlet in lieu of a full environmental impact report ("EIR") is improper. As explained below, the current record before the City shows the Project may have significant impacts notwithstanding the mitigation measures identified in the MND. An EIR is therefore required before the City may approve it.

**I. Traffic impacts**

The Initial Study's discussion of traffic impacts relies on the "Transportation Operations Analysis" contained in Appendix D. That analysis estimates the Project's trip generation using the Institute of Transportation Engineers ("ITE") land use category 850, "Supermarket." For purposes of calculating daily, AM and PM peak trips, the analysis therefore assumes, necessarily, that the Project is an 11,600 SF conventional supermarket. This is inaccurate. It should go without saying that a

11,600 SF structure devoted to receiving, storing, packaging, and distributing grocery items ordered online is substantially different from a retail supermarket of the same size. It will not have aisles, check-out stations, display cases, or other features that would occupy square footage in a conventional grocery store. Because the ITE's supermarket trip generation rates are based on total retail square footage, the Initial Study's reliance on them for this Project necessarily results in a significant underestimate of the total amount of traffic the Project will generate. The Initial Study's overall conclusions regarding Project impacts on Levels of Service at affected intersections is thus inaccurate.

In addition, the Initial Study and Appendix D inappropriately credit the Project with eliminating the trips that would otherwise be generated by 6,790 SF of the current OSH store. As the Initial Study itself acknowledges, "The proposed 11,600 square-foot grocery retail building would be located adjacent to the main OSH building in roughly the same location as the existing pick-up building." Because the existing OSH square footage that the Project would replace is actually not devoted to floor sales, it is not generating trips based on the rate assumed for a Home Improvement Superstore. Crediting the Project for eliminating 6,790 SF-worth of Home Improvement Superstore space is thus improper.

The Initial Study and MND's conclusion that the Project would have no significant unmitigated traffic impacts is therefore not supported by substantial evidence.

## **II. Adverse health effects from toxic air contaminant emissions**

The Initial Study fails to include a health risk assessment for emissions of toxic air contaminants during the one-year construction period for the Project. The Initial Study states that emissions from construction would be negligible, but provides no supporting data or analysis as to why. Without a construction-phase risk assessment, the Initial Study's ultimate conclusion that the Project would have no significant unmitigated air quality impacts from toxic air contaminant emissions is not supported by substantial evidence.

## **III. Greenhouse gas emissions**

We note that the Initial Study's Greenhouse Gas ("GHG") emissions model in Appendix C changed the default hauling trip length from 20 miles to 0.03 miles, while the Air Quality model in Appendix A relied upon the default hauling trip length of 20 miles. "User Entered Comments" in the GHG model state that this change is

representative of the “length of the project site = 0.06 mi.” This change is improper, and results in an underestimate of the Project’s GHG emissions. Since impacts from GHG emissions are a large-scale (indeed global) problem, the analysis should not be restricted to just what is occurring on-site.

Furthermore, the Initial Study states that “The proposed grocery store would require up to four truck deliveries with transportation refrigeration units (TRU) per day...” (p. 33). However, it does not appear that these operational delivery trips were included in the GHG analysis. If indeed they were not, then emissions of GHGs (not to mention criteria air pollutants) were underestimated. The Initial Study’s conclusion that the Project would have no significant unmitigated GHG impacts is therefore not supported by substantial evidence.

#### **IV. Hazardous materials**

The Initial Study references and incorporates a Phase I Environmental Site Assessment performed by Moore Twining. The Phase I Assessment fails to identify past agricultural use (orchards) as a recognized environmental condition. Although the Assessment does acknowledge that pesticide residuals may be found in soils generally, it dismisses the concern without any provisions for future sampling. Our understanding is that in Santa Clara County, residual pesticides are seen commonly as a residual environmental condition, and that soil sampling is typically required as a part of the CEQA process.

Without soil sampling and/or a Phase II Assessment, the Initial Study’s conclusion that the Initial Study’s ultimate conclusion that the Project would have no significant hazardous materials impacts is not supported by substantial evidence.

#### **V. Conclusion**

Under CEQA, an agency may rely on a negative declaration of mitigated negative declaration only if there is no substantial evidence whatsoever that a project may have a significant environmental impact. CEQA Guidelines, § 15064(f)(3). As a result of the analytic defects described above, there is insufficient evidence before the City that the Project will have no significant environmental effects. Under the circumstances, the City should require preparation of an EIR before considering whether to approve the Project.

Thank you for your consideration of this protest.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.

A handwritten signature in blue ink, appearing to read 'M Wolfe', with a long, sweeping horizontal line extending to the right.

Mark R. Wolfe  
On behalf of Appellant Michael Howland

MRW:am

cc: Gerri Caruso, Principal Planner (by email to: [gcaruso@sunnyvale.ca.gov](mailto:gcaruso@sunnyvale.ca.gov))  
Ryan Kuchenig, Project Planner (by email to: [rkuchenig@sunnyvale.ca.gov](mailto:rkuchenig@sunnyvale.ca.gov))  
City Clerk (by email to: [cityclerk@sunnyvale.ca.gov](mailto:cityclerk@sunnyvale.ca.gov))  
Planning Commission (by email to: [PlanningCommission@sunnyvale.ca.gov](mailto:PlanningCommission@sunnyvale.ca.gov))