APCC 2023-01

City of Clearlake

14050 Olympic Drive, Clearlake, California 95422
(707) 994-8201 Fax (707) 995-2653

Planning Application
Appeal to CC

OFFICE USE ONLY	INITIAL FEES
Clearance Fee	880.00
Categorical Exemption Fee	N.A.
General Plan Maintenance Fee	25.00
Technology Fee (2%)	18.10
Subtotal	**923.10**
3% CC/DC Processing Fee ($27.69)	
Total	

Received By:	
Date:	May 4 2023
Receipt Number:	
File Number:	APCC 2023 -- 01

APPLICANT

NAME: Appellant - Koi Nation of Northern California
MAILING ADDRESS: P. O. Box 3162
CITY: Santa Rosa
STATE: CA ZIP CODE: 95402
PRIMARY PHONE: 707-572-5586
EMAIL: kn@koination.com
SIGNATURE:

I declare under penalty **of perjury that I am the owner of** said property or have written authority from the property owner to file this application. I certify that all the submitted information is true and correct to the best of my knowledge and belief. I understand that any misrepresentation of submitted data may invalidate any approval of this application.

PROPERTY OWNER (IF NOT APPLICANT)

NAME:
MAILING ADDRESS:
CITY:
STATE: ZIP CODE:
PRIMARY PHONE:
EMAIL:
SIGNATURE:

I declare under penalty of perjury that I am the owner of said property or have written authority from the property owner to file this application. I certify that all the submitted information is true and correct to the best of my knowledge and belief. I understand that any misrepresentation of submitted data may invalidate any approval of this application.

PROJECT LOCATION

ADDRESS: 14885 Burns Valley Road
ASSESSOR PARCEL NUMBERS: 010-026-40

PRESENT USE OF LAND: Mixed use
WATER SUPPLY: ☐ PUBLIC ☐ GROUNDWATER WELL
SANITATION: ☐ PUBLIC SEWER ☐ SEPTIC SYSTEM
FLOOD ZONE:

OFFICE USE ONLY

ZONING DISTRICT:
GENERAL PLAN DESIGNATION:
RELATED FILE NUMBERS:

NOTES:

APPROVED: DATE:

Detailed Reason for Appeal (All material must be submitted as a complete application)

See attached letter to Mayor and City Councilmembers.

RECEIVED
MAY 04 2023
CITY OF CLEARLAKE

Revised August 15, 2022

Recd: May 4 2023@

KOI NATION OF NORTHERN CALIFORNIA

May 4, 2023

VIA EMAIL AND U.S. MAIL

Hon. Russell Perdock, Mayor
and City Councilmembers
City of Clearlake
14050 Olympic Drive
Clearlake, CA 95422
ATTN: Melissa Swanson, City Clerk
Email: mswanson@clearlake.ca.us

Re: Appeal of April 25, 2023 Planning Commission Decision
Approval of Burns Valley Development Project MND and CUP

Dear Mayor Perdock and Councilmembers:

While the Koi Nation of Northern California ("Koi Nation" or "Tribe") continues to support responsible development within the City of Clearlake ("City"), we are writing to you regarding an appeal from the City Planning Commission's April 25, 2023, adoption of a Mitigated Negative Declaration (IS-2022-05) ("MND") and approval of a Conditional Use Permit Application (CUP 2022-16) ("CUP") to authorize the Burns Valley Development Project ("Project"). Notwithstanding this appeal, the Tribe does appreciate the time taken by City staff to re-engage in consultation pursuant to AB 52 (Gatto, 2015) after the Planning Commission's initial September 27, 2022, hearing on this matter. The parties did make good progress in seeking to address the crucial issues raised by the Tribe, and the mitigation for significant impacts to tribal cultural resources ("TCR") has been improved. Thank you.

Unfortunately, the mitigation in the MND still does not reach the level of reducing the impact on TCRs to below a level of significance. The parties have not reached an agreement due to the City declaring an impasse over the extent of necessary tribal monitoring for the Project, which is necessary because of extensive TCRs present or likely to be present throughout the entire Project footprint. The record contains a lot of substantial evidence to support this fact. The City and the Tribe met for consultation twice, then exchanged a series of letters via email. The Tribe asked the City to meet again to consult on or about February 15, 2023, but the City unilaterally closed consultation in its March 23, 2023, letter to the Tribe.

The City must follow the law in approving this development. However, despite numerous warnings by the Tribe, the City continues to ignore its legal responsibilities. Unfortunately, the Commission's action is an example of the City approving a project based upon faulty environmental compliance documents in disregard of its obligations under the California Environmental Quality Act, Public Resources Code section 21000, et seq. ("CEQA"). The Commission specifically erred in adopting the faulty MND rather than directing the preparation of an Environmental Impact Report ("EIR") as required by CEQA.

Through this appeal, the Tribe requests that the City Council correct the Commission's error and direct the preparation of an EIR. The City's Municipal Code, at section 18-36.030, provides for appeals to the City Council of decisions by the City Planning Commission, and Code section 18-36.010 instructs that any person may appeal the decision of any official body. The Tribe has previously submitted comments to the Planning Commission on the Project including written comments in advance of the Commission's September 27, 2022 and April 25, 2023, hearings. Those comments, and any other documents submitted to the Commission by the Tribe related to this Project, are expressly incorporated herein by reference. Please note that these comments apply to the entire Burns Valley Master Plan including the Burns Valley Development Project and the Oak Valley Villas Senior Residential Development (collectively, "Project").

CONTINUANCE FOR FURTHER CONSULTATION

As an initial matter, the Tribe requests that the City Council continue this matter and direct staff to further consult with the Tribe in an effort to reach a mutually agreeable resolution as to remaining TCR protocol issues. The Tribe has attached to this letter, at Attachment 1, a redlined version of the mitigation measures needed to resolve this matter and remains optimistic that the parties can resolve any remaining differences if the City returns to the table.

To be clear, the Tribe is not trying to take away the City's decision-making authority as a lead agency under CEQA. Rather, the Tribe needs the City to fully consider the substantial evidence provided by the Tribe in consultation, in making its determinations about TCRs present on the Project site, and how to avoid, preserve, or mitigate them. The Tribe's concern is about the City's privileging archeological knowledge over the Tribe's cultural knowledge about the Tribe's own cultural resources, not the City's decision-making authority. The Tribe wants to be able to speak for its own cultural resources, not have an archeologist say that they do not matter because they are not part of an intact site useful for scientific research.

THIS PROJECT REQUIRES AN EIR RATHER THAN AN MND

If the City opts to proceed with the current MND, it places the Project at risk due to the document's many deficiencies. Of foremost concern is the MND's failure to properly consider and mitigate TCR impacts which can only be remedied by the preparation of an EIR. Under CEQA, all lead agencies must prepare an EIR for projects "which may have a significant effect on the environment." (Pub. Resources Code § 21151(a).) In *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, the California Supreme Court explained the role an EIR plays in the CEQA process, and instructed that: "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore the 'heart of CEQA.' [Citation]." (*Id.* at 392; *see also Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 ["At the 'heart of CEQA' [citation] is the requirement that public agencies prepare an EIR for any 'project' that 'may have a significant effect on the environment.' [Citation.]"].) "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in a manner required by law and has therefore abused its discretion." (*Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 118.)

Since an EIR is the "heart of CEQA," it is not surprising that CEQA "creates a low threshold requirement for an initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317). Accordingly, " 'if a lead agency

is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.' " (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1111.) To the extent there is a conflict in the evidence, the City should not "weigh" the conflicting evidence to determine whether an EIR should be prepared. It should simply prepare an EIR. It is the function of an EIR, not an MND, to resolve conflicting claims based on substantial evidence, as to the environmental effects of a project. (*See* Pub. Resources Code § 21064.5.) Substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code of Regs., tit.14, § 15384(a).) "The fair argument standard thus creates a low threshold for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review. [Citations.]" (*Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712, 723.) As explained in this comment letter, numerous aspects of the Project present a fair argument of significant environmental effects requiring the City to prepare an EIR rather than rely on a defective and inadequate MND for the Project.

THE MND FAILS TO ANALYZE AND MITIGATE IMPACTS TO TRIBAL CULTURAL RESOURCES

The Tribe is comprised of people whose Ancestors have lived in this area since time immemorial and who are survivors of state-sponsored genocide and the forceable removal of their Ancestors. The Project site, including the Burns Valley Creek and an identified Village Site, was inhabited and was an important source of food and cultural materials for Tribal Ancestors. Multiple TCRs have been discovered both within and without the City's identified monitoring area despite previous ground-disturbing activities, and all this information points to a very high likelihood of finding more TCRs throughout the Project.

Public Resources Code section 21082.3(b) sets forth the City's responsibilities under CEQA in regards to TCR and mandates:

> If a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document shall discuss both of the following:
>
> (1) Whether the proposed project has a significant impact on an identified tribal cultural resource.
>
> (2) Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.

The presence of TCRs and the unmitigated handling of them is one of the primary reasons that the City must prepare an EIR. (*See Protect Niles v. City of Fremont* (2016) 25 Cal.App.5th 1129, 1134 [holding that an EIR is required rather than an MND when evidence supports a fair argument that there will be adverse environmental impacts from a project]; *see also Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at 1111 [" 'if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.' "].) As courts have instructed,

> to the extent there was a conflict in the evidence, ' "neither the lead agency nor a court may "weigh" conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.' " (*Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 [73 Cal.Rptr.3d 202]; see also CEQA Guidelines, § 15064, subd. (f)(1).) "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." (*Pocket Protectors v. City of Sacramento*, *supra*, 124 Cal.App.4th at p. 935.) Because the record contains substantial evidence supporting a fair argument that the MND's measures are inadequate to avoid or mitigate the impacts to CA-LAN-1352 "to a point where clearly no significant effect on the environment would occur," an EIR is required to consider the project's impacts on cultural resources. (§ 21064.5.)

(*Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 690 (hereafter *Agoura Hills*); emphasis added.)

Throughout the proceedings before the Commission, the Tribe has presented substantial evidence of on-site TCRs, which have not been fully analyzed in the MND. (See AB 52, § 1 ["California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated.]; *Confederated Tribes and Bands of Yakama Nation v. Klichitat County* (9th Cir. 2021) 1 F.4th 673, 682 fn. 9 [noting the importance of tribal oral history and traditions in interpreting information].) The Tribe will again present to the Council confidential maps of TCRs on the Project site and near the Project site. Additionally, the Tribe presented evidence of a water source on or near the Project which by itself is important culturally and also because it contains the Clearlake Hitch/Chi – a very important food source. The Tribe also references the confidential email previously submitted in support of the Tribe by Tribal Historic Preservation Officer Robert Geary, dated August 20, 2022, identifying numerous pre-historic archeological sites and waterways next to and/or inside the Project site. The cultural importance of the entire site, not just the two limited areas identified in the MND, has now been further bolstered by the previously presented report prepared by archeologist John Parker, Ph.D. Dr. Parker examined three sites identified by the City's archeologist and "confirmed and expanded the site boundaries." Dr. Parker "found no break in surface artifact scatter between the two site areas reported by White" and "that these two sites are in fact a single site with areas of artifact concentration." This report undercuts the City's findings limited to only the two sites it believes are impacted by the Project. Fundamentally, it is not culturally appropriate to build a recreational facility on a Village site as identified by the Tribe. Nevertheless, the Tribe has decided not to oppose this Project so long as the TCRs on site are appropriately mitigated. Requiring tribal monitoring on the whole Project site so that the Tribe can move its TCRs out of the way of the bulldozers during construction is the bare minimum needed to move forward respectfully.

The archeologist retained by the City, Dr. White, prepared a Cultural Resources report dated August 30, 2022. Although the City and Tribe re-engaged in consultation during the October 2022 to March 2023, timeframe, to the best of our knowledge the City did not update the Cultural Resources report to include and analyze any of the new substantial evidence the Tribe provided during the period of renewed consultation including information about the tribal cultural landscape, new TCRs found, the sites identified in the email from Robert Geary on August 29, 2022, or the tribal cultural significance of Burns Valley Creek, which is mentioned only in passing in the report. The Tribe has provided the City with substantial evidence of impacts to TCRs, but the City is not even updating its documents to address such evidence. (*See Save our Peninsula Committee v. Monterey County Board of Supervisors*, *supra*, 87 Cal.App.4th at 118 ["When the informational

requirements of CEQA are not complied with, an agency has failed to proceed in a manner required by law and has therefore abused its discretion."].)

To be sure, and to give the City the benefit of the doubt, we asked the City on May 2, 2023, to provide a copy of the confidential TCR appendix for this Project, if one was prepared, so that we could see if the City did in fact analyze the new information and update the record. As of the date of this letter, we have not received a confidential TCR appendix.

It is impermissible under CEQA for the City to make an impact determination without first determining the extent of the resource, and whether avoidance of the resource is feasible. (*See Agoura Hills*, *supra*, 46 Cal.App.5th at 684-690.) In *Agoura Hills*, similar to this Project, the City of Agoura Hills failed to identify and analyze a prehistoric archaeological site which was also a tribal cultural resource, as a TCR, despite being notified by public comments that fairly apprised the City of the concern that it had failed to adequately address project alternatives or mitigation measures that could preserve TCRs. As a result, the City was sued, and it lost. After considerable expense and a lengthy delay of the project, the City was required by the Court of Appeal to prepare an EIR.

The failure to analyze the Project's impacts to the identified TCRs violates CEQA's mandate to analyze all of the Project's direct and indirect impacts. (*See* Pub. Resources Code § 21065.3; *see also* CEQA Guidelines §§ 15064(d), 15065(a)(4) & 15358(a); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ["the agency must . . . consider any fair argument that a certain environmental effect may be significant"].) Without a doubt, the Tribe has raised a fair argument that from a tribal cultural resources perspective there is valuable information available about the TCR landscape as informed by the presence of TCRs on the site, and present on adjacent sites. To the extent that there is a conflict in the evidence, the City should not "weigh" the conflicting evidence to determine whether an EIR should be prepared. It should simply prepare an EIR. It is the function of an EIR, not an MND, to resolve conflicting claims based on substantial evidence, as to the environmental effects of a project. (*Agoura Hills*, *supra*, 46 Cal.App.5th at 690.)

THE MND FAILS TO ANALYZE CUMULATIVE IMPACTS ON TRIBAL CULTURAL RESOURCES

In enacting AB 52 (Gatto, 2015), the Legislature acknowledged that "a substantial adverse change to a tribal cultural resource has a significant effect on the environment," and consequently it sought to "[r]ecognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to [CEQA]." The substantial change to TCRs and the need for tribal participation in the environmental review process for projects involving artifacts, remains, and ancestral lands is significant as to one project and this significance is amplified when numerous projects within the relatively small municipal boundaries of the City involve the same or similar TCR impacts. As courts recognize,

> [c]umulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114, disapproved on other grounds in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.) Impacts are cumulatively considerable if the effects of a project are significant when viewed in connection with the effect of past projects, other current projects, and probable future projects. (Pub. Resources Code § 21083(b)(2).) An EIR is required if a project will involve cumulatively significant impacts. (Pub. Resources Code § 21083(b).)

The City is located within the aboriginal territory of the Tribe, and it contains numerous documented and undocumented sites used and inhabited by Ancestors of Tribal members. Some of these sites are the oldest in California. Lake County in general, and the City of Clearlake area in particular, are incredibly archaeologically, historically, culturally, and tribal culturally significant. The City's own Cultural Resources report notes that there is a national monument which is a TCR only 0.6 miles away from the Project site, as well as multiple other TCRs within 0.5 miles from the Project site, yet there is no cumulative impact analysis of TCRs in the Project record. Many of these TCR sites have been, are currently, or will be subject to City projects including the present Project. These projects have resulted in, and will likely continue to result in, the discovery of Native American human remains and a significant number of TCRs and cultural artifacts associated with the Tribe such as occurred at the recent Austin Park Splash Pad project. The City's pattern and practice of engaging in development projects without full environmental analysis is creating a cumulative impact to TCRs which violates CEQA, and which is unethical and disrespectful to the Ancestors of people who are part of the Clearlake community. Thus, the City must fully examine such cumulatively considerable cultural impacts within the context of an EIR for this Project. Yet, contrary to the dictates of CEQA, the MND improperly lacks any cumulative impacts analysis, and such analysis must be included within the EIR's scope.

THE MND FAILS TO ANALYZE TURF IMPACTS

One significant aspect of the Project is the development of several sport fields. Initially, the City indicated these fields would use artificial turf. Such use raised a host of unaddressed impact issues as explained in detail in the Tribe's September 2, 2022, comment letter which is incorporated herein by reference. Rather than address such impacts, the current MND fails to acknowledge or discuss the surface areas of the sport fields. If the City intends to proceed with artificial turf, the significant impacts raised by the Tribe remain unaddressed. If the City intends to proceed with natural turf, it must address the significant water supply, drainage, and potential toxicity consequences of its revised plan and recirculate any environmental document. Additionally, there is Clearlake Hitch/Chi habitat in the Project area that is occupied habitat for this species, a rare and culturally significant fish which is presently being considered by the U.S. Fish and Wildlife Service for listing under the Endangered Species Act,[1] and which could be impacted by the Project including drainage from irrigation and surface areas into waterways and groundwater. Thus, deferred analysis is not appropriate, and an EIR is required to fully analyze and address these significant health and safety issues with impacts on both humans and wildlife. (*See Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 520-521 [deferral of mitigation without objective and measurable standards or reasonable assurance an impact will be reduced is an error].)

[1] https://biologicaldiversity.org/w/news/press-releases/californias-clear-lake-hitch-back-on-track-for-endangered-species-protections-2022-04-14/

THE MND FAILS TO PROPERLY ANALYZE IMPACTS TO WATER RESOURCES

The MND indicates summarily that the Project would be served by Highland Mutual Water Company, but it contains no indication the Water Company has the capacity to serve Project needs. (MND, at 42.) This contrasts with the MND's statement as to sewage indicating the Project "would be served by Lake County Special Districts which has sufficient wastewater treatment capacity to service the project. (MND, at 42, emphasis added.) The MND simply states in bare conclusionary language, without any supporting analysis, that "[t]he project would have sufficient water supplies available to serve the project and [sic] reasonably foreseeable future." (MND, at 42.) The lack of water availability analysis renders any conclusions about water service incomplete and requires further analysis.[2] This is especially important since the MND fails to identify, discuss or analyze the sport fields surface areas which could have a significant demand on water use and availability. This vital issue requires analysis through an EIR.

THE MND FAILS TO PROPERLY ANALYZE TRAFFIC IMPACTS

The Project description indicates it will include "[d]evelopment of a public park (sports complex), community center, public works yard with public works building facility and combined police department office and maintenance facilities, vehicle and equipment storage areas, public access and parking facilities . . .." (MND, at 3, emphasis added.) The traffic analysis section relies upon a Transportation Impact Study for the Burns Valley Development prepared by W Trans on June 22, 2022, and attached as Attachment E to the MND. The Study's "Project Profile" indicates: "[t]he project includes a public works corporation yard, a drive-through coffee shop, various recreational uses such as baseball, softball, and soccer fields as well as a 15,000 square-foot recreational center and a separate affordable multi-family residential project." Notably absent from the Study's project profile description is any indication that the Project includes a "police department office and maintenance facilities." Given this omission, it is unclear whether the Study includes traffic impacts arising from the police station and maintenance facilities. Absent a full analysis, the accuracy of the MND's traffic impact conclusions is called into doubt especially its conclusion that access and circulation are anticipated to function acceptably which are based upon the incomplete traffic study. (MND, at 40.) Additionally, the traffic study did not consider the traffic and public service impacts of having a police facility adjacent to a sports complex which potentially impacts the ability of first responders to provide emergency services when they must first navigate in and around a potentially crowded sports complex. Thus, the MND is incomplete. It has safety and traffic issues that are unaddressed, and it does not satisfy the City's CEQA obligations.

THE MND FAILS TO PROPERLY ANALYZE LIGHTING IMPACTS

The MND acknowledges that "[o]ne building [of the Oak Valley Villas housing complex] would be impacted by lighting during nighttime use of the sport field." (MND, at 19-20.) AES-1 simply directs that the Project shall comply with all federal, state, and local agency requirements. (MND, at 20.) However, the MND acknowledges that the "City does not have a threshold of significance for lighting levels." (MND, at 20.) Thus, the MND acknowledges the lighting will cause an impact, and directs, in part, that the Project must mitigate such impact by following an unspecified and

[2] While the subject to variables which would be analyzed in an EIR, turfgrasses can require one inch of water for irrigation per week. (https://hgic.clemson.edu/how-often-should-a-lawn-be-watered.) Since a baseball field and a soccer field will be at least five acres, this could require a significant amount of acre-feet of water annually for the playing fields alone.

undefined local requirement. Such a vague and ambiguous requirement for addressing this impact is meaningless and cannot support a valid MND. Mitigation measures must be specific enough to be implemented, and not deferred.

THE MND FAILS TO PROPERLY ANALYZE AIR QUALITY IMPACTS

The MND includes a finding that "unpaved roads were the largest source of particulate matter (PM) in the County" and "[m]ore than half of the area wide PM emissions come from travel on unpaved roads within the City." (MND, at 21.) AIR – 11 states that "[s]ignificant dust may be generated from increase vehicle traffic if driveways and parking areas are not adequately surfaced." (MND, at 24) AIR - 2 states "[d]riveways, access roads and parking areas shall be surfaced in a manner so as to minimize dust." (MND, at 23.) Based upon this mitigation, the MND concludes that "[o]nce fully operational, the proposed project would not generate volumes of criteria pollutants which may exceed thresholds of significance disclosed in the Bay Area Air Quality Management District Guidelines . . .." (MND, at 23.) As an initial matter, the MND fails to explain why it is appropriate to rely upon BAAQMD Guidelines for Lake County, which is outside of the BAAQMD's jurisdiction and inapplicable to a rural area such as Clearlake. Instead, the environmental review for this Project should focus on criteria considering the unique characteristics of the City. Additionally, while acknowledging the air quality impacts of unpaved roads, driveways, and other surfaces, the MND also states that driveways and parking lots will not be paved until 2024. (MND, at 63.) To the extent this encompasses the operational rather than the construction stage of the Project, the MND fails to address the impacts on air quality caused by these unpaved surfaces which will not be eliminated until at least 2024. The MND must address the air quality impacts of unpaved surfaces once the Project becomes operational.

THE MND FAILS TO PROPERLY ANALYZE WILDLIFE IMPACTS

The MND acknowledges that within the Project site "two special-status bats have potential or low potential to occur within the Study area" as well as "one special-status turtle." (MND, at 25.) BIO-1 simply indicates the Project will use BMP to reduce the potential for sediment or pollutants at the Project site. BIO-5 generally references a "Bat Management Plan outlining avoidance and minimization measures specific to the roost(s) potentially affected." Other mitigation measures deal with construction but not operational activities. Importantly, the Project admittedly contains large light installations to illuminate the sports fields. As the abstract of one journal noted, "[b]eing nocturnal, bats are among the taxa most likely to be affected by light pollution" and "[l]ight pollution affects the ecological interactions across a range of taxa, and has adverse effects on behaviors such as foraging, reproduction and communication." (80 Mammalian Biology (2015) Impacts of artificial lighting on bats: a review of challenges and solutions.) The MND is silent as to the impact of the lighting on the bat population. Additionally, as discussed above, the Project's multiple playing fields potentially comprised of artificial turf could generate toxic runoff, but the MND is silent on the impact of such toxic runoff on the special status turtle, let alone the Clearlake Hitch/Chi. The City must fully analyze these potential wildlife impacts within the scope of an EIR.

THE MND FAILS TO PROPERLY ANALYZE MIGRATION IMPACTS

According to the MND, "[t]he Study Area provides limited migratory opportunities for terrestrial wildlife. Project construction is likely to temporarily disturb and displace most wildlife from the Study Area. Some wildlife such as birds or nocturnal species are likely to continue to use the habitats opportunistically for the duration of construction. Once construction is complete, wildlife movements are expected to resume but will likely be more limited through the developed areas of the Study Area. The Project is not expected to substantially interfere with wildlife movement."

(MND, at 27.) However, the MND also purports to show a "perimeter fencing concept" for the Project with high chain link fencing topped by barbed wire. (MND, at 14.) Surrounding the Project perimeter with high barbed wire-topped fencing contradicts the statement that wildlife migration will face only minimal impacts once construction ends. The perimeter fence indicates a significant impact on terrestrial mitigation since wildlife will presumably no longer have access to a significant portion of the Project site. The City must fully explain and mitigate this impact through appropriate mitigation measures.

THE MND FAILS TO PROPERLY ANALYZE HAZARDS AND HAZARDOUS MATERIALS IMPACTS

The MND focuses on materials used during construction but also admits that "[s]mall quantities of hazardous materials would likely be routinely used on the site, primarily fertilizers, herbicides and pesticides." (MND, at 33.) However, the MND indicates the Project will include "[d]evelopments of a public park (sports complex), community center, public works yard with public works building facility and combined police department office and maintenance facilities, vehicle and equipment storage areas, public access and parking facilities . . . ." (MND, at 3, emphasis added.) Similarly, the police building on the Project site "would include a vehicle wash station, and sections for equipment repair . . . [t]his public works yard would be used to store and maintain city public vehicles including public works and police department cars, trucks and heavy equipment." (*Ibid.*) A public works yard and maintenance facilities will certainly use chemicals and potentially hazardous materials other than "fertilizers, herbicides and pesticides," and the City must analyze the use and disposal of these other potentially hazardous substances. These concerns coupled with hazardous substance concerns related to the potential artificial turf usage necessitate thorough analysis through an EIR.

THE MND FAILS TO PROPERLY ANALYZE NOISE IMPACTS

The MND attempts to limit noise impacts through NOI – 4 which restricts park operations to no later than 10 pm. (MND, at 37.) However, the noise study underlying the City's findings explains that "[a]t the time of the creation of this report and assessment the City of Clearlake has not sufficiently programmed the site nor provided the author of this report with any specific information on speaker location, mounting height, orientation, nor amplification metrics." (MND, at 81.) Lacking specific information, the Study relied upon assumptions and generalities to conclude that "[b]ased upon the anticipated duration of sporting events, e.g. summer weekends and evenings, and shoulder season (March through May) high school level sporting events, it can safely be stated that when averaged over a twenty-hour (24) hour period, the noise levels within these units would safely remain below HUD's required 45 dBA DNL standard." (MND, at 82, emphasis added.) Despite purporting to establish a mitigation measure, the City's consultant lacked concrete information on actual sound systems for the Project including speaker location, mounting height, orientation, and amplification metrics. Such information is necessary to establish a meaningful analysis rather than having to rely upon guesses, estimates, and assumptions as to the sound system's actual design. Additionally, listing noise based upon a 24-hour average is similarly meaningless since the noise level will be at or near zero at least during late night and early morning hours. Thus, a meaningful noise analysis requires information as to actual system design and must consider noise impacts throughout the day rather than rely on a 24-hour average.

At a minimum, a fair argument exists that there are substantial environmental impacts to each of these resource categories which lack any analysis or need further analysis, so the City must proceed to an EIR rather than adopt a defective MND. (*See Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at 1111.)

THE CITY FAILS TO COMPLY WITH ITS NEPA OBLIGATIONS

There is no apparent coordination of the City's CEQA process with the required National Environmental Policy Act ("NEPA") and Section 106 of the National Historic Preservation Act ("NHPA") process. Additionally, it is currently unclear which federal agency will be the lead agency for NEPA and NHPA purposes. The NEPA regulations provide that until the lead NEPA agency issues a Finding of No Significant Impact ("FONSI") or record of decision, "no action concerning the proposal may be taken that would: ... (2) Limit the choice of reasonable alternatives." (40 C.F.R. § 1506.1(a)(2).) Similar to NEPA, Section 106 of the NHPA prohibits an agency from "restrict[ing] the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." (36 C.F.R. § 800.1(c).) Likewise, "[t]he agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." (36 C.F.R. § 800.1(c).)

CEQA Guidelines instruct that CEQA and NEPA should be coordinated: "local agencies should cooperate with federal agencies to the fullest extent possible to reduce duplication between [CEQA] and [NEPA,]" including joint planning, joint environmental research and studies, joint public hearings, and joint environmental documents. (Cal. Code of Regs., tit.14, § 15226.) If a lead agency finds that NEPA review documents would not be prepared by the time the lead agency will need to consider CEQA review documents, "the lead agency should try to prepare a combined EIR-EIS or negative declaration-finding of no significant impact." (Cal. Code of Regs., tit.14, § 15222.) To do that, "the lead agency must involve the federal agency in the preparation of the joint document." (*Ibid.*) CEQA requires that if the City plans to prepare a joint document with a federal agency, it must consult with the federal agency as soon as possible. (Cal. Code of Regs., tit.14, § 15223.)

Adopting an MND and/or a Conditional Use Permit ("CUP") without coordinating review under NEPA and Section 106 of the NHPA could limit the choice of reasonable alternatives under NEPA and prevent the City from considering a broad range of alternatives under the NHPA. Adopting an MND/CUP under CEQA limits the City to one path forward for the Project and prevents the City from considering other alternative options under NEPA or the NHPA. The City is required to undertake the Section 106 process early in its project planning so that the Section 106 findings can inform the environmental review process and decisions. Committing the City to a particular project without any Section 106 input forecloses that possibility. Adopting an MND and CUP now constrains the City's ability to keep its options open, which is a violation of NEPA and NHPA.

Coordination between the CEQA process and the NEPA and NHPA processes is so crucial to project planning that the CEQA Guidelines emphasize the importance and instruct on how to coordinate. Under CEQA, coordination with federal agencies should be to the fullest extent possible throughout the entire process. To reduce duplication, CEQA encourages lead agencies like the City to prepare combined CEQA-NEPA documents if the federal agency will not prepare the NEPA review documents in time. If a joint document is prepared, CEQA requires the CEQA lead agency to consult with the federal agency as soon as possible. The City has made no apparent effort to reduce duplication between the CEQA and NEPA processes or to consult with the federal agency, as the proper agency under NEPA has not even been identified yet.

The Commission inappropriately rushed to adopt an MND/CUP, putting the City at risk of violating CEQA, NEPA, and NHPA. Violating these laws, even at this early procedural stage, can result in invalidation of the Project approvals. The Tribe therefore requests that the Council rescind the Commission's decision to adopt the MND/CUP, and instead instruct its staff to take the proper

steps to coordinate its CEQA, NEPA, and NHPA review in order to properly evaluate the Project in conjunction with its preparation of an EIR.

CONCLUSION

As set forth above, the City's proposed MND is defective and fails to comply with CEQA in numerous respects, and such defects can only be cured if the City Council rejects the Commission's MND approval and directs preparation of an EIR.

Please enter this letter into the administrative record for this Project. We also request that the City notify us via email to kn@koination.com, rgeary@hpultribe-nsn.com, and hroberson@kmtg.com and mail of the public hearing for this Project, so that the Tribe and its Tribal Historic Preservation Officer and Tribal Cultural Resources Counsel can submit further and updated comments on the record and can arrange for submission of the confidential information for the Council's consideration.

Thank you for your anticipated consideration of these matters. Again, we remain willing to engage in further good faith, meaningful consultations with the City. Please also feel free to reach out to the Tribal representatives, Robert Geary or Holly Roberson, at the emails noted above, if you have questions or wish to discuss this matter prior to the City Council appeal hearing.

Respectfully,

Chairman Darin Beltran
Koi Nation of Northern California

Attachment
cc w/attach.: Merri Lopez-Keifer, Director of the Attorney General's Office of Native American Affairs
Raymond Hitchcock, Native American Heritage Commission Executive Director
Mario Pallari, Native American Heritage Commission Counsel
Julianne Polcano, State Historic Preservation Officer
Mathew Brady, Caltrans District 1 Director
Leslie Hartzell, Chief of the Cultural Resources Division, California State Parks
Ryan Jones, City Attorney
Andrew Skanchy, City CEQA Attorney
Holly Roberson, KOI Nation Tribal Cultural Resources Counsel

ATTACHMENT 1

04/23/2023
Koi Nation of Northern California's Proposal to City of Clearlake Planning Commission
Revisions to Burns Valley Sports Complex Project Conditions of Approval/Mitigation Measures

Section E- CULTURAL~~/ Tribal Resources~~:

1. *(Mitigation Measure CUL-1)* During construction activities, if any subsurface archaeological remains are uncovered, all work shall be halted within 100 feet of the find and the owner shall utilize a qualified cultural resources consultant to identify and investigate any subsurface historic remains and define their physical extent and the nature of any built features or artifact-bearing deposits.

2. *(Mitigation Measure CUL-2)* The cultural resource consultant's investigation shall proceed into formal evaluation to determine their eligibility for the California Register of Historical Resources. This shall include, at a minimum, additional exposure of the feature(s), photo-documentation and recordation, and analysis of the artifact assemblage(s). If the evaluation determines that the features and artifacts do not have sufficient data potential to be eligible for the California Register, additional work shall not be required. However, if data potential exists – e.g., there is an intact feature with a large and varied artifact assemblage – it will be necessary to mitigate any Project impacts. Mitigation of impacts might include avoidance of further disturbance to the resources through Project redesign. If avoidance is determined to be infeasible, pursuant to CEQA Guidelines Section 15126.4(b)(3)(C), a data recovery plan, which makes provisions for adequately recovering the scientifically consequential information from and about the historical resource, shall be prepared and adopted prior to any excavation being undertaken. Under no circumstances will destructive data testing be allowed on a tribal cultural resource. Such studies shall be deposited with the California Historical Resources Regional Information Center within 90 days of completion of the Project. Archeological sites known to contain human remains shall be treated in accordance with the provisions of Section 7050.5 Health and Safety Code. If a historic ~~n~~ artifact must be removed during Project excavation or testing, curation may be an appropriate mitigation. Under no circumstances will curation be allowed on a tribal cultural resource. This language of this mitigation measure shall be included on any future grading plans and utility plans approved by the City for the Project.

3. *(Mitigation Measure CUL-3)* If human remains are encountered, no further disturbance shall occur within 100 feet of the vicinity of the find(s) until the Lake County Coroner has made the necessary findings as to origin (California Health and Safety Code Section 7050.5). Further, pursuant to California Public Resources Code Section 5097.98(b) remains shall be left in place and free from disturbance until a final decision as to the treatment and disposition has been made. If the Lake County Coroner determines the remains to be Native American, the Native American Heritage Commission must be contacted within 24 hours. The Native American Heritage Commission must then identify the "most likely descendant(s)". The landowner shall engage in consultations with the most likely descendant (MLD). The MLD will make recommendations concerning the treatment of the remains within 48 hours as provided in Public Resources Code 5097.98.]

4. *(Mitigation Measure CUL-4)* The sensitive site section noted on the project site plan shall not be disturbed during construction and/or maintenance of the park. This sensitive site

is identified as investigation resulted in the discovery of two intact, buried, archaeological sites, CCL-21-01 and CCL-21-02 (Figure 7, yellow polygons), both of the sites can be considered significant cultural resources. Both of the sites occupy relatively small areas and are buried at depths of 16–32 inches below grade. The project as currently designed, will not impact sites CCL-21-01 or CCL-21-02. If avoidance and/or preservation in place is not possible, the owner will consider re-design or other measures to avoid impacting resources consistent with CEQA. The owner will contract with tribal monitors designated by the Consulting Tribe for ground disturbance within 100 feet of sites CCL-21-01 and CCL-21-02. The owner and contract archeologist will consult with tribal representatives from the Consulting Tribe regarding ground disturbing work within these areas including the designation before construction begins of a "reburial" location on site, ~~if needed~~.

5. (Mitigation Measure CUL-5) On or prior to the first day of construction the owner shall organize cultural sensitivity training for contractors involved in ground disturbing activities.

6. (Mitigation Measure CUL-6) The southern two-thirds of site CCL-21-01 is contained within APN010-026-400-000 and the Burns Valley Development Project area. The area occupied by the site has been slated for a paved parking area serving planned playing fields nearby (Figure 2). This portion of the site is situated on the sloping bank of an extinct section of upper Miller Creek, an area marked by an overstory of mixed native oak and introduced conifer and hardwood trees. Because this part of the site is situated on a bank, the land surface is sloped and drops 10–15 feet in elevation. Current engineering plan calls for vegetation and tree removal as well as application of remote fill materials to bring it to a level grade, with installation of landscaping, drains, and underground utility lines in the area. Project revisions in design, location, and operations should be implemented in the area occupied by the footprint of site CCL-21-01, inclusive to a 15-foot (4.5- meter) buffer around the site perimeter. Limitations to disturbance in this area shall be as follows:

   - *Fill Cap*. Because CCL-21-01 is a buried archaeological deposit contained in a dense clay loam likely to resist compaction impacts, avoidance can be achieved by placing fill on the site surface;

   - *Flush Cut Vegetation*. Existing vegetation including shrubs and trees should be flush- cut, i.e., cut flush with the ground at a point not to exceed 10-inches below grade;

   - *Landscaping Fabric and Fill*. Once the flush cut is complete and surface cleared of debris, landscaping fabric should be laid over the area of the site to create a boundary between intact soils and remote fill. With respect to the fill, drainage, safety, and operational concerns may prevent adding a lot of elevation; however, an additional minimum 6–12-inches (15–30 centimeters) of fill should be added to the site area to provide a construction and compaction buffer to protect the deposit. This would result in an overburden of 21–27 inches (53–71 centimeters) of capping material. Only culturally sterile fill will be used on the Project;

   - *Avoid Installation of Subsurface Features*. Avoid placement of pier supports, subsurface landscaping features, subsurface drains, and utility lines in the site area.

- *Avoid New Overstory Plantings*. Avoid placement of new overstory trees in the site area.

7. (Mitigation Measure CUL-7) Site CCL-21-02 is contained within APN010-026-400-000 and the Burns Valley Development Project area. The area occupied by the site has been slated for open space. Project revisions in design, location, and operations should be implemented in the area occupied by the footprint of site CCL-21-02, inclusive to a 15-foot (4.5-meter) buffer around the site perimeter. Limitations to disturbance in this area shall be as follows:

   1. *Fill Cap*. Because CCL-21-01 is a buried archaeological deposit contained in a dense clay loam likely to resist compaction impacts, avoidance can be achieved by placing fill on the site/buffer surface;

   2. *Landscaping Fabric and Fill*. Prior to site prep and construction in the area, landscaping fabric should be laid over the area of the site to create a boundary between intact soils and remote fill. With respect to the fill, drainage, safety, and operational concerns may prevent adding a lot of elevation; however, an additional minimum 6–12-inches (15–30 centimeters) of fill should be added to the site area to provide a construction and compaction buffer to protect the deposit. This would result in an overburden of 21–27 inches (53–71 centimeters) of capping material;

   3. *Avoid Installation of Subsurface Features*. Avoid placement of pier supports, subsurface landscaping features, subsurface drains, and utility lines in the site area.

   4. *Avoid New Overstory Plantings*. Avoid placement of new overstory trees in the site area.

8. *(Mitigation Measure CUL-8)* For resources which are both a tribal cultural resource and a cultural resource, the tribal cultural resource mitigation measures shall control. The Consulting Tribe will determine which resources are tribal cultural resources.

Section J- TRIBAL CULTURAL RESOURCES

1. *(Mitigation Measure TCR-1):* Requirement to develop a tribal cultural resources preservation plan that applies to all tribal cultural resources on the Project site, including resources which are also a cultural resource, and delineates the boundary of CCL-21-01 and CCL-21-02 without further disturbance, describes the appropriate combination of materials and culturally sterile fill in capping, provides landscaping specifications that favor culturally important plants, and ~~restricts~~ prohibits ~~certain~~ any types of post-project activities in or on the cap that intrude past the cap. The tribal cultural resources preservation plan must be agreed to in writing by the Koi Nation of Northern California ("Consulting Tribe") and the City and completed before any permit is issued.

2. *(Mitigation Measure TCR-2):* Requirement to designate a project reburial area on the Project site in advance of ground disturbing activities, in the event that tribal cultural resources materials are discovered during construction. The reburial area shall be in a mutually agreed upon location with the Consulting Tribe and capped after ground disturbance is complete.

3. *(Mitigation Measure TCR-3):* Requirement for each contractor~~s~~ engaged in ground disturbing activities to receive meaningful training on tribal cultural sensitivity and tribal cultural resources one time and prior to the beginning of work, from a tribal representative designated by the Consulting Tribe.

4. *(Mitigation Measure TCR-4):* Requirement for tribal monitoring during ground disturbing activities in ~~sensitive areas of~~ the project area. The Tribal Monitoring Agreement must be agreed to by the Consulting Tribe and the City in writing and completed before any permits are issued.

5. *(Mitigation Measure TCR-5):* ~~Procedures for compliance~~The Project shall comply with existing state law in the event of the discovery of Native American human remains during ~~construction~~ground disturbance.

6. *(Mitigation Measure TCR-6):* ~~A prohibition on the~~ Rremoval of tribal cultural soils from the project area is prohibited. Tribal cultural soils shall be designated by the Consulting Tribe in consultation with the Project Archeologist.

CONDITIONS OF APPROVAL

7. Requirement for City staff to organize a discussion within 10 days of project approval with the Consulting Tribe and the City Council to exercise its independent discretion on naming part or all of the facility with an appropriate tribal name, such as Kula'i, if it so chooses.

8. Requirement to develop and install tribal culturally appropriate interpretive signage to educate the public about the tribal cultural significance of the area. The culturally appropriate verbiage of the signage shall be provided by the Consulting Tribe.

9. Requirement to allow free access to the Project facilities for tribal cultural events by the Consulting Tribe up to four times per year, pursuant to the same application process of other events at City facilities.

10. Commitment by the City to meaningful consultation with any requesting federally recognized Southeastern Pomo Tribe as a consulting party under Section 106 of the National Historic Preservation Act or National Environmental Policy Act, if applicable.

Receipt Number: R00005514
Cashier Name: Register Operator
Terminal Number: 2
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CITY OF CLEARLAKE

APCC 2023-01

Trans Code: 106 - Planning/Zoning **Name: PLANNING COMISSION APPEAL 2023-01** **$880.00**
Product: PLANNING/ZONING Units: 0.00 Amount: 880.00
PLANNING COMISSION APPEAL 2023-01 880.00
PLANNING/ZONING 880.00
100-414-510 -880.00

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224 27.69

Trans Code: 226 - GENERAL PLAN MAINTENANCE **Name: Miscellaneous Receipt** **$25.00**
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Miscellaneous Receipt 25.00
GENERAL PLAN MAINTENANCE 25.00
100-417-895 -25.00

Trans Code: 225 - TECH FEE **Name: Miscellaneous Receipt** **$18.10**
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Miscellaneous Receipt 18.10
TECH FEE 18.10
100-416-895 -18.10

Total Balance Due: $950.79

Payment Method: CREDIT CAF Payor: APCC 2023-01 Reference: Visa-Authorized Amount: $950.79

Total Payment Received: $950.79

Change: $0.00

Cardmember acknowledges receipt of goods and/or services in the amount of the total shown hereon and agrees to perform the obligations set forth by the cardmember's agreement with the issuer.

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