Citizens Advocating Roblar Rural Quality
P.O. Box 577
Sebastopol, CA 95473

By Email and UPS

October 18, 2016

County of Sonoma Permit and Resource Management Department

ATTN: Blake Hillegas

2550 Ventura Avenue

Santa Rosa, California 95403

RE: Proposed Roblar Road Quarry

File No.: UPE16-0058

Dear County of Sonoma Permit and Resource Management Department:

Citizens Advocating for Roblar Rural Quality ("CARRQ") has received a request asking it to comment on a project application, dated September 27, 2016 pertaining to the following project:

File Number: UPE16-0058

Project Description:

Applicant Name: John Barella Land Investments

Owner Name: Barella Family LLC

Site Address: 7175 Roblar Road, Petaluma

APN: 027-080-009 and 027-080-010

The September 27, 2016 application supplements application materials previously submitted to you for this project dated July 18, 2016. This July 18, 2016 application was not addressed to CARRQ. A CARRQ representative has subsequently reviewed those materials. Here, as requested, are CARRQ's comments on this proposed project and applications:

I. Summary of Comments to Application to Change Existing Permit Conditions:

Applicant's challenges to the five conditions of project approval are each grounded in the economic infeasibility or burden of Applicant's compliance with these conditions. Under the applicable law (See *Citizens of Goleta Valley v. Board of Supervisors* (1988) (*"Goleta I"*) 197 Cal.App.3d 1167) applicant has not submitted sufficient evidence to show its compliance with the conditions is economically infeasible. The application should be rejected on this basis.

However, in the event the County is willing to entertain evidence of infeasibility as to any of the conditions of approval, it must prepare a supplemental EIR. This is because the conditions of approval were approved and adopted by the County in conjunction with its certification of an Environmental Impact Report (EIR) and therefore can only be legally modified or deleted after preparation of a supplemental EIR (See *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508-1509).

We now explain the basis for this conclusion.

II. Description of Project and Proposed Changes to Permit Conditions:

Several years ago Applicant applied to develop and operate a gravel mine in the Roblar Road Area of Sonoma County. As required under the California Environmental Quality Act (CEQA). The Sonoma County through its Permit and Resource Management Department (PRMD) conducted and completed an EIR regarding the proposed project's impacts on the environment and public safety. The EIR recommended and Sonoma County required the project through the permit at issue here to meet certain conditions of approval to mitigate the environmental impacts it would cause. In 2010, after years of review, the Sonoma County Board of Supervisors certified the EIR and in conjunction with that certification approved the project subject to conditions of approval designed to mitigate the proposed project's impacts as identified in the final EIR. Five of these conditions of approval are now challenged by the Applicant in its July 18, 2016 and September 27, 2016 submissions to the PRMD as infeasible.

Following certification of the EIR, CARRQ in 2011 filled a petition in Sonoma County Superior Court challenging the sufficiency of the certified EIR and Board of Supervisor's approval of the project, alleging, among other things, that the EIR and the resulting permit

conditions failed to mitigate the environmental impacts of the project. Applicant opposed this lawsuit claiming the EIR was adequate and the conditions of approval sufficient to mitigate its impacts. In 2012 CARRQ prevailed in Sonoma County Superior Court proceeding and the trial court issued an injunction to halt the project. The First District Court of Appeal then reversed the trial court's decision in 2014, leaving in place the Board of Supervisor's certification of the EIR and the conditions of approval of for the project. At no time in this litigation, did the Applicant challenge the feasibility of the mitigation measures or the conditions of approval for the project, including conditions 44, 49 and 59.a, 101, and 133. Instead, Applicant has waited until now, six years after the County imposed the conditions of approval, to claim any are infeasible.

The Applicant now argues that these five conditions of approval are infeasible for the following reasons:

A. Condition of Approval 44: Signalization of Intersection of Roblar and Stony Point Roads

Applicant's rationale for infeasibility is based on two grounds. First, that the signalization that was a condition of approval may now require a supplemental EIR, which would cost too much and delay the project, and second, these costs are not necessary in the opinion of their experts, even though the conditions of approval require it. The first reason can form no basis for infeasibility, since a supplemental EIR is required for the County to change ANY of the conditions of approval requested by Applicant (See *Lincoln Place Tenants*, discussed infra.). The second reason is not supported by any evidence showing the costs of compliance are economically infeasible (See discussion of the evidence necessary to support a finding of economic infeasibility, infra).

B. Conditions of Approval 49 and 59.a: Improvements to Roblar Road

These conditions require improving and widening the approximately 1.5-mile segment of Roblar Road which will be used by **hundreds** of Quarry haul trucks which go up and down Roblar Road every work day. Applicants concede in their application that the conditions were imposed due to findings in the EIR and Mitigation Measures pertaining to traffic, pedestrian, and bicycle safety that gave rise to these specific Conditions of Approval. They ask the County to set them aside and substitute new conditions because in the opinion of their experts the conditions imposed by the EIR are impractical, unnecessary and therefore infeasible. Boiled down, these means that Applicant does not want to spend the money needed to construct them and does not think it should have to. None of the evidence submitted by the Applicant show the conditions are economically infeasible for the Applicant to perform.

The County should reject Applicant's proposed changes to these conditions of approval for this reason. If the County decides to consider them, a supplemental EIR will be required to change post EIR conditions of approval (See *Lincoln Place Tenants).*

C. Proposed Modification to Condition 101: Grading Within 50-feet of the Tops of Banks of Waterways

Applicant claims this change is necessary based on their announced plan to relocate Americano Creek just west of the Quarry entrance, as illustrated in Figure 11 of the July 18, 2016 Application. This plan to relocate the Americano Creek was not addressed in the EIR certified by the BOS and, if to be considered at all by the County, will require CEQA review through the supplemental EIR. CARRQ believes and is informed Applicants plan to relocate the Americano Creek will also require a stream alteration permit and possibly other permits by the California State Department of Fish and Wildlife and other agencies. CARRQ has contacted the California State Department of Fish and Wildlife to review the stream alteration permit on file for the Applicant for this project. To date, CARRQ has not been able to determine if Applicant has obtained or filed such a permit from the Department of Fish and Wildlife. CARRQ has requested the Department of Fish and Wildlife notify it if such a permit has been obtained or requested by the Applicant. Since the EIR certified by the BOS did not address this environmental impact, the stream alteration plan will also require further CEQA review.

Applicant bases his argument to change this condition of approval on the assertion that the certified EIR which approved the project and the conditions of that approval were defective in imposing Condition 101. Their argument is as follows:

> "The implications that the Board's modification of the ultimately approved project had for Condition 101 were not identified when the Conditions of Approval were finalized and approved. As noted above, the project as approved (Modified Alternative 2), together with the requirement that Roblar Road be widened, will unavoidably impact Americana [sic] Creek, making full compliance with Condition 101 literally impossible. Accordingly, Condition 101 must be amended to expressly include the relocation of Americana Creek along the Quarry parcel and road widening activities in general within the waterway setback in order for required road widening to occur." (Sept 27, 2016 application, pg. 10.)

The County through the Board of Supervisors approved both the project and the conditions of approval in question here based upon the certified EIR. By defending that

approval in both the trial court and court of appeal over challenge between 2011 and 2013, Applicant has waived any argument that the County's conditions of approval did not take into account the impact of the haul route designated by the certified EIR. To the extent the County now wishes to question the conditions of approval it issued in 2010 in conjunction with the certified EIR, which Applicant now claims were in error, it can do so only through a subsequent or supplemental EIR directed to this issue (See *Lincoln Place Tenants*, supra).

D. Condition 133: Avoidance of Potential Jurisdictional Wetlands and Riparian Habitat Located Along the Southern Boundary (i.e. Ranch Tributary) and the Southwestern Corner (i.e.. seasonal wetlands on valley floor adjacent to Americano Creek) of the Property

Applicant bases his argument that this condition is infeasible on the same grounds as its infeasibility argument it makes for Condition of Approval 101. The County should reject this argument out of hand. Applicant presents NO evidence that decision makers at the County or PRMD or the BOS were confused about the route to be taken by the Gravel Mine's trucks when they issued its conditions of approval in 2010 in conjunction with the certification of the EIR. Applicant presents no evidence that the decision of the County or PRMD or BOS to issue the conditions of approval at the same time was a mistake.

Further, Applicant's apparent assertion that Conditions 101 and 133 should be modified to allow Applicant to perform them only if performance is "feasible" in the Applicant's judgment is illegal under CEQA.

If the County, for some reason, is persuaded by the Applicant that the conditions of approval reflected in Conditions 133 or 101 are in fact mistaken and should be deleted, then the EIR should be decertified and a new EIR prepared to remedy that mistake. *Lincoln Place Tenants* compels this result. Otherwise, Applicants request to modify Conditions of approval 133, and 101, should now be rejected.

III. The Legal Standard of Review:

The elimination or modification of any Mitigation Condition based on a previously certified EIR requires substantial evidence that the Condition is infeasible

AND the preparation of a supplemental EIR.

The law cited by the Applicant itself is clear on this point: After certifying an EIR, an agency may not approve a project subject to conditions of approval and later delete or modify those conditions without substantial evidence to support such modification in a supplemental EIR.

In its September 27, 2016 application, the Applicant cites two legal precedents, *Napa Citizens for Honest Government* and *Lincoln Place Tenants*, as legal authority to support their position that the County has the power to modify or delete the five conditions of approval discussed above. These precedents also establish that while the County has the power to change conditions of approval after project approval, once a project EIR is certified an agency can legally modify the conditions of its approval only if:

a. The agency undertakes an supplemental EIR to analyze and discuss these proposed changes;
b. The agency finds the conditions of approval imposed after the certification of the original EIR are infeasible;
c. The agency supports such finding of infeasibility through substantial evidence;
d. The agency makes a finding of overriding considerations if the modifications to the conditions of approval will result in unmitigated environmental impacts as discussed and analyzed in the subsequent or supplemental EIR.

Since the two cases cited by Applicant itself, read together, require this standard of review, we discuss each precedent briefly below.

In *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (1st Dist. 2001) 91 Cal. App, 4th 342 [110 Cal. Rptr. 2d 579], petitioners challenged Napa County's approvals for an updated specific plan and subsequent EIR addressing the development of an unincorporated area south of the City of Napa.

> "When an earlier-adopted mitigation measure has been deleted, the deference provided to governing bodies with respect to land use planning decision must be tempered by the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration. We therefore hold that a governing body must state a legitimate reason for deleting an earlier-adopted mitigation measure and must support that statement of reason with substantial evidence. If no legitimate reason for the deletion has been stated, or if the evidence does not support heh governing body's finding, the land use plan, as modified by the deletion or deletions, is invalid and cannot be enforced. [¶] *** In other words the measure cannot be deleted without showing that it is infeasible."

The modified changes in Napa allowed were supported by a complete EIR which analyzed the changes and the infeasibility of the changed measures.

In *Lincoln Place Tenants Association v. City of Los Angeles* (2d Dist. 2005) 130 Cal. App. 4th 1491 [31 Cal. Rptr.3d 353], the Court of Appeal extended the holding in *Napa Citizens* by concluding that elimination of mitigation measure from a previously certified EIR required not only substantial evidence of the measure's infeasibility (as required by *Napa Citizens)*, but also the preparation of a supplemental EIR. Following *Napa Citizens*, the *Lincoln Place* court stated:

> "because an initial determination a mitigation measure is infeasible must be included in the EIR and supported by substantial evidence it is logical to require a later determination a mitigation measure is infeasible be included in a supplemental EIR and supported by substantial evidence".

Here of course, no supplemental EIR has been prepared to address any of the requested modifications. No changes to conditions of approval can be made without such an EIR which analyzes them. This is especially the case here since at least two of the requested changes, (to Conditions 101 and 133), according to the Applicant, are based on mistakes or carelessness by the County in requiring conditions of approval that are not justified by the EIR which was certified by the BOS in in conjunction with the Conditions of Approval. Further, Applicant now claims that changes to Condition 101 are necessary because of the failure of the certified EIR to consider Applicant's recent plan to relocate of Americano Creek. That plan of relocation itself should trigger an EIR before any changes are considered.

Lincoln Place Tenants sets the standard of review the County must follow to assess any changes to the conditions of approval here, since there was a previously certified EIR that governed the project. In conjunction with that EIR certain conditions of approval were imposed in 2010 on the gravel mine project. Therefore, any changes to any of these conditions (including those requested by Applicant here) must not only be supported by substantial evidence, required the preparation of a supplemental EIR.

However the County may **reject** the Applicants proposed changes without the necessity of preparing a supplemental EIR. It may, and should do so, because the County can only change or eliminate conditions of approval based on evidence that the challenged conditions of approval are infeasible. We now discuss the standard of evidence needed for a determination of infeasibility and show why the Applicants assertion of infeasibility lacks such evidence under the applicable CEQA standards.

IV Applicant's Evidence does not Demonstrate that the

Conditions of Approval are Infeasible.

The law regarding enforceability under CEQA is clear: the fact that a condition of approval may be more expensive or less profitable is insufficient to demonstrate that the condition is not economically feasible. What is required under CEQA is evidence that the additional costs or lost profitability as a result of Applicant's compliance with the permit conditions are sufficiently severe as to render it impractical to proceed with the project.

For a private project, like this one, a finding that a condition imposed on the applicant is economically infeasible requires not just cost data, but also data showing insufficient income and profitability. *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322 at 327 (infeasibility claim unfounded absent data on income and expenditures showing project unprofitable). There, the court identified three criteria that should be evaluated when determining whether a project alternative would be economically feasible: (1) estimated income; (2) estimated expenditures; and (3) estimated profitability. Implicit in the court's finding is the need to conduct a comparative analysis, on the basis of each of these criteria, between the proposed project and project alternatives or the proposed project with and without the recommended mitigation measure to determine whether a particular alternative or measure would render the project economically infeasible.

In *Citizens of Goleta Valley v. Board of Supervisors* (1988) (*"Goleta I"*) 197 Cal.App.3d 1167, the court confirmed the use of the criteria identified by the *Burger* court, added additional criteria, and stated that proof of an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. *What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.*

The *Citizens of Goleta Valley* Court then set forth five criteria against which a proposed project and project alternative can be compared.[1] They include the following: (1) total estimated costs; (2) total projected income; (3) total expenses; (4) the change in the per unit cost of a project that results from a project alternative or mitigation measure; and (5) the economic benefits of the project to the community and public at large.

Each of the Applicants requested changes to the conditions of approval are grounded in the assumption that, if the County does not change them, Applicant will suffer undue economic

injury. However, the Applicant provides no estimated cost data, projected income, expenses, or change in costs as required under CEQA for the costs of such compliance, as required by *Citizens of Goleta Valley*. Accordingly, the Applications are not supported by any evidence of economic infeasibility to meet the tests imposed by Burger or Goleta.

Applicant's argument that compliance with any Condition of Approval is legally infeasible is flawed for the same reason – there is no way of knowing whether the costs and burden imposed on the Applicant are out of proportion to their environmental impacts (See CEQA Guidelines, §15126.4, subd. (a)(4)(B)) until one understands what the costs of those burdens are in relation to Applicant's expected income or profits. No such evidence is provided by the Applicant.[2]

Since Applicant presents no evidence of infeasibility under CEQA standards sufficient to establish economic infeasibility, the County now should reject each of the requested modification to the five conditions of approval.

CONCLUSION

The Applicant has not presented sufficient evidence (and in the cases of Conditions 101 and 133 any evidence at all) that the conditions of approval are economically infeasible under applicable law. The County should now reject the requested modifications or changes.

In the event the County is prepared to further analyze Applicant's request for modification of any condition of approval established after the certification of the EIR by the BOS it must, in order to do so legally, prepare a supplemental EIR to address Applicant's unsupported contentions that the conditions of approval are infeasible.

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[1] Other factors suggested by Applicant also do not meet the CEQA test for infeasibility. Applicant's claimed inability to obtain a Right of Way (ROW) without undue economic burden is not demonstrated at all. If, for sake of argument, we assume rights of way cannot be economically obtained (which Applicant does not show or evidence in any way) there is no analysis of the County's ability, through a recordation of necessity, to acquire the acquisition of the land for a wider roadway. (See Code Civ. Proc., §§ 1245.220, 1245.230.)

Further, Applicants claim that a lack of County backed funding for any required improvement does not make it infeasible. To the contrary, lack of funding without a showing of economic infeasibility does not make a mitigation measure "infeasible." *City of San Diego v. Bd. of Trs. of the Cal. State Univ.*, 2011 Cal. App. LEXIS 1562 (Cal. Ct. App. 2011).

Sincerely,

Susan Buxton for CAARQ

cc: By email and first class mail:

California State Department of Fish and Wildlife

Sonoma County Board of Supervisors

Applicant