

1 Petitioners allege:
2

3 INTRODUCTION

4 Citizens for Adequate Review (CFAR), a non-profit public interest corporation, and
5 Antonio Andrade bring this mandamus action in the public interest to enforce mandates of the
6 California Environmental Quality Act. CFAR challenges the action of the County of Mendocino
7 to approve the demolition of the former Masonite Plant on property owned by Developers
8 Diversified Realty DB Mendocino LLC (DDR) that lies just north of the City of Ukiah. The
9 demolition is a first step towards the construction of a related commercial mall project proposed
10 by DDR, the Mendocino Crossings Development, without a valid project approval or any CEQA
11 review.

12 County program level environmental review for the revised Ukiah Valley Area Plan
13 (UVAP) is currently in progress. The UVAP EIR envisions the development of the Masonite
14 site in its “preferred project alternative” with the attendant zone and general plan changes in
15 place, consistent with the development of the mall project, but does not analyze the demolition
16 of the Masonite site. In its September 2007 Quarterly SEC filings, DDR lists the mall project as
17 “under construction.” The SEC document describes the project as the “Ukiah commercial
18 center” and as “Wholly-Owned and Consolidated Joint Venture Developments Currently *in*
19 *Progress*” with an expected gross leasable area of 669, 406 sq. ft. and expected cost of \$133.5
20 million dollars with a projected completion date of 2009. (Emphasis added.) The October 2007
21 MSN Money Central News reported that DDR had the Ukiah shopping center listed as a project
22 under construction. As one of the largest mall developers in the United States, DDR is in the
23 business of building malls.

24 The County Building and Planning Services Department processed the demolition permit
25 as a ministerial permit even though the demolition, as conditioned by the Board of Supervisors,
26 should have been considered a discretionary permit subject to CEQA. Further, where a project
27 involves an approval that contains elements of both a ministerial action and a discretionary
28 action (the mall project) the project will be deemed to be discretionary and will be subject to the

1 requirement of CEQA. The demolition is part of the “whole of the action” of the mall project
2 and may not be segmented from analysis and mitigation of the potential impacts of the entire
3 project.

4 Substantial evidence from the administrative record supports the requisite “fair
5 argument” that the whole project may have significant environmental impacts relating to air
6 quality, noise, dust, traffic and circulation, public health, hazardous materials, hydrology and
7 water quality, and inconsistency with area plans. Of special concern are the continuing potential
8 health risks associated with the demolition due to the numerous toxic substances that were
9 produced at the industrial facility over the years and the lack of coordination of the oversight
10 process. Preparation of an environmental impact report is required as a matter of law to analyze
11 potential environmental impacts and to inform consideration and adoption of mitigations and
12 project alternatives to the demolition and the mall development project.

13 The peremptory writ should issue to enforce the mandates of CEQA and to require the
14 County to set aside the demolition permit that would be a first step in the proposed mall project.
15 As a matter of law, the County’s future consideration of any such development must first be
16 informed by its preparation of an environmental impact report (EIR). The EIR process will
17 allow the County to understand the potentially significant environmental impacts of the
18 demolition and related development with feasible mitigations and project alternatives to protect
19 the County’s environs.

20 **JURISDICTION**

21 2. This Court has jurisdiction under Public Resources Code sections 21168 and 21168.5
22 and Code of Civil Procedure sections 1085 and 1094.5. The parties and the site are located
23 within the County of Mendocino.

24 **PARTIES**

25 3. Citizens for Adequate Review (CFAR) is a non-profit public benefit corporation
26 formed in 1987 to promote environmental protection in the environs of the Mendocino County
27 area for the benefit of the people of Mendocino. CFAR members include community residents
28 and concerned citizens who personally enjoy and appreciate the Mendocino environs. CFAR

1 brings this petition on behalf of all others similarly situated who are too numerous to be named
2 and brought before this Court as petitioners. Antonio Andrade is among the members of CFAR
3 and is a County resident who discovered that work on the proposed project has commenced
4 without the required approvals or any environmental review. Since no CEQA review was
5 conducted for the demolition, there was no opportunity to object to the adequacy of
6 environmental review, and since there was no project approval there was no opportunity or
7 requirement to object.

8 4. Respondents County of Mendocino, its Board of Supervisors, the Department of
9 Planning and Building Services, the Chief Executive Office, CEO Tom Mitchell, and the Air
10 Quality Management District are the governmental bodies that are implementing the project and
11 act as lead agency. Respondent Director Raymond Hall, Mendocino County Department of
12 Planning and Building Services approved the demolition permit. Respondent Gary Leonard,
13 Mendocino County Deputy Director of the Department of Transportation Solid Waste Division
14 issued the Construction and Demolition Recycling and Reuse Plan. Named individuals are sued
15 in their official capacity only. Does 1 to 10 are Respondents whose true names and capacities
16 are currently unknown to Petitioners. If their true names and capacities are known, Petitioners
17 will amend this petition to assert them.

18 5. Real Parties in Interest, Developers Diversified Realty DB Mendocino LLC is listed
19 as the owner of the property, Complete Decon Inc. is the demolition contractor who is listed as
20 the applicant of the demolition permit and is implementing the demolition, DenBeste
21 Transportation Inc. is the grading and excavation contractor, and Lori DenBeste is listed as the
22 President of DenBeste Transportation Inc. Does 11 to 20 are Real Parties in Interest whose true
23 names and capacities are currently unknown to Petitioners. If their true names and capacities are
24 known, Petitioners will amend this petition to assert them.

25 6. Not all of the named Respondents and Real Parties in Interest appear to be
26 indispensable to this action and Petitioners anticipate that they will dismiss any named party that
27 so requests and is not indispensable in the view of the Court or the other named parties.

28 7. The paragraphs below refer to and rely on information in documents relating to this

1 action, all of which will be filed with this Court as part of the record of proceedings and which
2 are here incorporated by reference.

3 **GENERAL ALLEGATIONS**

4 8. The project site is located at 280, 300 Ford Road, and 1175 State Street on the former
5 Masonite plant site, accessor's parcel numbers 170-170-04, 05, and 12; 170-190-02, 03, 04, 05,
6 06, 09, 14, and 15, at the intersection of North State Street and Highway 101.

7 9. In 2002 and 2003 the County prepared a draft Ukiah Valley Area Plan (UVAP), a
8 county-wide planning document that governs land use and will serve as the General Plan, and in
9 2004 and 2005, a Draft Program Environmental Impact Report (EIR) was prepared for that
10 project. The UVAP will provide long-term policy direction for growth and development in the
11 plan area over the planning period.

12 10. In early 2005, DDR submitted plans for a commercial mall development to the
13 Department of Planning and Building Services including an application for a general plan
14 amendment (Industrial to Commercial) and a similar zoning change (I-2 to C-2). The application
15 contained a topographical map, general plan map, two proposed site plans with project statistics,
16 along with a check for the application fee and an EIR deposit. As noted in the application

17 [a]s identified in the draft Ukiah Valley Plan, tentatively adopted by the Board of
18 Supervisors, the North State area is in transition from industrial to commercial and
19 residential. This site at the northeast corner of North State Street and Highway 101 is
at a prime location for commercial development.

20 DDR further noted that "all existing structures will be demolished and removed" to make way
21 for the roughly 700,000 square footage development. The application stated that proposed
22 project phasing consisted of: "1. Phase I – Retail on the east boundary plus internal roads – 3rd
23 Quarter 2007 2. Phase II – North State Street Pads – 4th Quarter 2007 3. Phase III – All infill
24 retail – 2nd Quarter 2008." Access to the site "will be provided by North State Street, Masonite
25 Road and Ford Road."

26 11. On August 17, 2005, in response to the DDR project application, Chief Planner Frank
27 Lynch assured DDR in a letter that zoning changes considered by the revised UVAP would take
28

1 into account zoning that would be consistent with the project. Lynch confirmed that the
2 demolition is a part of the proposed project and would be subject to environmental review.

3 Planner Lynch noted that

4 it would be appropriate to submit any other environmental studies that have been
5 prepared for the site. I assume there have been detailed studies prepared for the
6 demolition of the plant, as well as groundwater contamination studies. ... While the EIR
7 process will independently investigate the myriad of environmental issues the project
8 presents, any studies that you have to address issues would be of assistance to the
9 consultant preparing the EIR and provide clarity to the project presented.

10 The applicant also signed an indemnification and hold harmless agreement with the County as
11 required by County ordinance for applicants with discretionary land use approvals.

12 12. In 2006, in response to issues raised by agencies and individuals on the Draft EIR,
13 the County determined that the Draft UVAP required revision and the County launched a
14 revised UVAP and the EIR reassessment process. The UVAP program EIR is expected to
15 review the potential environmental impacts of converting the Masonite site from Industrial to
16 Mixed Use, allowing commercial development of the site, but the proposed program EIR will
17 not include review of the project specific impacts nor potential impacts of the demolition or
18 remediation efforts currently underway on the site.

19 13. In August 2006, DDR purchased property from the Masonite Corporation on the
20 proposed development parcels. The County Building Division requires that demolition permits
21 receive clearance from the Air Quality Management District prior to issuance of a permit.

22 14. On July 10, 2007, the Air Quality Management District issued a clearance for the
23 demolition permit.

24 15. On July 16, 2007, the Department of Planning and Building Services issued the
25 demolition permit to the applicant and contractor Complete Decon Inc., and listed DDR as the
26 owner of the property.¹ The demolition permit indicated that the demolition was part of the
27 “Mendocino Crossings Development – Package 1: Demolition (Former Masonite Site).” The
28 demolition is slated to occur in three phases but the permit only encompasses the first two

1 phases of demolition. The permit states that the first two phases of work consists of the
2 following: removal of building superstructures and other structures, including equipment and
3 fixtures, to foundation and removal of tanks, slabs, asphalt and sub-grade piping in the above
4 ground petroleum hydrocarbon storage tank area; barricading of pits and vaults; salvage
5 materials identified by owner; and removal and disposal of hazardous materials, including
6 asbestos abatement, handling, disposal and/or recycling of silica-containing material, lead-
7 containing material, material coated with lead-based paint, and residual material in tanks, piping
8 and or other reservoirs. The last phase of demolition is slated to occur in the spring of 2008 and
9 is under a separate contract. The permit notes that “[a] separate contract will be awarded for
10 slab, foundation, and underground utility demolition.”

11 16. On July 16, 2007, the Mendocino County Solid Waste Division issued a Construction
12 and Demolition Recycling and Reuse Plan for the demolition. The Plan stated that a total of
13 535,000 square feet of building was slated for removal. Commencement of the first phase of the
14 demolition was estimated to occur on July 20, 2007, with an estimated finish date of the second
15 phase of demolition by November 30, 2007. The County Executive Office also confirmed that
16 “demolition of the buildings has been taking place since July 2007.” Christopher Brown, AICP,
17 Air Quality Management District stated on September 14, 2007, that “[t]he District has been
18 monitoring the site since the abatement and demolition process began on July 31.” It is
19 Petitioners’ belief that demolition commenced on or about July 31, 2007.

20 17. Chapter 18.35 to Title 18 of the Mendocino County Code provides for the
21 Construction and Demolition Recycling and Reuse. The Code states in relevant part that
22 “project” means a demolition or construction activity for which a County building permit
23 is required, and in the case of ... a commercial development consisting of several
24 detached buildings, the “over all project” shall be defined as the entire development for
25 purposes of determining exemption or non-exemption from the waste reduction
26 requirements of this ordinance.

27 Both the phasing of the demolition permit to include a separate future phase not covered under
28

¹ County demolition permits are not governed by County Code, instead the County utilizes the 2001 Uniform Building Code, Chapter 33, Section 3303.9.

1 the permit, and the segmentation of the demolition phase from the commercial development
2 project phase, are in violation of the code requirement to consider the “overall project” for
3 purposes of applying the requirements of the ordinance.

4 18. On July 19, 2007, Jeff Adams, AIA, Senior Development Director for DDR
5 submitted an economic analysis for the Mendocino Crossings development project to the Board
6 of Supervisors, *Mendocino County Retail Sales Leakage Assessment and Regional Shopping*
7 *Center Impact Analysis (update) and Industrial Trends Analysis*.

8 19. On August 15, 2007, County of Mendocino Health and Human Services Agency
9 Public Health Officer Marvin Trotter M.D., wrote to the California Environmental Protection
10 Agency, Department of Toxic Substances Control, requesting the department assume oversight
11 of the “Masonite project” cleanup efforts citing health concerns for the Ukiah Valley residents.
12 Dr. Trotter noted that the Masonite Corporation manufactured many products involving toxic
13 substances for decades in Ukiah and stated that the proposed large shopping mall project
14 warrants an assessment by the agency for risk assessment and cleanup similar to the Georgia
15 Pacific site in Fort Bragg. Dr. Trotter expressed that the cleanup effort would be better handled
16 under the EPA than the Water Quality Board as proposed by the County. Dr. Trotter
17 commended EPA Director Maureen Gorsen on the excellence of the Georgia Pacific site
18 cleanup that involved “community input, transparency, adequate data collection and unbiased
19 recommendations.”

20 20. On August 21, 2007, the Board of Supervisors reviewed the alternatives identified in
21 the original Notice of Preparation for the UVAP EIR and selected an alternative that is the
22 current UVAP Project.

23 21. In August 2007, DDR submitted a follow-up economic study for the Mendocino
24 Crossings development to the Board of Supervisors. In August and September of 2007, DDR
25 held public forums to consider the design of the mall and hired a public relations firm.

26 22. On September 5, 2007, DenBeste Transportation Inc. was issued a building permit
27 for the subject property for the purpose of excavation and grading.

28 23. In its September 2007 Quarterly SEC filings, DDR lists the mall project as “under

1 construction.” The SEC document describes the project as the “Ukiah commercial center” and
2 as “Wholly-Owned and Consolidated Joint Venture Developments Currently *in Progress*” with
3 an expected gross leasable area of 669, 406 sq. ft. and expected cost of \$133.5 million dollars
4 with a projected completion date of 2009. (Emphasis added.)

5 24. In September 2007, Mendocino County Health Advisory Board (MCHAB) Chair
6 Antonio Andrade wrote to the Board of Supervisors (BOS) about the public’s concerns
7 regarding the potential health risks associated with the demolition of the Masonite facility and
8 requested that the BOS request State EPA oversight. On behalf of the County Health Advisory
9 Board, Andrade stated that the Masonite facility has used numerous toxic substances in its
10 production facility some of which were treated and disposed of onsite and still remain in parts of
11 the facility such as the smoke stacks that are slated for demolition. MCHAB stated that there
12 have been observations of airborne particulate matter coming from the site. MCHAB noted that
13 waste disposal practices in Mendocino County have often not met current environmental
14 requirements. MCHAB noted that although various departments and the Air Quality
15 Management District are overseeing the process, there does not appear to be an overall
16 demolition plan or a management team in place coordinating oversight of the entire process.
17 MCHAB stated that the chemical make-up and magnitude of the toxic substances used at the
18 facility for over 50 years are hazardous by nature. MCHAB urged the County to take the highest
19 precautions and stated that “the adage, ‘An ounce of prevention is worth a pound of cure’
20 applies here.”

21 25. On October 22, 2007, a group of citizens wrote an extensive letter to the California
22 State Department of Toxic Substance Control (DTSC) thoroughly documenting the potential for
23 harmful environmental impacts associated with the demolition project. The citizens asked for
24 the immediate halt of demolition and remedial activities at the Masonite site due to concerns
25 about the ongoing demolition activities including the removal of contaminated stacks and soil.
26 The citizens requested the DTSC assume oversight of the demolition in light of records that
27 indicate dioxins, heavy metals, and other hazardous substances that are potentially present at and
28 were routinely emitted from the Masonite facility. The citizens noted that in the 1990s Masonite

1 had been the subject of hefty fines by the State Air Resources Board and EPA due to
2 noncompliance for air toxics and air quality and that there is evidence that toxic substances
3 remain on site. The citizens noted that not only has there been no comprehensive site
4 characterization document or clear list of chemicals of concern (COC) to guide demolition
5 safety precautions and remediation activities, there has been inadequate testing of the removal of
6 materials from the site. The citizens noted that during the demolition process some of the
7 remedial efforts were the result of persistent public investigation and pressure and that it is the
8 responsibility of the County not the citizens to develop a comprehensive, coordinated, cohesive
9 plan to fulfill their oversight responsibilities. The citizens noted that five schools are located
10 downwind of the Masonite site and that demolition materials are transported on the road
11 adjacent to the Tree of Life Montessori Elementary school located across the street from the site.
12 The citizens noted that Section 3, Division 26, Provision 42301.7 of the Health and Safety Code
13 requires the Mendocino County Air Pollution Control Officer to contact all schools within 1000
14 feet of discharges that may be harmful and take actions as the situation demands. No
15 notifications have been issued. The citizens noted that the Air Quality Management District
16 failed to adequately monitor the air quality for any other contaminants other than asbestos. The
17 citizens noted that in late September 2007 citizens reviewed records at the Mendocino County
18 Environmental Health (EH) office to obtain lists of Masonite hazardous materials inventories
19 and business plans and discovered that virtually all records listing these substances were
20 missing. EH staff was at a loss to explain what had happened to these records. “Apparently no
21 report of the missing information was reported to authorities and no investigation into the loss of
22 this information has been launched.” The citizens noted that the mandated demolition storm
23 water management plan was also not available for public review.

24 26. At the October 23, 2007, Board of Supervisors hearing concerned citizens and
25 residents expressed their concerns regarding the demolition and cleanup project on the Masonite
26 property urging the Board to take immediate action to prevent harm. Supervisor J. David Colfax
27 expressed concerns that the Board had not addressed the issues and asked what steps the County
28 should take to address them. Chair Kendall Smith stated that a public hearing/workshop should

1 occur sooner than Chief Executive Officer Tom Mitchell had indicated and suggested the Board
2 address the topic at their next meeting.

3 27. At the October 30, 2007, Board of Supervisors (BOS) hearing the BOS conditioned
4 the demolition permit by directing the Chief Executive Officer to “immediately contact the
5 property owner requesting that they suspend demolition of the stacks at the former Masonite
6 site” until the public meeting in November had occurred. Chair Kendall Smith expressed
7 concerns regarding whether the County had the expertise to conduct the cleanup and supported
8 DTSC oversight. Ukiah attorney Barry Vogel commented that the BOS should require
9 environmental review to be conducted for the demolition project as it constituted a mixed
10 discretionary and ministerial permit that triggers CEQA. Resident, Meca Wawona requested that
11 the BOS halt the demolition and remediation cleanup and requested DTSC oversight. Meca
12 expressed her concerns regarding the lack of oversight for the large industrial cleanup project,
13 the fragmentation of the cleanup process, and lack of coordination that has led to a lack of
14 comprehensive review of all of the activities as one project under CEQA.

15 28. On October 31, 2007, County Executive Office CEO, Tom Mitchell issued a news
16 release that the Executive Office would hold a public forum on November 5, 2007, to discuss
17 the status of the DDR property at 300 Ford Road in Ukiah. Mitchell stated that

18 [t]he former Masonite property west of the railroad tracks has been purchased by DDR
19 and demolition of the buildings has been taking place since July 2007. Concerns have
20 been raised in the community about the demolition process, hazardous wastes at the site,
21 the characterization of contamination at the property and potential for human exposure.

22 This public forum is for any interested parties to learn more about the processes and to
23 provide comments to the Mendocino County Executive Office.

24 29. At the Board of Supervisors (BOS) hearing on November 6, 2007, there was
25 extensive public comment and concern regarding the demolition activities. The County
26 conditioned the demolition and transport of waste by requiring the demolition contractor to alter
27 the truck haul routes to avoid the Montessori school. Supervisor Colfax moved that the BOS
28 request that a letter be sent by the BOS requesting the DTSC provide ongoing consultation as to
“testing, safety, and transportation, in cooperation with County staff, in order to ensure that the

1 site is properly managed.” The motion failed 2-3.

2 30. In November 2007, a new Notice of Preparation was filed for the UVAP EIR and in
3 December 2007, the Board of Supervisors chose the preferred alternatives for review in the
4 program EIR.

5 31. December 27, 2007, Chief Planner, Frank Lynch stated that, to date, DDR had not
6 withdrawn its development application.

7 32. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law.
8 Issuance of a peremptory writ is needed to avoid immediate, severe, and irreparable harm to
9 Petitioners and all Mendocino County residents via the demolition of the Masonite plant in
10 furtherance of a related mall development project without environmental review. The County
11 has capacity to correct its violations of law but refuses to do so. Legal challenge to an agency’s
12 failure to conduct environmental review for a discretionary project with potential environmental
13 impacts undertaken without a formal approval or notice of approval by the public agency is
14 timely if it is filed within 180 days of the commencement of the project. (Pub. Resources Code §
15 21167 subd. (d).) Petitioners believe that the demolition work commenced on or about July 31,
16 2007, as attested to by Christopher Brown of the Air Quality Management District. This suit is
17 timely filed.

18 **FIRST CAUSE OF ACTION**
19 **VIOLATIONS OF THE CALIFORNIA**
20 **ENVIRONMENTAL QUALITY ACT**

21 33. Petitioners incorporate all previous paragraphs as if fully set forth.

22 34. The County Respondents abused their discretion and failed to act in the manner
23 required by law in approving the demolition permit and allowing the commencement of
24 construction of the related mall development project without complying with CEQA, because:

25 a. The Planning and Building Services Department processed the demolition permit as a
26 ministerial permit although the permit, as conditioned by the Board of Supervisors and
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1 the Chief Executive Officer, should have been treated as discretionary permit requiring
2 CEQA review;

3 b. The continuing demolition project at the Masonite site is part of a larger discretionary
4 mall development project that has not been subjected to environmental review, nor has
5 the development been approved by the County;

6 c. An EIR should have been prepared and certified before the County took discretionary
7 actions with potentially significant impacts on the Mendocino County area and its
8 resources. The County failed to prepare an initial study or environmental impact report
9 for the first phase of development, the demolition of the Masonite plant, and the record
10 contains substantial evidence to support a fair argument that the whole project may result
11 in significant environmental impacts relating to air quality, noise, dust, traffic and
12 circulation, public health, hazardous materials, hydrology and water quality, and
13 inconsistency with area plans and policies;

14 d. The County improperly segmented the demolition from the related development
15 project and did not analyze the “whole of the action” when approving the demolition
16 permit.

17 **SECOND CAUSE OF ACTION**
18 **VIOLATION OF THE MENDOCINO COUNTY CODE**

19 35. Petitioner incorporates all previous paragraphs as if fully set forth;

20 36. The County of Mendocino Department of Transportation Solid Waste Division and
21 Deputy Director Gary Leonard have failed to perform a mandatory duty in failing to comply
22 with Title 18.35 to Title 18 of the Mendocino County Code, Construction and Demolition
23 Recycling and Reuse, regarding the requirements for reviewing and defining the “overall
24 project” and have instead allowed the project to be segmented.

25 WHEREFORE, Petitioners pray:

26 1. That the Court issue a peremptory writ of mandamus ordering respondents County
27 Respondents to set aside and void all approvals relative to the proposed continuing demolition
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1 of the Masonite site and to refrain from further consideration of the project until full compliance
2 with CEQA is achieved, including the preparation and certification of an environmental impact
3 report and adoption of feasible project mitigations and alternatives based on findings supported
4 by substantial evidence in the record;

5 2. That the Court issue an administrative stay order, temporary restraining order, and/or
6 preliminary injunction enjoining the County and their agents and employees from any physical
7 actions in furtherance of the project while this Petition is pending, including but not limited to
8 grading, demolition, waste disposal, or construction;

9 3. For Petitioners' costs and attorney fees pursuant to CCP section 1021.5; and

10 4. For such other and further relief as the Court finds proper.

11 Dated: January 14, 2008

PROVENCHER & FLATT, LLP

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13
14 By _____
15 Rachel Howlett
16 Attorney for Petitioners

17 **VERIFICATION**

18 I, Rachel Howlett, am an attorney for Petitioner whose members are located outside of
19 Sonoma County where I have my law offices, and so I verify this petition on its behalf. I have
20 read the Petition for Writ of Mandamus and know its contents. The matters stated in it are true
21 and correct based on my knowledge, except as to the matters which are stated on information
22 and belief, and as to those matters, I believe them to be true.

23 I declare under penalty of perjury that the above is true and correct. Executed this 14th
24 day of January, 2008, at Santa Rosa, California.

25
26
27 _____
Rachel Howlett