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Via U.S. Mail and Electronic Mail

Telma Moreira
Contra Costa County
Department of Conservation and Development
30 Muir Road
Martinez, CA 94553
E-Mail: Telma.Moreira@dcd.cccounty.us

Re: Comments on Final Environmental Impact Report and Potential Conditional Use Permit for Creekside Memorial Park Cemetery, County File No. LP 052096

Dear Ms. Moreira and Department of Conservation and Development:

I am writing regarding the ongoing concerns with the proposed Creekside Memorial Park Cemetery Project ("the Cemetery" or "Creekside"), County File No. LP 052096 on behalf of the Friends of Tassajara Valley, a local group of concerned citizens; and Bill and Holly Newman, neighbors who reside next to the proposed Creekside Memorial Park Cemetery Project. The Friends of Tassajara Valley and Bill and Holly Newman specifically wish to provide comments for the record to the Department of Conservation and Development/Contra Costa County ("the County") concerning the AGI Valuations ("AGI")'s Financial Feasibility Study ("AGI Study"), dated August 14, 2015 and revised on December 29, 2015. Creekside's applicant Corrie Development Corporation/7000 CMP, LLC ("the Applicant") retained AGI to provide a study that would demonstrate compliance with County zoning and California Health and Safety Code requirements to finance an appropriate endowment fund ("cemetery-care endowment fund") providing for long-term maintenance of the Cemetery sufficient to prevent the Cemetery from becoming a degraded nuisance. As set forth below, the AGI Study is deeply flawed in numerous respects and fails to provide the basis for the County to reasonably conclude that the Applicant has demonstrated sufficient resources to properly fund cemetery endowment requirements. *See, e.g., Laurel Heights improvement Association of San Francisco v. Regents of the University of California* (1988) 47 Cal. 3d 376, 409 n.12 (courts will not "uncritically rely on every study or analysis before by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.").

Relatedly, the Final EIR imposes requirements for endowment funding for long-term implementation of environmental mitigation measures. The AGI Study clearly fails to demonstrate that the Applicant has either the means or the intention to fund such an endowment for environmental mitigation measures. Indeed, the Applicant's consultant P/A Design Resources, Inc. indicated in comments on the Draft EIR that the Applicant opposed the environmental mitigation endowment requirement (see Final EIR at 2-134) and the AGI Study makes no attempt to analyze whether the Applicant has the means (or the intention) to fund such endowment requirements.

The County has asked Economic and Planning Systems, Inc. ("EPS") to perform a peer evaluation of the AGI Study. Unfortunately, the EPS evaluation is extraordinarily cursory and fails to point out the numerous obvious flaws in the AGI Study discussed in this letter. Given EPS's failure to consider and discuss the numerous flaws identified in this letter, the County could not reasonably rely upon the EPS peer review to conclude that the AGI Study adequately demonstrates that the Applicant has the financial resources to establish the required endowment fund *or* the mitigation requirements the County would impose per the recommendations in the County's Final Environmental Impact Report ("Final EIR") for Creekside. Accordingly, as also discussed below, the County's Final EIR remains flawed for its failure to demonstrate that the environmental mitigation requirements it recommends imposing, which will also include financial endowment requirements, can be met.

I. The County Should Consider the Comments in this Letter To Be Part of Its Public Record on the DEIR and Should Supplement Its CEQA Responses to Comments Accordingly.

The Final EIR specifies that the County would require the Applicant to implement a Biological Mitigation and Monitoring Plan (BMMP) (Mitigation Measure 3.4-2a) and a Long Term Management and Operations Plan (LTMOP) (Mitigation Measure 3.4-2b). Final EIR at 2-31 to 2-32. The Final EIR specifies that endowment funding sufficient to implement the BMMP and LTMOP are part of the required mitigation measures:

The BMMP requires that a funding and implementation agreement be secured for the conservation easement area that would include a long-term management program defining details of the endowment and in-perpetuity funding assurances, which would also address funding required for long-term monitoring and possible contingency measures to the satisfaction of the USFWS and CDFW. The LTMOP is necessary to avoid possible conflicts between site management operations and the numerous habitat protection and enhancement measures.

Id. at 2-32.

Mitigation Measure 3.4-1a further specifies that should establishment of populations of the special plant species Congdon's tarplant and San Joaquin spearscale on off-site mitigation lands be required to offset loss of these special plant species at Creekside, the Applicant would have to establish a management endowment to provide for long-term management of the preserved populations. *Id.* at 2-41.

In its Final EIR response to comments from the Applicant's consultant P/A Design Resources, Inc. that the County should not impose any additional endowment requirements beyond that required under the California Health and Safety Code, the County made plain that such additional endowment requirements were an essential integral part of the mitigation measures that the County would impose:

The referenced mitigation included in the DEIR is a requirement by the resource agencies to offset any environmental impacts that may result from the project, not to maintain the Cemetery grounds. The State Fee is only to maintain the Cemetery Grounds. As indicated in the framework for the Biological Mitigation and Monitoring Plan (BMMP) contained in Mitigation Measure 3.4-2a on pp. 3.4-39 through 3.4-42 of the DEIR, a conservation easement would be established for the approximately 147 acres of the Project Site that would serve as mitigation lands to address potential impacts on sensitive biological resources. The BMMP would include a funding and implementation agreement, and the long-term management program would require an endowment with in-perpetuity funding assurances necessary to ensure successful implementation. The BMMP would be prepared by a qualified biologist and then would be peer reviewed and approved by the County and all appropriate resource agencies prior to issuance of grading permit. The Project Sponsor would be required to demonstrate the feasibility of all aspects of the BMMP and other required mitigation as part of the agency review and approval process, including financing of long-term monitoring and maintenance of the conservation lands, which typically requires an endowment. Because it is an endowment the monies are collected prior to site disturbance.

As the cemetery fee would be collected as grave sites sold, the funding could not serve as mitigation for potential biological impacts. It is the responsibility of the Project Sponsor to secure the necessary funding necessary to demonstrate financial feasibility of the Project, including required mitigation and long-term management of conservation areas. The resource agencies will not sign off on the incidental take permit without an endowment for a project of this significance.

Id. at 2-136.

Despite the obvious centrality of demonstration of financial resources to fund the environmental mitigation endowment to the Final EIR's analysis and conclusions concerning mitigation of Creekside's adverse environmental impacts, neither the Draft EIR nor the Final EIR included the financial analysis set forth in the AGI Study (nor any equivalent financial analysis). Notably, the AGI Study was prepared and provided to the County and interested members of the public in August 2015 and the Revised AGI Study in December 2015—*i.e.*, *only after the County released the Final EIR in November 2013*. See *Sundstrom v. County of Mendocino*, (1st Dist. 1988) 202 Cal. App.3d 296, 306-308 (mitigation measures must be specified before project approval). Thus, the County has not provided the public an opportunity to comment on this important part of the EIR analysis, the ability of the Applicant to fund the required endowment for mitigation requirements specified in the Draft and Final EIR.

The County has a duty under CEQA to adopt feasible mitigation measures to substantially lessen or avoid otherwise significant adverse environmental impacts. Cal. Pub. Resources Code §§ 21002, 21081(a); Cal. Code Regs tit. 14, § 15002(a)(3), 15021(a)(2), 15091(a)(1). The County cannot rely on mitigation measures as the basis for project approval without a showing that the mitigation measures are feasible. *Kings County Farm Bureau v. City of Hanford* (5th Dist. 1990) 221 Cal. App.3d 692, 712, 720. In the Creekside context, that would include a showing that the Applicant does in fact have the financial resources to fund the environmental mitigation endowment necessary for implementation of the BMMP, LTMOP, and off-site mitigation project for impacts to special status plants. The County still further has a duty under CEQA to provide the public with an opportunity to comment on mitigation measures before finalizing an EIR and to respond to those public comments. Cal. Code Regs tit. 14, § 15088. The County would not meet these duties were it to adopt a financial analysis concluding that the Applicant has the means to fund and will fund the necessary environmental mitigation endowment outside of and after issuing the Final EIR. The County should consider the comments in this letter as part of the County's CEQA public record and the County should formally respond to these comments pursuant to Cal. Code Regs tit. 14, § 15088. For the reasons further discussed below, the County's further appropriate response to this comment letter would be to require a new, adequately thorough financial analysis from the Applicant--and then to allow further CEQA public comment on this revised financial analysis.

II. County Zoning Requirements and the California Health And Safety Code Require the Applicant To Demonstrate the Resources To Finance an Appropriate Cemetery Endowment Fund.

All land use decisions must be consistent with a county's zoning ordinance. *Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1333, *citing* Gov. Code, § 65860, subd. (a)(2); *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 355; *see also Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 957–958 (“[i]ssuance of a permit inconsistent with zoning ordinances or the general plan may be set aside and invalidated as *ultra vires*”).

The County's Zoning Ordinance, codified at Contra Costa County Code, Chapter 88-2, sets forth the standards applicable to cemeteries. Under Section 88-2.206, a land use permit is required for the establishment of a cemetery. To obtain a permit, the Applicant must provide, among other things, a statement demonstrating financial ability “to establish, care for, and maintain the proposed Cemetery in a manner to prevent it from being or becoming a public nuisance.” County Code § 88- 2.402(b)(4). California Health and Safety Code section 8739.1 requires all new cemeteries such as the Creekside Cemetery to be “endowment cemeteries.” In turn, the County's Zoning Ordinance requires for an endowment-care cemetery that the Applicant submit a statement regarding the endowment-care fund indicating “the amount then on hand and the method, scheme, or plan of continuing and adding to the fund in details sufficient to show that the cemetery will be maintained so as not to become a public nuisance.” County Code § 88-2.402(b)(5). An application must be denied if the Applicant, through the endowment fund or otherwise, “cannot demonstrate adequate financial ability to establish or maintain the proposed cemetery so as to prevent the proposed cemetery from becoming a public nuisance.” County Code § 88-2.404 (b)(4); *see also* Cal. Code Regs. Tit. 16, § 2333 (requiring cemetery

maintenance standards "to ensure the property is kept in a condition so as to prevent the cemeteries offensive deterioration.").

The Applicant has proposed meeting these requirements via the AGI Study. The AGI Study, however, is deeply flawed (marred, *inter alia*, by numerous arithmetical errors and erroneous assumptions concerning the project in issue) and does not demonstrate adequate financial ability to establish, operate and maintain the proposed Cemetery and to finance the required endowment for long-term cemetery maintenance and the additional endowment required by Mitigation Measures 3.4-2a and 3.4-2b in the Final EIR, as well. Indeed, the information currently known about water supply for the potential Cemetery combined with the financial assumptions utilized by the AGI Study suggests an opposite conclusion, that the project is likely not to generate the revenues necessary for the project to be profitable and to fund the required endowment fund. Accordingly, the County cannot, consistent with the Zoning Ordinance and the California Health and Safety Code, grant a land use permit for the proposed Cemetery in reliance on the AGI Study. At a minimum, the County must require additional financial analysis before determining whether the proposed Cemetery complies with endowment requirements of the County Zoning Ordinance, the California Health and Safety Code, and Mitigation Measures 3.4-2a and 3.4-2b in the Final EIR.

III. The AGI Study Overestimates Revenues by Improperly Assuming Full Buildout of the Cemetery.

The County cannot conclude that the AGI Study shows that the Cemetery would generate the revenues necessary to meet endowment fund requirements because the AGI Study relies on assumptions that directly contradict the County's findings in the Final EIR concerning environmental mitigation necessary to address significant adverse impacts from the proposed Cemetery's projected water use. Specifically, the financial analysis in the AGI Study assumes a cemetery design and ultimate full buildout cemetery size that the Final EIR expressly indicates may not be permitted, in order to mitigate adverse impacts from the Cemetery's projected water use.

The AGI Study describes the project as follows:

The subject project proposes irrigated, manicured landscaping for approximately 9.4 acres of the lower gardens near the main entry at the Administrative/Chapel building, as well as the indoor and outdoor mausoleums. This landscaping will include lawns, gardens and ornamental plantings, with additional features such as fountains and reflecting pools incorporated into the landscaping near the Administrative/Chapel building and the mausoleums. The remaining areas of the lower gardens, and the upper gardens, approximately 20.8 acres total, will be xeriscaped (requiring little or no irrigation or other maintenance) with native wildflowers, grasses and shrubs. Approximately 13.6 acres will receive riparian plantings, while woodland enhancements will be made to approximately 31.6 acres.

AGI Study at 57-58 (emphasis added).

The AGI Study further elaborates that the Cemetery would proceed as a “phased” project, but does not consider that the project may be halted at less than full buildout of these phases due to water constraints, even though the Final EIR proposes this to be an important potential mitigation for the project's adverse impacts on local water resources. *See* AGI Study at 59. AGI indicates the first phase of the Cemetery project would involve construction of an Administrative Building/Chapel, a partially-constructed indoor mausoleum, and two outdoor mausoleums. *Id.* at 59. AGI states that Phase Two (the first “Operational Phase”) would include 9.4 acres of “irrigated, manicured landscaping” in a Lower Gardens area which would include two acres of irrigated, traditional lawn entombment, plus 21 acres described as “Green” or xeriscaped burial grounds. *Id.* at 57, 59. The Study assumes that each acre would accommodate 3,000 burials, creating a total of 75,000 ground entombments (actually, an overestimate by 6,000 plots¹). *Id.* AGI states that Phase Two also includes 8,000 crypts and cremation niches in an indoor mausoleum, 1,000 burials in outdoor mausoleums, and 1,000 family estate and sarcophagi scattered throughout the site. *Id.* Altogether, the Study states that the Cemetery would be ready to accommodate 85,000 burials at the time operations commence (again an overestimate by 6,000 plots). *Id.* Phase Three consists of a “Lower Gardens ‘Reserve’ Area,” which could yield 23,000 entombments. *Id.* The only limitation on this phased project development identified by the AGI Study is whether this “Reserve Area” would have traditional or “green” landscaping, which is contingent on the findings of the groundwater supply monitoring required by the EIR. *Id.*

However, the project described in the Final EIR, the “Enhanced Modified Plan Alternative” (“Enhanced Plan”) conflicts with AGI’s assumptions in highly material ways. The CEQA process revealed that the project’s only source of water—groundwater on the project site—is not sufficient to supply the project as initially proposed. As a result, the Final EIR included a new proposal, the Enhanced Plan, in an effort to ensure that the Cemetery is not constructed prior to securing the water necessary to meet its demands. *See* Final EIR at 2-157-158 (The Enhanced Plan “is designed so that no development can occur until an adequate water supply is developed and proven.”). One, as the Final EIR states, the Enhanced Plan “requires that groundwater usage not exceed the conservative estimate of available groundwater (10.3 AFY).” Final EIR at 2-55. Two, under the Enhanced Plan, “Any traditional landscaping proposed would be...allowed only if it is demonstrated that there is water to establish and maintain the landscaping as shown in the Conceptual Landscape Plan.” *Id.* Three, the Enhanced Plan would require Creekside to perform five years of monitoring to establish a groundwater baseline and only allow traditional landscaping after Creekside performed this five years of monitoring. Thus, AGI’s assumption that Creekside would open with 2 acres of traditionally landscaped burial plots is erroneous. Instead, under the Enhanced Plan, Creekside would be forbidden from having traditional lawn landscaping for at least five years and would perhaps be permanently prohibited from having such lawn landscaping. Four, under the Enhanced Plan, Creekside would be required to

¹ AGI's arithmetic concerning the numbers of the project's ground entombments is faulty. AGI assumes 3000 burials per acre in approximately 21 acres of xeriscaped "Green" entombment area in the cemetery's Upper and Lower Gardens which AGI inexplicably totals as 69,000 burials (whereas 21 x 3000 is only 63,000 burials, i.e., 6000 less than projected by AGI). When added to the additional 6000 burial plots in the two acres of what AGI assumes would be traditionally landscaped cemetery grounds in the Cemetery's Lower Gardens (again assuming 3,000 burials per acre times two acres of available land), the total should be only 69,000 burial plots in these areas, not 75,000.

"[d]evelop water necessary to establish Xeriscape and/or traditional landscaping in a phased approach to ensure water usage for the site does not exceed available water." *Id.* Thus, Creekside would not necessarily be allowed to develop the full-scale 100,000 plus burials capacity that AGI projects; water limitations may preclude Creekside from developing even an exclusively xeriscaped cemetery of that size. Five, under the Enhanced Plan, the Applicant's proposed lake would be eliminated and other water uses, such as for decorative water features, would only be permitted if Creekside's five year hydrological study demonstrates adequate water supply. *Id.* Thus, Creekside may never be allowed to develop the "additional features such as *fountains and reflecting pools* incorporated into the landscaping near the Administrative/Chapel building and the mausoleums" that AGI assumes to be part of the project.

The Final EIR's analysis strongly suggests that it is highly unlikely that Creekside's five year hydrological study would show that there is sufficient local groundwater supply to allow Creekside to develop the 9.4 acres of traditional landscaping and decorative water features that the Applicant proposes. The Final EIR acknowledges the minute likelihood that additional groundwater would be discovered. *See* Final EIR at 2-156 (noting the "watershed's limited groundwater yield and difficulty in developing reliable onsite groundwater supply"). The Final EIR further documents that it is unlikely that the project can obtain a water source other than local groundwater. Final EIR at 2-51 (potential alternative water sources deemed unlikely and further analysis as mitigation or alternatives was considered speculative). Furthermore, the water needed to establish and maintain 9.4 acres of traditional, manicured landscaping greatly exceeds the 10.3 AFY available groundwater use that the Final EIR's Enhanced Plan would limit Creekside to absent a showing of a greater water supply. The County's DEIR analysis shows the Cemetery's non-irrigation operational water demand would be approximately 2.05 AFY, including domestic water (1.25± AFY) assuming two services a day in a 138-seat chapel, emergency fire protection water (0.14± AFY), and wildland fire management water (0.66± AFY). DEIR Appendix E, June 2009 Memo, pdf p. 497-498. The two acres of traditional lawn entombment proposed by Creekside alone would require 8 AFY. DEIR Appendix E, June 2009 Memo, pdf p. 499 (The amount of water required for each acre of traditional cemetery landscaping is approximately 4 AFY). However, more water would be necessary for (1) an additional 7.4 acres of irrigated, manicured landscaping proposed by Creekside and assumed in AGI's analysis; (2) decorative water features; and (3) 21 acres of xeriscaped area (the EIR and AGI Study state that xeriscaped land would require "little or no irrigation," but common sense dictates that at least some water is necessary to establish and maintain plant communities, and that water is neither quantified, nor accounted for). In sum, there is no indication that a water supply exists to serve more than a small fraction of the Creekside project, much less cemetery buildout to 85,000 or 100,000 plots.²

These discrepancies are highly material as AGI's conclusions that Creekside would be profitable and would generate sufficient revenue to establish an endowment fund sufficient to provide for the Cemetery's long-term maintenance assume full project buildout. Specifically, AGI assumes

² Moreover, it appears that AGI was not informed of the water supply issue, as the AGI Study simply states that water is supplied by on-site groundwater wells, includes a 2011 map of then-existing wells, and notes that "[a]dditional wells may be required depending on the production of water from the existing wells." AGI Study at 52-53, 58.

that the Cemetery would sell 900 interments per year at an average price of \$17,000 to generate about \$15,300,000 in annual revenue, and would continue to do so for 100 years. AGI Study at 74, 76-77 (assuming 696 burials, 176 niches, 28 crypts, and 70 scatterings sold annually). AGI assumes the sale of these interments will generate \$110,000 per year in endowment fund contribution given the set-aside of the fees per interment required by California Health and Safety Code section 8738 (\$4.50 per square foot for each grave, \$70 for each niche, \$220 for each crypt, \$70 for the cremated remains of each deceased person scattered in the Cemetery), which Creekside would augment from its revenues with an additional \$50,000 per year contribution--for a total endowment fund contribution of \$165,000 annually. AGI calculates that this would create an endowment fund of \$103 million at the end of the Cemetery's 100 years of active business operations (assuming annual compound interest return on moneys in the endowment fund of 3%). These projections will of course be wrong, perhaps dramatically so, if the County sharply curtails the size of the Cemetery as mitigation for adverse impacts on local water supply.

Before the County could approve Creekside, the County would need a financial analysis showing that the Cemetery would be profitable and would generate sufficient revenues for endowment funding purposes even if it were limited by water constraints to a much smaller project and one that included few or even no traditional lawn landscape burial plots.

IV. The AGI Study Analysis of Creekside's Revenue Potential and Competitive Position Fails to Properly Consider Creekside Would Be a Largely (or Exclusively) Xeriscaped Cemetery.

AGI's analysis of Creekside's potential revenues has two components: (1) AGI's assessment of what Creekside would be able to charge per interment and (2) the size of and the percentage of the local interment market that Creekside would be able to capture and thus the number of interments per year that Creekside would be able to sell (price per interment times number of interments per year = amount of total annual revenue). In assuming the price that Creekside could command per interment and the percentage market share that Creekside could likely capture, AGI ignores that Creekside would be a largely, or maybe even exclusively, xeriscaped cemetery potentially devoid of any lawns or decorative water features such as fountains or pools--and thus would lack the attributes/amenities of traditional cemeteries. AGI ignores that Creekside's existing competitors *all* have irrigated lawn burial plots and many have decorative water features, features that even AGI at least indirectly acknowledges that the consuming public traditionally associates with a desirable cemetery. *See* Exhibit 1 (attached). The AGI analysis is flawed for failing to consider at all how Creekside's fundamental difference from its competitors in this respect would affect the price that Creekside could charge per interment and Creekside's ability to capture market share.

AGI identifies 11 cemeteries³ within 15 miles of Creekside that AGI concludes are Creekside's effective competitors: five "Category 3 cemeteries" that AGI identifies as "large-scale cemeteries or cemeteries with plans for expansion" that are expected to conduct over 100 interments per

³ The AGI Study says that AGI has identified "12 active cemeteries," but this is an error. In actuality it only identifies 11 such cemeteries. *See* AGI Study at 68.

year and six "Category 2 cemeteries" that AGI identifies as generally interring about 50 persons per year. AGI Study at 68. As reflected in Exhibit 1 to this letter, all the Category 3 cemeteries which collectively represent most of Creekside's potential competition have all of their burial plots covered by lawn.⁴ As further reflected in Exhibit 1, many of these cemeteries also have some decorative water features. In determining what prices Creekside can charge and what competition Creekside would face, AGI focuses on the five cemeteries (Nos. 2, 4, 9, 12, and 19), which AGI concludes are "the most comparable cemeteries to the proposed Creekside Memorial Cemetery." *Id.* at 61.

With respect to Creekside's potential prices, AGI analyzed "the pricing for an upscale memorial park, considering the target market" to conclude that Creekside would be able to yield weighted annual average revenue of \$17,000 per interment.⁵ *Id.* at 74. AGI broke down how much Creekside could charge for various types of burials and explained how it calculated this weighted average revenue from this breakdown, but provided no specific explanation of how it arrived at the prices for individual types of interments. The AGI Study has only very scant discussion of typical charges for interments in the cemetery industry in general--reciting only that "the cost of a burial plot is typically more than \$4000." *Id.* at 19. AGI has an extended discussion of the prices charged by the Category 2 and 3 cemeteries AGI identifies--which is the only pricing information that remotely supports interment pricing in the range of AGI's \$17,000 per case figure (a price obviously much larger than the typical burial plot price of \$4000 that AGI recites as typical for the industry generally). *Id.* at 61-67. However, AGI reliance on the pricing charged by existing local cemeteries involves improper methodology: it is invalid for AGI to evaluate the prices charged by local, traditionally landscaped cemeteries that have extensive areas of lawn and decorative water features to reach conclusions concerning what Creekside could charge. As a xeriscaped cemetery lacking lawn or water features, Creekside may well not be seen as an "upscale memorial park" by the consuming public and, at a minimum, is obviously a very different product from a traditionally landscaped cemetery. Even AGI acknowledges "aesthetic appeal is one of the primary factors that individuals consider when choosing a cemetery," and "the appearance of the cemetery, including *well-maintained grounds* and favorable views, are important components of competition for industry operators." *Id.* at 22, 24 (emphasis added). AGI further ignores in its analysis of Creekside's potential for rapid market share capture, that Creekside would be at a competitive disadvantage, at least initially, simply by virtue of being a new cemetery--even though AGI itself acknowledges this to be an important factor in cemeteries' attraction of customers: "Older and more well known cemeteries hold a competitive advantage over new operators." *Id.* at 24. At a minimum, for AGI to provide a defensible financial analysis, AGI should have done some market research into the prices commanded by xeriscaped cemeteries. AGI further should have included in its analysis some consideration of the hurdles Creekside would face, at least in the early years, in attracting customers away from established cemeteries.

⁴ Except for the Pleasanton Pioneer Cemetery, which as a pioneer cemetery currently has minimal lawns, no views, and no decorative water features, although it has plans to expand. AGI Study at 63.

⁵ AGI assumes the following prices: indoor crypts – \$30,000; indoor niches – \$12,000; outdoor crypts – \$8000; outdoor niches – \$4000; ground plots – \$15,000; and additional services to go along with burials – \$3,415. *Id.*

The same point is true for AGI's analysis of Creekside's potential market capture. AGI assumes that Creekside "should be able to capture 50% to 60% of the unsatisfied demand" for local interments. *Id.* at 72. Again, however, AGI's assumptions concerning competitive dynamics includes no consideration of how Creekside being a largely, and maybe exclusively, xeriscaped cemetery would affect its ability to capture market share from its competitors, all of whom are traditionally landscaped cemeteries. At a minimum, for AGI to provide a defensible financial analysis, AGI should have performed some market research into how xeriscaped cemeteries are faring in attracting customers from competing traditionally landscaped cemeteries.

V. The AGI Study Improperly Ignores Costs of Environmental Mitigation and Otherwise Understates Costs in its Financial Analysis.

Financial analysis must include not only revenues, but the costs that an enterprise will face. AGI's analysis of Creekside's potential costs is also highly flawed. Most obviously, AGI's cost analysis is flawed for failing to account for the costs of environmental mitigation for Creekside, which include a multiyear hydrological study to ascertain and document available groundwater and current reliance on groundwater by neighboring property owners, water quality sampling in Tassajara Creek, and the cost of trucking water in to establish both cemetery landscape vegetation and additional vegetation required for environmental mitigation/enhancement (the Enhanced Project expressly forbids Creekside from using groundwater to establish this vegetation and instead requires Creekside to import water from off-site for this purpose. Final EIR at 2-55, Mitigation Measures 3.9-3b, 3.9-3c, 3.9-3c, 3.9-4). AGI's cost analysis only considers the typical construction and operating costs of a cemetery, not the added costs of environmental mitigation unique to Creekside--despite the fact that Creekside is required to study and mitigate the effects of increased groundwater extraction in an area with limited rainfall now exacerbated by a multiyear drought. *See* AGI Study at 73-75. These additional costs are likely to be highly significant and thus to substantially reduce Creekside's profit margin. The County would need a financial analysis that includes consideration of the costs of the environmental mitigation measures imposed by the County before being able to reasonably conclude that the Cemetery would be profitable and would generate sufficient revenues for endowment funding purposes.

AGI's cost analysis is also erroneous because it only includes the costs for Creekside to develop "Phase I" of the Project. AGI identifies this Phase I as including 1,600 crypts and 6,400 niches in an indoor mausoleum (at a cost of \$4,800,000 and \$1,280,000 respectively) and 1,000 crypts in two garden mausoleums (at a cost of \$2,400,000). *Id.* at 74. However, as described in the Draft EIR (DEIR) and the Applicant's application, Creekside's full buildout includes 3,000 crypts and 12,000 niches in an indoor mausoleum (which would equate to a much larger cost of \$9 million and \$2,400,000 respectively, using the same cost per unit is assumed by AGI) and 2,000 crypts (which would equate to a much larger cost of \$4,800,000). DEIR at 2.0-9, 2.0.5. Furthermore, AGI identifies Phase I as including 7500 linear feet of road and utilities (at a cost of \$1,875,000). However, this is a gross underestimate of the amount of linear feet of road for full project buildout. The DEIR indicates that the footprint of all impervious surfaces for the project amounts to 12.68 acres--the equivalent of 551,341 sq. ft. The DEIR provides enough information to identify the footprint of all impervious surfaces besides roads (*i.e.*, all buildings). Subtracting out

these other impervious surfaces leaves 442,076 sq. ft. of roads. DEIR at 796, 2.0-5, 2.0-9, 2.0-11. Assuming an average road width of 24 feet, this is 18,420 linear feet of road for full buildout (at a cost of \$4,591,250). In sum, whereas AGI only takes into account project construction costs for Phase I of \$22 million, the true costs of full project buildout are over \$34 million (using AGI's own estimates of costs per unit). *See* Exhibit 2 (attached).

This is an obvious and significant logical flaw because for purposes of calculating the total revenue that Creekside would develop and utilize to finance an endowment fund, AGI assumes full buildout of the Project. Accordingly, for AGI to present a valid financial analysis, AGI would have to analyze the costs of full project buildout and demonstrate that revenues would be sufficient to cover full project buildout costs and still fund both a cemetery-care endowment fund and the additional endowment fund required by Mitigation Measures 3.4-2a and 3.4-2b in the Final EIR.

VI. The AGI Study's Own Calculations Fails To Show Sufficient Net Revenues for Proper Endowment of Long-Term Cemetery Maintenance.

Even taking all of AGI's assumptions and analysis at face value, the AGI Study fails to show that Creekside would generate an endowment fund sufficient for financing long-term Cemetery maintenance after Creekside closes. AGI assumes that Creekside would generate \$165,000 of contributions annually to the cemetery-care endowment fund over 100 years. AGI assumes a 3% rate of return on endowment funds. AGI concludes that this series of contributions combined with this rate of return would create an endowment fund of \$103 million in 100 years. AGI further estimates that current annual cost to maintain the Cemetery would be \$200,000. AGI assumes a 3% inflation rate to calculate that the annual maintenance costs for the Cemetery in 100 years would be \$3,845,000 per year. However, \$103 million would only generate \$3,090,000 in income at a 3% rate of return, *i.e.*, \$755,000 less than the amount needed for Cemetery maintenance. Accordingly, starting in the first year of cemetery maintenance post-cemetery closure, Creekside's operator would need to begin dipping into the endowment fund principal to fund cemetery maintenance. AGI even acknowledges that in about 50 years, endowment fund principal would be depleted, leaving no means to finance cemetery maintenance. AGI Study at 77.⁶

Even this analysis reflects errors that overstate Creekside's funding potential. AGI assumes Creekside would sell 900 interments per year at \$17,000 per interment to generate \$15,300,000 in revenue annually for 100 years. This obviously would require Creekside to have 90,000

⁶ Even this conclusion is unduly optimistic, in that it assumes cemetery maintenance costs remain fixed forever at \$3,845,000 after the 100 year point is reached. This is obviously self-contradictory and erroneous. AGI had more reasonably assumed that Cemetery maintenance costs would continue to rise at an annual 3% inflation up to the 100 year point. There is no reasonable basis for assuming that inflation in maintenance costs will abruptly stop at the 100 year point. A more reasonable analysis would assume that the 3% annual inflation rate in maintenance costs will continue after 100 years. With that assumption, the cemetery-care endowment fund would be depleted much faster than the 50 years AGI projects, and would be gone only 26 years after cemetery closure.

interment locations to sell. However, AGI assumes that Creekside would only have 84,000 such locations (in a combination of indoor and outdoor crypts, indoor and outdoor niches, and traditional burial plots). *Id.* at 74. With only 84,000 interment locations to sell, Creekside would run out of locations to sell in 93.33 years rather than 100 years and would thus generate revenue for 6.67 fewer years than AGI assumes. This translates into over \$102 million less lifetime revenue for the project than AGI projects (*i.e.*, $6.67 * \$15,300,000/\text{year} = \102 million).

VII. AGI's Analysis of the Relevant Market Size, Creekside's Market Competition and Likely Market Capture Are Flawed.

A. AGI Has Improperly Defined the Relevant Market Size.

AGI defines the relevant market geographic area as encompassing a 15-mile radius around the Creekside project site. AGI Study at 6. AGI's supply analysis evaluates the competitive market based on cemeteries and memorial parks within this 15-mile "primary market" radius, and its demand analysis evaluates the number of probable consumers based on demographic, population, and growth data within the same area. AGI Study at 7.

However, the AGI Study incorrectly plotted the location of the proposed Creekside Cemetery for purposes of calculating the population within a 15 mile radius of the Cemetery-- erroneously placing the center of the Cemetery 2.3 miles to the northwest of where the proposed Cemetery is actually located. The AGI Study utilized ESRI On-Line reports to calculate the population within the relevant 15 mile radius. AGI Study at 69, 84-93. However, the AGI Study entered the wrong GPS coordinates for the project site. For purposes of generating its ESRI data on market demographics, the AGI Study entered the Creekside Cemetery's coordinates as: latitude--37.79928, longitude--121.87754. AGI Study at 69, 84-93. The attached Exhibit 3 shows that these coordinates are located at an entirely different location from where the Cemetery is proposed to be built. In fact, as illustrated in the attached Exhibit 3, the proposed Cemetery's proper GPS coordinates are: latitude--37.767092, longitude--121.86673. The attached Exhibit 4 illustrates the 15 mile radius market area mapped by the AGI Study compared with the true 15 mile radius area surrounding the true location of the proposed Cemetery. This error is highly significant. As a result, the AGI Study erroneously included the populations of Pittsburg and a portion of Antioch in its market delineation area. See Exhibit 4 (attached). The AGI Study overstates the true population of the 15 mile radius market area by 17.5%. The same ESRI data used by AGI to estimate the population within its market delineation area shows that the population of the true 15 mile radius area surrounding the proposed Cemetery is only 831,029 instead of the 976,784 assumed by AGI. See Exhibit 5 (attached).

The AGI Study concluded, based on the 2015 population within the incorrectly delineated market area (976,784), an assumed local death rate (610/100,000 people), and the California cremation rate (55%), that there are about 2,680 total interments (*i.e.*, full body burials) per year within the market area. AGI Study at 70. The AGI Study further concluded that 950 of these annual interments would be sold to existing cemeteries, leaving an unsatisfied demand of 1,730 interments per year, of which the Project would capture 50-60% or about 900 annual interments. *Id.* at 71-72. However, because the Study overstated the population in the market area by about 17.5 percent, its conclusions regarding unsatisfied demand and the number of annual interments

the Project may expect to capture are likewise improperly inflated. Moreover, because the Study's projected revenue (\$15,000,000 per year--*see* AGI Study at 72) and annual contributions to the endowment care fund (\$111, 076 + a 50% contribution from the Applicant—*see* AGI Study at 76-78) are based on an incorrect number of potential interments, the AGI Study does not adequately demonstrate financial ability to fund even just a cemetery-care endowment fund. The County must insist on a revised financial analysis that uses the correct population figures for the projected market area.

A second error in AGI's analysis is assuming Creekside's relevant potential market to be equivalent to the number of deceased persons within a 15 mile radius of the Cemetery who will be laid to rest with full-body burials as opposed to being cremated. AGI excludes the latter from Creekside's potential customer base, which it estimates as 55% of all deaths within the market area (based on current average cremation rates in California). AGI Study at 70. Yet, AGI elsewhere contradicts its assumed exclusion of cremated persons from Creekside's potential customer base as it clearly identifies cremated persons as among this customer base. By definition, only cremated remains can be accommodated in niches, and AGI assumes that 16,400 of Creekside's interment locations would be niches. *Id.* at 74. AGI fails to consider Creekside's true potential market: the percentage of deceased persons whose survivors would opt to have their bodies buried intact or their cremated remains interred in local cemeteries. For AGI to have properly defined the relevant potential market, it should have done some research into the percentage of survivors who opt to have their deceased family members transported elsewhere for full-body burial or cremated with their ashes either kept at home in urns, scattered in the environment, or transported out of the area for final disposition.

B. AGI's Analysis of Market Competition Is Erroneous.

As noted, AGI assumes that the relevant market for a cemetery is a 15 mile radius around the Cemetery. AGI identifies Creekside's competitors as those Category 3 cemeteries located within (or only slightly beyond) 15 miles of Creekside. AGI's logical flaw in this approach is that, to be consistent with AGI's premise, each of these competing cemeteries must also be assumed to have 15 mile radius market areas. This means that the relevant market area for any cemetery located within 30 miles of Creekside has at least some overlap with the Creekside market area defined by AGI. For example, 14.4% of the 15 mile radius market area of a cemetery located 22.5 miles away from Creekside would overlap with Creekside's market area. *See* Exhibits 6 and 7 (attached). Thus, a comprehensive assessment of Creekside's competitors would include all cemeteries located within 30 miles of Creekside, not 15 miles as done in the AGI Study. This flaw is quite significant: AGI eliminates from its consideration of market competition at least 28 cemeteries that are located within 15-30 miles of Creekside. *See* Exhibit 7. Notably, AGI eliminates the 226 acre Mountain View Cemetery in Oakland as one of Creekside's competitors, even though it is located only 20.9 miles away and 19.1% percent of its market area overlaps with the market area of Creekside. Similarly, AGI eliminates the nearly 200 acre Category 3 Queen of Heaven Cemetery in Lafayette, although it is only 17.9 miles away.

AGI further fails to acknowledge that the market area of existing Category 3 cemeteries nearly completely overlaps with Creekside's prospective market area. As illustrated by Exhibit 8 (attached), only 8.6% of the population within Creekside's 15 mile radius market area (71,758

out of the total area population of 831,029) does not also reside within the market area of an existing Category 3 cemetery. Moreover, this small sliver of total market population is part of the population located furthest away from Creekside, mostly in the towns of Brentwood and Antioch, a drive of nearly an hour to the proposed Cemetery. This strongly suggests that competition is greater than accounted for by AGI.

C. AGI's Analysis of Creekside's Likely Market Capture Is Erroneous.

AGI's analysis of Creekside's likely market capture is also flawed. AGI assumes that there is "unsatisfied demand" for interments currently being generated within Creekside's 15 mile radius market area and that Creekside should be able to capture 50% to 60% of this "unsatisfied demand." AGI indicates that it has estimated that the "12 active cemeteries" (though, as noted, the Study actually only identifies 11 such cemeteries) perform about 1,650 interments annually. AGI Study at 68. AGI further observes that some of the interments in these cemeteries come from customers residing outside of the 15 mile market area, particularly for the seven active cemeteries AGI identifies as Cemeteries Nos. 9, 11, 12, 14, 16, 18 and 19 within the 11 competitor Cemeteries Nos. 9-19. *Id.* at 66, 71-72. AGI indicates that 50% of the sales for these seven cemeteries (which AGI estimates as about 700 sales) come from outside the Creekside 15 mile radius market area, meaning that the 11 competitor cemeteries only sell about 950 interments annually within the Creekside market area (700 sales for Cemeteries Nos. 9, 11, 12, 14, 16, 18, and 19 and about 250 annual sales for Cemeteries Nos. 1-4). As noted, AGI assumes that the local death rate and customer preferences generate demand for 2,680 interments annually within the market area. AGI subtracts the 950 interments sold by the competing cemeteries from this 2,680 interment demand generated within the market area to conclude that there is "unsatisfied demand" for 1,730 interments that existing cemeteries are not meeting. *Id.* As noted, AGI assumes that Creekside could capture 50% to 60% of this unsatisfied demand--and uses 52% market share capture to calculate 900 sales per year. This analysis is simplistic, illogical, and relies on assumptions that, as discussed above, are plainly wrong.

One, as noted above, AGI overestimates by 17.5% the population of the true market area and thus overstates the size of the market that Creekside could potentially capture. Employing AGI's "unsatisfied demand" methodology adjusted to reflect the true size of the market would result in only "unsatisfied demand" for 1,472 interments (not 1,730) and thus only 765 interments per year for Creekside even if it could capture a 52% market share as AGI assumes.⁷ Notably, this alone would reduce Creekside's projected annual revenue from \$15.3 million to only \$13,017,240, even assuming AGI's average price of \$17,000 per sale. Two, obviously, all deceased persons within the market area are currently being laid to rest in some fashion, *i.e.*, there truly is no demand for handling the remains of deceased persons within the local market area that is not being addressed currently in some fashion. A more reasonable market analysis would have made some attempt to discern how all deceased persons within the market area are currently being laid to rest and then considered Creekside's likely ability to persuade future

⁷ AGI's derives its estimated "unsatisfied demand" number of 1,730 deaths based on its erroneous population estimate of 976,784. Since the true population estimate is 831,029, then the number of 1,730 needs to be proportionately reduced. The correct calculation is $1,730/976,784 = X/831,029$ or $X = 831,029 * 1,730/976,784 = 1,472$. Thus, using AGI's own methodology would yield only 1,472 "unsatisfied demand" deaths.

potential customers within the market area to alter the consumption patterns of past customers and thus to choose Creekside over previous options selected by survivors of deceased persons. Three, as noted above, AGI's assumption that there are only 11 cemeteries for market share within the Creekside 15 mile market radius is wrong. As discussed, there are actually at least 28 more cemeteries whose own 15 mile market radius at least partially overlaps with Creekside's 15 mile market radius that AGI ignores. All of these cemeteries would be competing for at least part of Creekside's market--and would thus reduce the extent of any "unsatisfied demand." Four, AGI's analysis of Creekside's potential to compete for market share ignores, as noted above, that Creekside would be a largely, and perhaps exclusively, xeriscaped cemetery potentially devoid of any lawns or decorative water features whereas its competitors are all traditionally landscaped cemeteries that typically have such decorative features. AGI's analysis cannot be considered reliable without any attempt to ascertain or consider how xeriscaped cemeteries have performed in capturing market share away from traditionally landscaped cemeteries.

VIII. AGI's Sensitivity Analysis Is Arbitrary and Fails to Reflect Realistic Considerations of Less Favorable Scenarios for Creekside's Economic Performance.

EPS's peer review of the AGI Study concluded that the Study could be improved by providing more project-specific financial information in a typical pro forma time series cash flow analysis that arrays the phasing of construction costs and provides more detailed assessment of operating costs. EPS further suggested that AGI's work could be improved by a "sensitivity analysis" that considered potential variation in key financial factors such as lower-than-expected annual revenues or higher-than-expected construction costs and how such variation might affect project returns. In response, AGI produced a revised Study Report that included a "Sensitivity Analysis." See AGI Study at 4.1, 74, 114-15. AGI's Sensitivity Analysis considered four "pro forma" alternative scenarios for Creekside's economic performance: scenario 1 – 10% less revenues than projected by AGI's original analysis, operating expenses remaining at 80% of revenues but applying this percentage to the assumed reduced revenues; scenario 2 – 10% less revenue than projected by AGI's original analysis, operating expenses declining to 70% of these reduced revenues; scenario 3 – 10% more revenues than projected by AGI, operating expenses remaining at 80% of revenues but applying this percentage to these increased revenues; scenario 4 – 10% more revenues than projected by AGI, operating expenses increasing to 90% of these increased revenues. In all four scenarios, AGI assumed endowment care contributions would change slightly in dollar terms depending on fluctuations in revenue, but would remain a constant percentage, 1.08%, of revenues. In all four alternative scenarios, AGI projected Creekside remaining profitable, with net revenues ranging from \$1.5 million to just under \$4 million annually. *Id.*

In the main text of the report, AGI further indicated it also developed four additional "discounted cash flow analysis" scenarios: scenario 5 – cash flows stabilize in year 3 of Creekside's operations with expenses remaining as AGI's main analysis projects; scenario 6 – cash flows stabilize in year 5 of Creekside's operations with expenses remaining as AGI's main analysis projects; scenario 7 – cash flows stabilize in year 3 of Creekside's operations with expenses higher than what AGI's main analysis projects; scenario 8 – cash flows stabilize in year 3 of Creekside's operations with expenses higher than what AGI's main analysis projects. *Id.* at 4.1.

For all four of these latter scenarios, AGI projects positive return on investment ranging from 13.2% to 20.7%.⁸

AGI's "Sensitivity Analysis" analysis cannot reasonably be concluded to be a sound analysis of potential alternative economic outcomes for Creekside. AGI provides no rationale for assuming 10% increases or decreases in either Creekside's revenues or expenses nor any rationale for assuming that endowment contribution expense would remain a fixed 1.08% of revenues, regardless of how revenues fluctuate. With what AGI has provided in its report, these percentages have simply been chosen arbitrarily, apparently only to ensure that Creekside continues to look potentially profitable on paper. While forecasting the potential range of future economic performance of any yet-to-be established business of course requires assumptions and a degree of guesswork, the scenarios should be at least tied to some consideration of the potential factors that could increase or decrease revenues or expenses. AGI should have at least identified and made some attempt to contemplate the potential factors that could obviously cause Creekside's revenues to fluctuate including: (1) difficulty in attracting market share from existing cemeteries as a xeriscaped cemetery, especially if the County denies Creekside the right to develop any traditional cemetery landscaping or decorative features as water conservation measures, (2) inability to charge \$17,000 as a weighted average for interments and remain competitive with other cemetery options, since as a xeriscaped cemetery, Creekside would not be considered as desirable as more traditional landscaped competing cemeteries; (3) continued increase in the percentage of consumer preference for cremation over full body burial, with acknowledgment that if past trends towards increased consumer preference for cremation continue, this could cause Creekside's revenues to decline given that handling cremations generate substantially less revenue than full-body burials, and (4) difficulty in acquiring customers, especially in early years, because of customers' preference for having their deceased family members interred in existing cemeteries near other family members' existing graves. AGI could and should have performed a market analysis with some basis in data reality by looking at how xeriscaped cemeteries (or even just new cemeteries) have performed economically elsewhere, especially with respect to attracting customers in a competitive environment. A significant flaw in AGI's analysis is that even the limited pricing and revenue data that the Study presents is all for well-established cemeteries, rather than new cemeteries entering an area with established competitors. Additionally, AGI should have at least identified and made some attempt to contemplate the factors that could obviously cause Creekside's costs to fluctuate. The most obvious of these potentially fluctuating costs is the cost of environmental mitigation, a large portion of which is presently unknown and will remain unknowable until Creekside completes the County's required hydrological study. AGI could and should have made some attempt to evaluate the range of potential environmental mitigation expense by researching what environmental mitigation measures have typically cost elsewhere.

⁸ Inexplicably, however, AGI's more detailed description of its "discounted cash flow analysis" set forth in the Study's addendum is not consistent with this textual explanation. *Id.* at 115. In this addenda, AGI has renamed these four scenarios as 1-4 rather than 5-8 and has made several significant unexplained modifications to these scenarios. In the addendum, AGI adds an inflation factor to its revenue projections for three of four scenarios-- something unexplained in the Study's text. The addendum also shows revenues, not merely costs, fluctuating in the different scenarios. The addendum also shows costs remaining a constant percentage of expenses in only the second scenario, not the first.

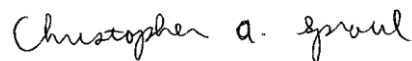
Conclusion

In sum, for the reasons set forth above, the AGI Study fails to demonstrate adequate financial ability to maintain the proposed Cemetery so as to prevent it from becoming a public nuisance. Accordingly, the County cannot, consistent with County Zoning Ordinance County Code section 88-2.404 and California Health and Safety Code sections 8738, 8738.1 grant a conditional use permit for the Creekside project in reliance on AGI's conclusions. The AGI Study further fails to provide information that would allow the County to conclude that the Applicant has the demonstrated financial means to fund the BMMP and LTMOP required by Mitigation Measures 3.4-2a and 3.4-2b in the Final EIR.

We will shortly submit additional comments expressing our additional objections on legal and policy grounds to approval of the Cemetery along the lines proposed in the Final EIR.

Thank you for your consideration of our comments. Please keep us informed of the County's further processing of approval requests for the Cemetery.

Sincerely,



Christopher Sproul
Environmental Advocates

Attachments