SVLG Support - Icon/Echo

Vince Rocha <[redacted]>

Mon 11/28/2022 10:30 AM

To: District1 <district1@sanjoseca.gov>;Jones, Chappie <Chappie.Jones@sanjoseca.gov>;District2 <District2@sanjoseca.gov>;Jimenez, Sergio <sergio.jimenez@sanjoseca.gov>;District3 <district3@sanjoseca.gov>;Peralez, Raul <Raul.Peralez@sanjoseca.gov>;District4 <District4@sanjoseca.gov>;Cohen, David <David.Cohen@sanjoseca.gov>;District5 <District5@sanjoseca.gov>;Carrasco, Magdalena <Magdalena.Carrasco@sanjoseca.gov>;District 6 <district6@sanjoseca.gov>;Davis, Dev <dev.davis@sanjoseca.gov>;District7 <District7@sanjoseca.gov>;Esparza, Maya <Maya.Esparza@sanjoseca.gov>;District8 <district8@sanjoseca.gov>;Arenas, Sylvia <sylvia.arenas@sanjoseca.gov>;District9 <district9@sanjoseca.gov>;Foley, Pam <Pam.Foley@sanjoseca.gov>;District 10 <District10@sanjoseca.gov>;Mahan, Matt <Matt.Mahan@sanjoseca.gov>

1 attachments (99 KB)

Icon-Echo - SVLG SUPPORT - San Jose - 11.29.22.pdf;

Dear Mayor and Council,

Please see the attached letter of support for the Icon-Echo Mixed Use Project coming before you this week. The Silicon Valley Leadership Group strongly supports this mixed-use development near transit.

Regards,

Vince Rocha (he/him)
Vice President, Housing & Community Development
[redacted] | svlg.org
Connect with us: Twitter | LinkedIn | Facebook

We've got a new office! As of October 1, our new headquarters will be at [redacted].

SILICON VALLEY LEADERSHIP GROUP

[redacted]

[redacted]

svlg.org

DATE
November 29, 2022

Mayor and Council
City of San José
200 E. Santa Clara St.
San José, CA 95113

RE: Support for Icon/Echo Mixed Use Development

Dear Mayor and Council,

On behalf of the Silicon Valley Leadership Group, I am writing in support of the Icon/Echo mixed use development proposal located at N. 4th street between Santa Clara street and St. John from Urban Catalyst.

The Silicon Valley Leadership Group is driven by more than 350 member companies to proactively tackle issues to improve our communities and strengthen our economy, with a focus on education, energy, the environment, health care, housing, tax policy, tech & innovation policy, and transportation. Among the top concerns of our members is a need for housing affordable for all incomes here in the Bay Area.

This project will provide up to 415 needed new homes and over half a million square feet of new commercial space near the location of the future BART station in downtown San José. This project will activate the downtown area as well as contribute to the city's tax base with a new commercial and retail space.

This kind of transit-oriented development is environmentally friendly and leverages the public transit infrastructure instead of our overtaxed roadways.

It is important to note that not only does this project meet the housing needs of the community, but it also anchors the downtown as a place where new jobs can be created and contribute to the local economy.

We encourage approve this excellent project. Thank you for consideration of our comments.

Sincerely,

[redacted]

Vince Rocha
Vice President, Housing and Community Development
Silicon Valley Leadership Group

FW: Support Letter - Icon Echo (November 29 2022)

City Clerk <city.clerk@sanjoseca.gov>
Mon 11/28/2022 12:21 PM
To: Agendadesk <Agendadesk@sanjoseca.gov>

From: Derrick Seaver <[redacted]
Sent: Monday, November 28, 2022 12:07 PM
To: Derrick Seaver <[redacted]
Cc: Taber, Toni <toni.taber@sanjoseca.gov>; City Clerk <city.clerk@sanjoseca.gov>; The Office of Mayor Sam Liccardo <TheOfficeofMayorSamLiccardo@sanjoseca.gov>; Reed, Jim <Jim.Reed@sanjoseca.gov>; Jones, Chappie <Chappie.Jones@sanjoseca.gov>; Gomez, David <David.Gomez@sanjoseca.gov>; Jimenez, Sergio <sergio.jimenez@sanjoseca.gov>; Sandoval, Vanessa <vanessa.sandoval@sanjoseca.gov>; Peralez, Raul <Raul.Peralez@sanjoseca.gov>; Ramos, Christina M <christina.m.ramos@sanjoseca.gov>; Cohen, David <David.Cohen@sanjoseca.gov>; Brown, Stacey <Stacey.Brown@sanjoseca.gov>; Carrasco, Magdalena <Magdalena.Carrasco@sanjoseca.gov>; Arreola, Kiara <Kiara.Arreola@sanjoseca.gov>; Davis, Dev <dev.davis@sanjoseca.gov>; Groen, Mary Anne <maryanne.groen@sanjoseca.gov>; Esparza, Maya <Maya.Esparza@sanjoseca.gov>; Kaspar, Nick <Nick.Kaspar@sanjoseca.gov>; Arenas, Sylvia <sylvia.arenas@sanjoseca.gov>; McGarrity, Patrick <Patrick.McGarrity@sanjoseca.gov>; Foley, Pam <Pam.Foley@sanjoseca.gov>; Hughes, Scott <scott.hughes@sanjoseca.gov>; Mahan, Matt <Matt.Mahan@sanjoseca.gov>; Asada, Julia <Julia.Asada@sanjoseca.gov>
Subject: Support Letter - Icon Echo (November 29 2022)

[External Email]

Mayor Liccardo & San Jose City Council Members:

Attached, please find a letter in support of Item 10.2 on tomorrow's agenda – the Icon/Echo Project. We appreciate your consideration of our position, and look forward to continuing to work with you in the future!

Derrick Seaver
President & CEO
San Jose Chamber of Commerce
[redacted]

San Jose Chamber of Commerce

[redacted]

[redacted]

sjchamber.com

November 28, 2022

San Jose City Council
Mayor Sam Liccardo
200 E. Santa Clara Street
San Jose, CA 95113

Mayor Liccardo & San Jose City Council Members:

On behalf of the San Jose Chamber of Commerce, our Board of Directors and members, I am writing to you today to ask for your support of the Icon/Echo project, item 10.2 on the November 29, 2022, Council agenda. We respectfully request your support of staff recommendations on Items 1-4 and full approval of the proposed project.

Members of the Chamber of Commerce, as well as most residents of our city, believe that the shortage of housing in our region is a significant impediment to economic growth and competitiveness, and that correcting the shortage is an imperative. A recent report by *Angi,* as covered in *San Jose Spotlight* on September 13, detailed that the San Jose metro area faces the worst housing shortfall in the United States, totaling a staggering 15,000 units. The project as proposed would bring 415 multifamily residential units to San Jose, a self-explanatory benefit at time of severe housing shortfall.

Additionally, the jobs-housing imbalance faced by San Jose continues to provide significant challenges to stable city funding. The project as proposed would add 525,000 feet of commercial office space, as well as 8,500 square feet of storefront retail space, bringing jobs along with housing to our downtown core as it continues the recovery from COVID-19.

Finally, all of this will be accomplished with a view to the future of downtown in mind. The project is transit-oriented, situated near the soon-to-be-completed downtown BART station; the project would activate an up-and-coming area of San Jose's downtown, near both City Hall and the newly constructed Miro Tower; and Santa Clara Street remains the heart of the downtown, making the vibrancy this project brings to it even more critical.

For these reasons, the Icon/Echo project was supported unanimously by our Housing and Land Use Policy Committee, our Board Executive Committee, and our full Board of Directors. In line with these votes, I would respectfully request an affirmative vote on this project when it comes before you on November 29. We thank you for your consideration, and for all you do to make San Jose a world class place to start and grow your business.

Sincerely,

[redacted]

Derrick Seaver
President & CEO

FW: Support Letter - Icon Echo (November 29 2022)

City Clerk <city.clerk@sanjoseca.gov>
Mon 11/28/2022 2:53 PM
To: Agendadesk <Agendadesk@sanjoseca.gov>

From: Janikke Klem <[redacted]
Sent: Monday, November 28, 2022 2:41 PM
To: Derrick Seaver <[redacted]
Cc: City Clerk <city.clerk@sanjoseca.gov>; The Office of Mayor Sam Liccardo <TheOfficeofMayorSamLiccardo@sanjoseca.gov>; Taber, Toni <toni.taber@sanjoseca.gov>; Reed, Jim <Jim.Reed@sanjoseca.gov>; Jones, Chappie <Chappie.Jones@sanjoseca.gov>; Gomez, David <David.Gomez@sanjoseca.gov>; Jimenez, Sergio <sergio.jimenez@sanjoseca.gov>; Sandoval, Vanessa <vanessa.sandoval@sanjoseca.gov>; Peralez, Raul <Raul.Peralez@sanjoseca.gov>; Ramos, Christina M <christina.m.ramos@sanjoseca.gov>; Cohen, David <David.Cohen@sanjoseca.gov>; Brown, Stacey <Stacey.Brown@sanjoseca.gov>; Carrasco, Magdalena <Magdalena.Carrasco@sanjoseca.gov>; Arreola, Kiara <Kiara.Arreola@sanjoseca.gov>; Davis, Dev <dev.davis@sanjoseca.gov>; Groen, Mary Anne <maryanne.groen@sanjoseca.gov>; Esparza, Maya <Maya.Esparza@sanjoseca.gov>; Kaspar, Nick <Nick.Kaspar@sanjoseca.gov>; Arenas, Sylvia <sylvia.arenas@sanjoseca.gov>; McGarrity, Patrick <Patrick.McGarrity@sanjoseca.gov>; Foley, Pam <Pam.Foley@sanjoseca.gov>; Hughes, Scott <scott.hughes@sanjoseca.gov>; Mahan, Matt <Matt.Mahan@sanjoseca.gov>; Asada, Julia <Julia.Asada@sanjoseca.gov>
Subject: Re: Support Letter - Icon Echo (November 29 2022)

You don't often get email from [redacted] Learn why this is important

[External Email]

Sent from my iPad

On Nov 28, 2022, at 12:07 PM, Derrick Seaver <[redacted] wrote:

Mayor Liccardo & San Jose City Council Members:

Attached, please find a letter in support of Item 10.2 on tomorrow's agenda – the Icon/Echo Project. We appreciate your consideration of our position, and look forward to continuing to work with you in the future!

Derrick Seaver
President & CEO
San Jose Chamber of Commerce
[redacted]

[redacted]

<Support Letter - Icon Echo (November 28 2022).docx>

FW: Icon Echo Support Letter

City Clerk <city.clerk@sanjoseca.gov>
Mon 11/28/2022 2:53 PM
To: Agendadesk <Agendadesk@sanjoseca.gov>

From: Louis Mirante <[redacted]
Sent: Monday, November 28, 2022 2:47 PM
To: City Clerk <city.clerk@sanjoseca.gov>
Cc: Matt Regan <[redacted]
Subject: Icon Echo Support Letter

City Clerk,

Please find attached the Bay Area Council's support letter for the Icon Echo project covered in Agenda Item 10.2 tomorrow. We support the staff recommendation for that item. Please let me know if you have any questions.

Best,
Louis

| Louis Mirante
| Vice President of Public Policy
| **BAY AREA** COUNCIL [redacted]
| Cell- [redacted] | [redacted] | www.bayareacouncil.org | twitter: @bayareacouncil

October 30, 2022

San Jose City Council & Planning Commission
200 E. Santa Clara St.
San Jose, CA 95113

RE: Support for Icon/Echo 425 East Santa Clara St, San Jose

Dear Mayor Liccardo and Members of the City Council,

The Bay Area Council is an employer sponsored public policy and advocacy organization dedicated to solving our region's most challenging issues and improving the quality of life for everyone who calls this region home. On behalf of our 350+ members, I write in support of the proposed Urban Catalyst development of 425 East Santa Clara

California is experiencing an unprecedented housing crisis that will worsen without significant intervention. The California Department of Housing and Community Development estimates that the state must plan for 2.5 million new units of housing by 2030 to address the state's housing affordability crisis – an estimated 312,500 units annually and over 200,000 more units than we are currently permitting. This shortage continues to disproportionately impact low-income communities and communities of color that are being priced out of Bay Area communities by the lack of housing options. To combat this, every county and city must do its part to produce more housing at all levels of affordability.

As you know well, San Jose remains challenged by some of the highest housing costs in the country driven in large part by the shortage of new homes being built across our region. The proposed development at 425 East Santa Clara is a great opportunity to transform an underutilized, but key infill site, to build 415 homes, 524,000 sq ft of office and 8500 sq ft of retail. San Jose also suffers from a significant housing/jobs imbalance and the office/retail component of this project will mean more people working and living and spending money in downtown San Jose 24 hours a day 7 days a week.

Given its proximity to the future BART station in downtown San Jose, this project and others like it, will play a key role in driving future ridership on that line and ensuring its long-term success.

We are also impressed with Urban Catalyst's involvement with the San Jose community, and in particular their outreach and work with the neighboring senior center. This project will be a great addition to the neighborhood, provide additional amenities, new homes, shopping and office, all without displacing a single current resident.

This site and proposed project meet all accepted smart growth standards and is a clear example of sustainable and inclusive growth for future generations. We encourage you to support it.

Sincerely,

Matt Regan
Senior Vice President, Bay Area Council

CC; San Jose Planning Commission

Agenda Item 10.2 – Comments on the Icon-Echo Mixed-Use Project (File Nos. SP21-031, T21-033, ER21-134 & HP21-007)

Alisha C. Pember <[redacted]

Mon 11/28/2022 3:46 PM

To: City Clerk <city.clerk@sanjoseca.gov>;Burton, Chris <Christopher.Burton@sanjoseca.gov>;Hill, Shannon <Shannon.Hill@sanjoseca.gov>

Cc: Aidan P. Marshall <[redacted]

1 attachments (3 MB)

5693-007acp - Icon Echo Letter 11.28.22 and Attachments A-B.pdf;

[External Email]

Good afternoon,

Please find attached **Agenda Item 10.2 – Comments on the Icon-Echo Mixed-Use Project (File Nos. SP21-031, T21-033, ER21-134 & HP21-007)** and **Attachments A-B**.

If you have any questions, please contact Aidan Marshall.

Thank you.

Alisha Pember

Alisha C. Pember
Adams Broadwell Joseph & Cardozo
[redacted]
voice, Ext.

ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
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MARC D. JOSEPH
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[redacted]
TEL: [redacted]
FAX: [redacted]

SACRAMENTO OFFICE
[redacted]
TEL: [redacted]
FAX: [redacted]

November 28, 2022

Via Email
Mayor Liccardo and City Councilmembers
San José City Council
200 E. Santa Clara St.
San José, CA 95113
Email: city.clerk@sanjoseca.gov

Chris Burton, Director
Email: Chris.burton@sanjoseca.gov

Shannon Hill, Planner
Department of Planning, Building and Code Enforcement
Email: Shannon.Hill@sanjoseca.gov

Re: Agenda Item 10.2 – Comments on the Icon-Echo Mixed-Use Project (File Nos. SP21-031, T21-033, ER21-134 & HP21-007).

Dear Mayor Liccardo, Honorable Councilmembers, Mr. Burton, and Ms. Hill:

We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents") to provide comments on the Icon-Echo Mixed-Use Project (File Nos. SP21-031/ER21-134, T21-033; SCH 2021090554) ("Project") proposed by Urban Catalyst ("Applicant"). The Project appears as Item 10.2 on the agenda for the November 29, 2022 City of San José ("City") City Council ("Council") hearing. The Council will consider resolutions certifying the Project's Final Supplemental Environmental Impact Report ("FSEIR"), and approving its Special Use Permits, Vesting Tentative Map, and Historic Preservation Permit ("Approvals").

The Project proposes to construct a 21-story office/retail tower and a 27-story, 415-unit residential tower. The Project calls for approximately 525,000 square feet of commercial space, 8,500 square feet of retail space, and 1,255 parking spaces. The following addresses are associated with the Project site: 128 East St. John Street, 95 North Fourth Street, and 77 North Fourth Street (Accessor's Parcel Number 467-20-060), 147 East Santa Clara Street (Accessor's Parcel Number 467-

20-079), 49 North Fourth Street (Accessor's Parcel Number 467-20-081), and 60 North Third Street (Accessor's Parcel Number 467-20-080). The Project's Approvals include a Special Use Permit (SP21-031), Vesting Tentative Map (T21-033), and Historic Preservation Permit (HP21-007).

On August 1, 2022, Silicon Valley Residents submitted comments on the Project's Draft Supplemental Environmental Impact Report ("DSEIR").[1] Our comments explained that the Project failed to accurately analyze, disclose, and mitigate the Project's environmental impacts, including, but not limited to, air quality, greenhouse gas ("GHG"), hazards, noise, transportation, and growth-inducing impacts. As a result of these errors and omissions, the California Environmental Quality Act ("CEQA") precludes the City from approving the Project until a revised DSEIR is recirculated for public review and comment.

On October 5, 2022, the Historic Landmarks Commission ("HLC") considered the Project's Historic Preservation Permit. The HLC concluded that, due to the Project's features, size, scale, proportion, and massing, the Project does not conform with Saint James Square Historic District Design Guidelines. The Historic Landmarks Commission also recommended that there was insufficient evidence to grant a hardship under Section 13.48.260, which would exempt the Project from certain design requirements.

On October 14, 2022, the City released the FSEIR, (also called a 1st Amendment to the SEIR). The FSEIR contains responses to our comments, and makes revisions to the DSEIR aiming to address some of the issues we raised. These revisions include a condition of approval requiring enrollment in SJCE's TotalGreen level (100 percent renewables) program, changing the Project to no longer propose natural gas usage, and edits to the Project's hazards mitigation.

But the FSEIR still failed to resolve or mitigate all of the Project's potentially significant impacts. As explained herein, and in our supplemental comments to the Planning Commission,[2] the Project contributes to a significant cumulative health risk through emissions of Toxic Air Contaminants. The Project's construction will generate significant noise impacts, but fails to adopt mitigation committing to

[1] Silicon Valley Residents' letter re: Comments on the Draft Supplemental Environmental Impact Report (File Nos. SP21-031/ER21-134), is attached hereto as **Attachment A**.
[2] Silicon Valley Residents' letter re: Agenda Item 5(c) – Comments on the Icon-Echo Mixed-Use Project (File Nos. SP21-031, T21-033, ER21-134 & HP21-007), is attached hereto as **Attachment B**.

meaningfully reduce these impacts. And the Project conflicts with state and local policies requiring generation of affordable housing by failing to include affordable housing units. For these reasons, and others discussed herein, the City lacks substantial evidence to make the requisite findings to make the Project's Approvals. Silicon Valley Residents urges the Council to require that the City revise and recirculate the FSEIR before any further action is taken on the Project, and to require the Applicant to bring the Project into compliance with all State and local land use policies before the Project can be considered for approval.

I. STATEMENT OF INTEREST

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of San José and Santa Clara County.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

I. THE FSEIR FAILS TO ADEQUATELY RESOLVE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

A. The FSEIR Fails to Adequately Mitigate Significant Noise Impacts

In our comments on the DSEIR, we explained that the City's construction noise mitigation fails to adequately mitigate the Project's construction noise impacts. The DSEIR acknowledged that the Project's construction would cause significant noise impacts, exceeding ambient noise levels at nearby residences by five dBA Leq or more throughout construction.[3] But MM NOI-2.1 merely calls for a "noise logistics plan" to be prepared after project approval. In our comments on the DSEIR, we explained by failing to include performance standards in MM NOI-2.1, the City improperly defers mitigation.

The City's response to this comment in the FSEIR argues that the mitigation is sufficient because "[t]here are no quantifiable construction noise level thresholds at the federal, state, or local level, only operational noise,"[4] and by requiring preparation of a construction noise logistics plan, the Project would be consistent with General Plan Policy EC-1.7.[5] Policy EC-1.7 provides:

> The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would: […] Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months.[6]

This reasoning ignores that the CEQA Guidelines explicitly prohibits deferring formulation of mitigation measures unless the agency (1) commits itself to the mitigation, (2) **adopts specific performance standards the mitigation will achieve**, and (3) identifies the types of potential actions that can feasibly achieve that performance standard" [emphasis added].[7] The FSEIR continues to lack

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[3] DSEIR, pg. 131, Table 3.6-5; *See also* Appendix F, pg. 29 ("ambient levels at the surrounding uses would potentially be exceeded by 5 dBA Leq or more at various times throughout construction.").
[4] FSEIR, pg. 42, Response E.26.
[5] *Id.*
[6] Envision San José 2040 General Plan, EC-1.7.
[7] CEQA Guidelines, § 15126.4(a)(1)(B).
5693-007acp

specific performance standards, and fails to identify actions that can feasibly achieve such standards.

Further, courts have held that Courts have held that compliance with noise regulations alone is not substantial evidence of a less-than-significant impact.[8] In *Keep our Mountains Quiet v. County of Santa Clara*,[9] neighbors of a wedding venue sued over the County of Santa Clara's failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors' homes and disrupted the use and enjoyment of their property.[10] The County's Mitigated Negative Declaration relied on the noise standards set forth in its noise ordinance as its thresholds for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.[11] The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts[12] in holding that the County's reliance on the project's compliance with noise regulations did not constitute substantial evidence supporting the County's finding of no significant impacts.[13]

Here, the SEIR relies on consistency with the City's noise standards (Policy EC-1.7) to conclude that the Project's significant noise impacts are reduced to a less-than-significant level. As in *Keep Our Mountains Quiet*, the standards in Policy EC-1.7 do not address the actual increase in noise caused by the Project. And whereas the noise threshold in *Keep Our Mountains Quiet* was held insufficient for merely

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[8] *King & Gardiner Farms, LLC v. Cnty. of Kern* (2020) 45 Cal.App.5th 814, 865.
[9] *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.
[10] *Id.* at 724.
[11] *Id.* at 732.
[12] *Id., citing Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1338; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 (project's effects can be significant even if "they are not greater than those deemed acceptable in a general plan"); *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354, ("CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan").
[13] *Id.* at 732-734; see also *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 893, as modified on denial of rehearing (Mar. 20, 2020).

setting a maximum noise level, Policy EC-1.7 does not even set a maximum allowable noise level or increase.

Additionally, the DSEIR seems to adopt a 5 dBA noise threshold in Impact NOI-2: "[c]onstruction noise **would exceed ambient levels by five dBA** for a period of more than one year within 500 feet of residential uses or 200 feet of commercial or office uses, which exceeds the City thresholds defined in General Plan Policy EC-1.7" [emphasis added].[14] The DSEIR also provides analysis showing that ambient noise levels at the nearby land uses would be exceeded by approximately five dBA Leq or more throughout construction.[15] Since the DSEIR seems to identify 5 dBA as the relevant noise increase threshold, the City's mitigation must commit to reducing increases in noise to below 5 dBA (or some other specific performance standard) and identify specific types of actions that can feasibly achieve that standard.

B. The Project Fails to Adequately Analyze and Mitigate Cumulative Health Risk Impacts

The FSEIR states that the Project would not have a cumulatively significant health risk impact due to emission of Toxic Air Contaminants ("TACs"). The combined PM2.5 concentration from existing sources and construction of nearby projects have a pre-existing cumulative health risk impact, and the Project would contribute to this impact during the Project's construction and operation.[16] The FSEIR provides the following as the significance threshold for a cumulatively significant contribution to this impact:

> As mentioned on pages 40-41 and Appendix B of the Draft SEIR, BAAQMD CEQA Guidelines state that in instances where a pre-existing cumulative health risk impact exists, the project's individual contribution to that cumulative impact should be analyzed and if project health risks would be reduced to below the single-source thresholds **with best available mitigation measures**, the project's contribution to pre-existing cumulative impacts would not be cumulatively considerable. [emphasis added][17]

[14] DSEIR, pg. 131.
[15] *Id.*
[16] FSEIR, pg. 9, Response B.2
[17] *Id.*

According to the City's significance threshold, the Project must adopt best available mitigation measures to conclude its impacts are not cumulatively considerable. BAAQMD, in comments on the DSEIR, proposed that the Project require additional controls to mitigate construction-related exhaust emissions:

- Off-road construction equipment should be zero-emission, where available; the City should require commitments to zero-emission equipment in applicable bid documents, purchase orders, and contracts; successful contractors should demonstrate the ability to supply the compliant construction equipment for use prior to any ground-disturbing and construction activities. At minimum off-road diesel construction equipment should meet Tier 4 emissions standards.
- Medium and Heavy-Duty diesel on-road vehicles should be equipped with engine model year 2010 or newer, or powered by zero or near zero-emissions technology, as certified by the California Air Resources Board, whenever feasible.
- Provide electrical hook ups to the power grid, rather than using diesel-fueled generators, for electric construction tools, such as saws, drills, and compressors, and using electric tools whenever feasible.[18]

BAAQMD also proposed that the City should require a site-specific dust control plan that includes measures that go beyond the Air District's Basic and Enhanced Air Quality Construction Measures.[19]

BAAQMD's recommended measures represent examples of the best available mitigation measures. Thus, the City should include these measures as binding mitigation measures to ensure the Project's contribution to the community's health risk is not cumulatively considerable.

C. The FSEIR Fails to Adequately Analyze Potentially Significant Growth-Inducing Impacts

This Project calls for 525,000 square feet of office space, which would result in potentially significant growth-inducing impacts – the demand for further housing. This potential impact is especially significant due to the Project's lack of affordable

[18] FSEIR, pg. 12, Comment B.4.
[19] FSEIR, pg. 10, Comment B.3

housing. In our initial comments on the DSEIR, we explained that the DSEIR failed to analyze this impact, as required by CEQA.

The DSEIR claimed that the increase in office space is "part of the planned growth in the Downtown Strategy 2040," but failed to substantiate this claim (i.e., it fails to analyze how much office space has already been constructed or is planned to be constructed, and then determine whether the Project's contribution to that increase in office space would exceed capacity). The FSEIR's discussion of this issue is also conclusory and does not provide the requisite analysis:

> The City tracks all development within the Downtown Strategy 2040 plan area. At this time, all entitled and currently proposed projects are within the development capacity of the Downtown Strategy 2040 Plan; therefore, the project would not result in growth-inducing impacts.[20]

The City thus lacks substantial evidence to claim growth-inducing impacts would be less than significant.

II. THE PROJECT DOES NOT PROVIDE AFFORDABLE HOUSING, IN CONFLICT WITH LOCAL LAND USE GOALS, OBJECTIVES, AND POLICIES

The Project proposes to construct 415 multi-family residential units, but fails to provide any of the residential units at a below-market rate.[21] This lack of affordable housing conflicts with applicable local goals, objectives, and policies promoting affordable housing. CEQA Guidelines section 15125(d) requires that an environmental impact report "discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans," which includes regional housing plans.[22] Therefore, the Project's inconsistency with affordable housing goals, objectives, and policies is also a violation of CEQA.

[20] FSEIR, pg. 43. Response E.27.
[21] DSEIR, pg. 4.
[22] *See also Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal. App. 5th 467, 543.

A. The Project is Inconsistent with the Housing Element Update of the General Plan

The Regional Housing Needs Assessment ("RHNA") is the California State-required process that seeks to ensure cities and counties plan for enough housing in their Housing Element cycle to accommodate all economic segments of the community.[23] Accordingly, the Housing Element of the City's General Plan identifies the City's housing conditions and needs, evaluates the City's ability to meet its RHNA numbers, and establishes the goals, objectives, and policies of the City's housing strategy. The Housing Element Annual Progress Report ("APR"), as required by Government Code Section 65400, requires jurisdictions to report on the annual progress towards meeting the RHNA during the calendar year, as well as on the status of implementation programs identified in the Housing Element.

The City's 2021 Housing Element APR shows that "San José is ahead of schedule in delivering market-rate housing and is behind schedule in delivering all other income levels of affordable housing."[24] Affordable units are those offering rents affordable to extremely low-, very low-, low- and moderate-income households.[25] The APR states that "[t]he City's annual production of "extremely low-, very low-, low- and moderate-income housing remained well below the annual goals for each income level."[26]

[23] Cal. Gov. Code Section 65580 – 65589.9; *see* City of San Jose, 2014-2023 San José Housing Element (January 27, 2015), pg. 1-2.
[24] City of San Jose, 2021 Housing Element and FY 2020-21 Housing Successor Annual Report to State of California ("2021 APR"), pg. 12, available at https://www.sanjoseca.gov/home/showpublisheddocument/87578/637926224037070000.
[25] *Id.* at 10.
[26] *Id.*

Income Level		RHNA Allocation by Income Level	Total Units to Date (all years)	Total Remaining RHNA by Income Level
Very Low	Deed Restricted Non-Deed Restricted	9,233	1,796	7,437
Low	Deed Restricted Non-Deed Restricted	5,428	162	5,266
Moderate	Deed Restricted Non-Deed Restricted	6,188	2,591	3,597
Above Moderate		14,231	11,106	3,125
Total RHNA		**35,080**		
Total Units			**15,655**	**19,425**

As shown in the table[27] above, excerpted from the 2021 APR, the City still has not produced enough affordable housing at any level (extremely low-, very low-, low- and moderate-income). San Jose was obligated to identify capacity for 35,080 new units of housing in the 2015-2023 RHNA cycle. And while the City produced more than 15,655 new total units, the City has a deficit of 16,300 affordable units. The 2021 APR concludes that "[a]s the City remains far short of meeting its RHNA housing goals, despite diligent staff work and the dedication of considerable resources, San José will need to be aggressive in pursuing all production strategies appropriate and feasible to grow and diversify its housing stock – both with new types of housing and with more housing affordable to lower- and moderate-income residents."[28]

Because the City has not produced and is not expected to produce enough affordable housing to meet its RHNA, projects that do not contribute to the City's RHNA are inconsistent with the City's Housing Element, a primary goal of which is to meet the RHNA. The City does not ensure that the Project will provide any affordable units, and the Project is therefore inconsistent with the Housing Element affordable housing goals.

[27] *Id.*, Table B.
[28] *Id.* at 16.

B. The Project Does Not Provide Information Regarding Compliance with the Inclusionary Housing Ordinance

The City has a city-wide inclusionary housing ordinance ("IHO") that requires a minimum of 15% of residential units built on-site to be affordable, or pay an in lieu fee.[29] The IHO contains exemptions and waivers for "Downtown High Rises." According to the City's 2022 Inclusionary Housing Guidelines,

> "Downtown High Rise" shall mean a Residential Development that:
>
> 1. is located in the Downtown Core Area (as described in Resolution Number 73587 adopted January 9, 2007) or located in such other geographic area as may be specified in a Resolution adopted to implement SJMC Section 5.08.520(F);
> 2. has ten (10) or more floors or stories in height, not including any nonresidential uses, with the highest occupied floor at an elevation at least 150 feet above street level;
> 3. for which the Developer has provided the information requested by the City for compliance with Government Code (GC) Section 53053 and Resolution 77135 for disclosure of public subsidies and the public hearing has been held; and
> 4. receives its final certificates of occupancy for 80% of the dwelling units on or prior to June 30, 2025 or such deadline as may be specified in a Resolution implementing SJMC Section 5.08.520(F).
>
> If all these criteria are met, then the Downtown High Rise may request that the applicable reduced In Lieu Fee rate be applied in the Residential Development's Affordable Housing Compliance Plan and Inclusionary Housing Agreement and a waiver letter or partial waiver letter be provided at the time the In Lieu Fee is due.[30]

The In Lieu fees for qualifying Downtown High Rise Developments that obtain all Certificates of Occupancy on or prior to June 30, 2025 are as follows:

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[29] City of San José. Inclusionary Housing Ordinance, available at: http://www.sanjoseca.gov/index.aspx?nid=3979.

[30] Revised Guidelines for Implementation of the Inclusionary Housing Ordinance of the City of San José, Chapter 5.08 of the San José Municipal Code (August 24, 2022), pg. 4-5, available at https://www.sanjoseca.gov/home/showpublisheddocument/89225/637980703088770000.

Building permit by June 30, 2021 – $0/Square Foot
Building permit by June 30, 2022 – $0/Square Foot
Building permit by June 30, 2023 – $0/Square Foot
Building permit by June 30, 2024 – $13/Square Foot
Building permit by June 30, 2025 – $23/Square Foot[31]

Here, the Project's documentation does not provide any information on whether it would construct affordable housing, or would seek a waiver from the IHO. A waiver could result in the Project paying $0 in In Lieu fees. At the Planning Commission hearing, the Applicant's representative discussed the possibility of a $20 million In Lieu fee, but did not make any binding commitments to paying the fee. Since the Applicant can still seek a waiver of the In Lieu fee, compliance with the IHO may not resolve the Project's inconsistency with the Housing Element affordable housing goals.

C. The Project is Inconsistent with the Downtown Strategy 2040

The Project's lack of affordable housing conflicts with the Downtown Strategy 2040. The policy document states that its "top priorities" are to "[d]evelop housing with an emphasis on very high densities, and at least 20 percent of which is deed-restricted affordable to extremely low, very low, low, and moderate-income households."[32] The Project lacks deed-restricted affordable housing, and is thus inconsistent with this goal.

D. The Project is Inconsistent with the Envision San José 2040 General Plan

The Envision San José 2040 General Plan contains goals and policies promoting development of affordable housing:

> H-2.1 Facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs.

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[31] Revised Guidelines for Implementation of the Inclusionary Housing Ordinance of the City of San José, Chapter 5.08 of the San José Municipal Code (August 24, 2022), Attachment 3, available at https://www.sanjoseca.gov/home/showpublisheddocument/89231/637980706325400000.
[32] Downtown Strategy Update (Downtown Strategy 2040), pg. 13.

H-2.2 Integrate affordable housing in identified growth locations and where other housing opportunities may exist, consistent with the Envision General Plan.

The Project's DSEIR and FSEIR fails to analyze consistency with these provisions. The instant Project's lack of affordable housing is inconsistent with these goals.

III. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO APPROVE THE PROJECT

In order for the Project to be approved, the City must be able to make all required findings for a Special Use Development Permit, Site Development Permit, Tree Removal Permit, Demolition Permit, and Historic Preservation Permit.

A. The City Cannot Make the Findings to Approve the Special Use Permits

Pursuant to San José Municipal Code Section 20.100.820, the City can only approve the Project's Special Use Permits if the following findings are made:

- The special use permit, as approved, is consistent with and will further the policies of the general plan and applicable specific plans and area development policies; and
- The special use permit, as approved, is consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency; and
- The proposed use at the location requested will not:
    - Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
    - Impair the utility or value of property of other persons located in the vicinity of the site; or
    - Be detrimental to public health, safety, or general welfare; and
- The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.

Here, this Project conflicts with the policies of the general plan by failing to provide affordable housing necessary to meet Housing Element goals. And as demonstrated in the comments herein, as well as our comments on the FSEIR and DSEIR, the project has potentially significant environmental and public health impacts. Thus, the City lacks substantial evidence to make the requisite findings to approve the Special Use Permits.

B. The City Cannot Make the Findings to Approve the Site Development Permit

To make the Site Development Permit findings pursuant to San José Municipal Code Section 20.100.630, the City Council must determine that:

1) The Site Development Permit, as approved, is consistent with and will further the policies of the General Plan, applicable specific plans and area development policies; and
2) The Site Development Permit, as approved, conforms with the Zoning Code and all other Provisions of the San José Municipal Code applicable to the project; and Analysis:
3) The Site Development Permit, as approved, is consistent with applicable City Council policies, or counterbalancing considerations justify the inconsistency; and
4) The interrelationship between the orientation, location, and elevations of proposed buildings and structures and other uses on-site are mutually compatible and aesthetically harmonious.
5) The orientation, location, and elevation of the proposed buildings and structures and other uses on the site are compatible with and are aesthetically harmonious with adjacent development or the character of the neighborhood.
6) The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative effect on adjacent property or properties.

Here, as discussed in the analysis for the Project's Special Use Permits, the Project lacks affordable housing and has potentially significant environmental and public health impacts.

Further, the City lacks substantial evidence to claim that the Project's design is harmonious with the character of the neighborhood. The Historic Landmarks Committee concluded that, due to the Project's features, size, scale, proportion, and massing, the Project does not conform with Saint James Square Historic District Design Guidelines. The Historic Landmarks Commission also recommended that there was insufficient evidence to grant a hardship under Section 13.48.260, which would exempt the Project from certain design requirements.

As a result, the City cannot make the requisite findings to approve the Site Development Permit.

C. The City Cannot Make the Findings to Approve the Vesting Tentative Map

Pursuant to Section 66474 of the California Government Code, the City shall deny approval of a Vesting Tentative Map, if it makes any of the following findings:

1) That the proposed map is not consistent with applicable General and Specific Plans as specified in Section 65451.
2) That the design or improvement of the proposed subdivision is not consistent with applicable General and Specific Plans.
3) That the site is not physically suitable for the type of development.
4) That the site is not physically suitable for the proposed density of development.
5) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
6) That the design of the subdivision or type of improvements is likely to cause serious public health problems.

Here, the Project is inconsistent with General Plan Policies requiring production of affordable housing. The Project's construction and operation will generate potentially significant noise and health risk impacts. Further, the site is physically suitable for this type of development, as due to the Project's features, size, scale, proportion, and massing, the Project does not conform with Saint James Square Historic District Design Guidelines. Thus, the City lacks substantial evidence to make the findings requisite to approve a Vesting Tentative Map.

IV. CONCLUSION

For these reasons, and others discussed herein, the City lacks substantial evidence to make the requisite findings to make the Project's Approvals. Silicon Valley Residents urges the City Council to require the Planning Department to revise and recirculate the FSEIR before any further action is taken on the Project, and to require the Applicant to bring the Project into compliance with all State and local land use policies before the Project can be considered for approval. We thank you for the opportunity to provide these comments.

Sincerely,

[redacted]

Aidan P. Marshall

Attachments
APM:acp

5693-007acp

ATTACHMENT A

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Re: Comments on the Draft Supplemental Environmental Impact Report (File Nos. SP21-031/ER21-134).

Dear Mr. Burton and Ms. Hill:

We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents") to provide comments on the Draft Supplemental Environmental Impact Report ("DSEIR") prepared by the City of José ("City") for the Icon-Echo Mixed-Use Project (File Nos. SP21-031/ER21-134, T21-033; SCH 2021090554) ("Project") proposed by Urban Catalyst ("Applicant").

The Project proposes to construct a 21-story office/retail tower and a 27-story, 415-unit residential tower connected by a podium on floors 1-4. The Project calls for approximately 525,000 square feet of commercial space and 8,500 square feet of retail space. One level of below-grade parking is included with a total of 1,151 parking spaces. The following addresses are associated with the project site: 128 East St. John Street, 95 North Fourth Street, and 77 North Fourth Street (Accessor's Parcel Number 467-20-060), 147 East Santa Clara Street (Accessor's Parcel Number 467-20-079), 49 North Fourth Street (Accessor's Parcel Number 467-20-081), and 60 North Third Street (Accessor's Parcel Number 467-20-080).

Several discretionary approvals will be required to implement the Project: Special Use Permit; Demolition, Grading, and Building Permit(s); Vesting Tentative Map; Historic Preservation Permit; Department of Public Works Clearances; and Public Street Improvement Permit.[1]

We reviewed the DSEIR and its technical appendices with the assistance of air quality and health risk experts Matt Hagemann, P.G, C.Hg. and Paul E. Rosenfeld, PhD from Soil / Water / Air Protection Enterprise ("SWAPE").[2] The City must separately respond to these technical comments.

Based upon our review of the DSEIR and supporting documentation, we conclude that the DSEIR fails to comply with the requirements of CEQA. As explained more fully below, the DSEIR fails to provide a clear project description and accurate environmental baseline upon which to measure the Project's reasonably foreseeable impacts. The DSEIR also fails to accurately analyze, disclose, and mitigate the Project's air quality, greenhouse gas ("GHG"), hazards, noise, transportation, and growth-inducing impacts. As a result of its shortcomings, the DSEIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project's significant environmental impacts. The City cannot approve the Project until the errors and omissions in the DSEIR are remedied, and a revised DSEIR is recirculated for public review and comment which fully discloses and mitigates the Project's potentially significant environmental impacts.

I. STATEMENT OF INTEREST

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of San José and Santa Clara County.

[1] DSEIR, pg. 15.
[2] Mr. Hagemann's and Dr. Rosenfeld's July 27, 2022 letter re: "Comments on the Icon/Echo Mixed Use Project" ("SWAPE Comments") contains their technical comments and curricula vitae and are attached hereto as **Exhibit A**.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which the DSEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.[3] CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.[4] The EIR should not rely on scientifically outdated information to assess the significance of impacts, and should result from "extensive research and information gathering," including consultation with state and federal agencies, local officials, and the interested public.[5] To be adequate, the EIR should evidence the lead agency's good faith effort at full disclosure.[6] The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."[7] "Thus, the EIR protects not only the environment but also informed self-government."[8]

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[3] CEQA Guidelines, § 15002, subd. (a)(1).
[4] *See* Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.
[5] *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* ("*Berkeley Jets*") (2001) 91 Cal.App.4th 1344, 1367.; *Schaeffer Land Trust v. San José City Council* (1989) 215 Cal.App.3d 612, 620.
[6] CEQA Guidelines, § 15151; *see also Laurel Heights Improvement Assn. v. Regents of University of California* ("*Laurel Heights I")* (1988) 47 Cal.3d 376, 406.
[7] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[8] *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.[9] The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to "identify ways that environmental damage can be avoided or significantly reduced."[10] If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible," and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081.[11]

As these comments will demonstrate, the DSEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It fails in significant aspects to perform its function as an informational document that is meant "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment" and "to list ways in which the significant effects of such a project might be minimized."[12] The DSEIR also lacks substantial evidence to support the City's proposed findings that the Project will not result in any significant, unmitigated impacts.

III. THE PROJECT DESCRIPTION IS INADEQUATE

The DSEIR does not meet CEQA's requirements because it fails to include an accurate and complete Project description, rendering the entire analysis inadequate. California courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR."[13] CEQA requires that a project be described with enough particularity that its impacts can be assessed.[14] Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the

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[9] CEQA Guidelines, § 15002, subd. (a)(2)-(3); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.,* 91 Cal.App.4th at 1354.
[10] CEQA Guidelines, § 15002, subd. (a)(2).
[11] *Id.*, subd. (b)(2)(A)-(B).
[12] *Laurel Heights I, supra,* 47 Cal.3d at pg. 391.
[13] *Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 17; *Communities for a Better Environment v. City of Richmond* ("*CBE v. Richmond*") (2010) 184 Cal.App.4th 70, 85–89; *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.
[14] 14 CCR § 15124; *see, Laurel Heights I, supra,* 47 Cal.3d 376, 192-193.

project's impacts and undermining meaningful public review.[15] Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.[16]

CEQA Guidelines section 15378 defines "project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[17] "The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval."[18] Courts have explained that a complete description of a project must "address not only the immediate environmental consequences of going forward with the project, but also all "*reasonably foreseeable* consequence[s] of the initial project."[19] "If a[n]…EIR…does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decision-making cannot occur under CEQA and the final EIR is inadequate as a matter of law."[20]

A. The Project Does Not Have A Clear Description of On-site Solar Facilities

The Project's Initial Study states that "[a]lthough the proposed project does not include on-site renewable energy resources, the project would be designed and constructed in compliance with the City of San José's Private Sector Green Building Policy (Council Policy 6-32), Green Building Ordinance, Energy and Water Building Performance Ordinance, and Reach Code and includes solar panels and/or solar hot water panels."[21] And the Project's DSEIR states that "[s]olar panels, air cooled chillers, a cooling tower, and air source heat pumps are proposed on the roof of the residential building."[22] But neither of these documents disclose the number or capacity of the proposed solar panels, chillers, a cooling tower, and air source heat pumps. As a result of this unclear project description, the DSEIR does not fulfill its

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[15] *Id.*
[16] *Sundstrom v. County of Mendocino* ("*Sundstrom*") (1988) 202 Cal.App.3d 296, 311.
[17] CEQA Guidelines § 15378.
[18] *Id.*, § 15378(c).
[19] *Laurel Heights I,* 47 Cal. 3d 376, 398 (emphasis added); *see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 449-50.
[20] *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal. App. 4th 1186, 1201.
[21] Initial Study, pg. 42.
[22] DSEIR, pg. 13.

purpose as an informational document. The consequence of this lack of clarity regarding solar facilities is that the Project's consistency with GHG reduction measures is unsubstantiated.

IV. THE DSEIR FAILS TO ADEQUATELY ESTABLISH THE ENVIRONMENTAL SETTING

CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project as they exist at the time environmental review commences.[23] As numerous courts have held, the impacts of a project must be measured against the "real conditions on the ground."[24] Accordingly, the CEQA Guidelines provide that "[a]n existing conditions baseline shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline."[25]

The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts.[26] Use of the proper baseline is critical to a meaningful assessment of a project's environmental impacts.[27] An agency's failure to adequately describe the existing setting contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting.

Baseline information on which a lead agency relies must be supported by substantial evidence.[28] The CEQA Guidelines define "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion."[29] "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion

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[23] CEQA Guidelines, § 15125, subd. (a).
[24] *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.
[25] CEQA Guidelines, § 15125(a)(3).
[26] *Id.*
[27] *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Ca.4th 310, 320.
[28] *Id.* at 321 (stating "an agency enjoys the discretion to decide […] exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence"); *see Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[29] CEQA Guidelines §15384.

supported by facts ... [U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous ... is not substantial evidence."[30]

A. The DSEIR's Transportation Impacts Baseline is Incorrect

The DSEIR's Transportation Analysis discloses that the Project would generate 4,753 daily trips.[31] But the DSEIR takes credit for 1,264 trips from existing uses when analyzing the vehicle miles travelled ("VMT") generated by the Project.[32] The DSEIR's Local Transportation Analysis states that these current uses include an 8-pump gas station, a 6,860-sf church, and 13,500 sf of retail space.[33] The below excerpt from the DSEIR's Local Transportation Analysis shows the estimated number of trips from each current use.[34] This information constitutes the environmental baseline.

Proposed Project Trips (After Reductions)			**4,753**			
Existing Land Uses						
ITE LU # 945 - Gas Station with Convenience Market[1]	8 Vehicle Fueling Positions	205.36	1,643	12.47	51%	49%
Passby Reduction[7]		*56%*	*-920*	*62%*		
ITE LU # 560 - Church[1]	6,860 Square Feet	6.95	48	0.33	60%	40%
ITE LU # 820 - Shopping Center[1]	13,500 Square Feet	37.75	510	0.94	62%	38%
Passby Reduction[7]			*-17*			
Total Existing Trips			**1,264**			
Net Project Trips (Proposed - Existing)			**3,489**			

But this baseline is flawed because it does not resemble existing conditions at the time environmental review commenced.

The 8-pump gas station the DSEIR estimates to generate 723 trips daily (1,643 trips minus a 920 trip pass by reduction) is located at 95 North Fourth Street.[35] The DSEIR discloses that this location was formerly a gas station, but does not disclose how long it has been since the building was used as a gas station. But

[30] Pub. Resources Code § 21082.2(c).
[31] Appendix I, pg. 10.
[32] *Id.*
[33] Appendix I, pg. 31.
[34] Appendix I, pg. 11, Table 2.
[35] DSEIR, pg. 62.

an online search reveals the building was available for lease as early as 2014.[36] Further, the building has been used as a tattoo shop for at least four years.[37] CEQA requires that the baseline reflect conditions as they exist at the time environmental review commences, but the DSEIR's baseline has not been accurate for at least four years.[38] To accurately represent existing conditions at 95 North Fourth Street, the DSEIR's transportation analysis may only take credit for trips generated by a tattoo shop. The consequence of this erroneous baseline is an overestimation of the trips generated by existing uses, as a tattoo shop generally generates fewer trips than a gas station. As a result, the DSEIR discloses a lower transportation impact than can be supported by substantial evidence.

The DSEIR estimates that First Presbyterian Church, located at 49 North Fourth Street generates 48 trips daily. The DSEIR states the building was used as a church until 2019, but now provides services for the disadvantaged.[39] However, the DSEIR's transportation analysis models the trips generated by the building as a church.[40] The DSEIR must analyze existing conditions as they existed when environmental review commenced – September 2021 (the date of the Notice of Preparation) – so it must remodel this building's trips generated.[41]

The DSEIR estimates that the 13,500 sf of retail space of a one-story commercial building at 77 North Fourth Street generates 510 trips a day.[42] The DSEIR's Local Transportation Analysis treats this building as a "shopping center."[43] This trip generation rate may be erroneous, as it is unclear whether this commercial building was ever used as a shopping center. The DSEIR does not provide information on the building's existing uses or historical uses. But even if the building could be used as a shopping center, the CEQA Guidelines provide that "[a]n existing conditions baseline shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing

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[36] Loopnet.com, Listing for 95 N. 4th Street, created on 8/14/2014, available at https://www.loopnet.com/Listing/18845612/95-N-4th-Street-San-Jose-CA/ (last accessed 7/29/2022, 4:00 PM).
[37] "Inkvested," a tattoo shop at 95 North Fourth Street, San José, received a customer review on Google 4 years ago. The review is available at https://g.co/kgs/HZafc9 (last accessed 7/29/2022, 4:00 PM).
[38] CEQA Guidelines, § 15125, subd. (a).
[39] DSEIR, pg. 61.
[40] Appendix I, pg. 11, Table 2.
[41] City of San José, Notice of Preparation of a Supplemental Environmental Impact Report for the Icon Echo Mixed-Use Project, September 2021.
[42] Appendix I, pg. 11, Table 2; DSEIR, pg. 62.
[43] Appendix I, pg. 11, Table 2.

permits or plans, as the baseline."[44] Since the DSEIR fails to substantiate its assessment of the existing building as a shopping center, its baseline is not supported by substantial evidence. The consequence of this flaw is that it likely overestimates the credit the Project takes for trips generated by existing uses, masking the Project's impacts.

Because of this unsubstantiated baseline, the DSEIR's significance determinations regarding transportation impacts are not supported by substantial evidence. Further, the DSEIR fails as an informational document by failing to disclose the existing uses of the Project site, and to accurately disclose the full extent of the Project's impacts.

The City might argue that the DSEIR's unsubstantiated baseline is irrelevant because Downtown Strategy 2040 EIR provides project-level clearance for VMT impacts for projects that meet certain screening criteria.[45] But the Project must still comply with local land use regulations. General Plan Policy TR-5.3 states that "'Development projects' effects on the transportation network will be evaluated during the entitlement process and will be required to fund or construct improvements in proportion to their impacts on the transportation system." This policy requires the accurate disclosure of the trips generated by the Project. Moreover, even analysis added for informational purposes, as the Initial Study claims, must be accurate in order for the environmental document to fulfill its purpose as an informational document.[46]

V. THE DSEIR FAILS TO ADEQUATELY ANALYZE, QUANTIFY, AND MITIGATE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

An EIR must fully disclose all potentially significant impacts of a project, and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.[47] An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.[48]

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[44] CEQA Guidelines, Section 15125(a)(3).
[45] Initial Study, pg. 104.
[46] Initial Study, pg. 26.
[47] 14 CCR § 15064(b).
[48] *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by law.[49] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[50] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[51]

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"[52]

A. The DSEIR's Assessment of Air Quality and Greenhouse Gas Emissions is Not Supported by Substantial Evidence.

The DSEIR concludes that the Project's construction and operational criteria air pollutant emissions will be less than significant. These conclusions rely on emissions calculated with CalEEMod Version 2020.4.0 modeling software.[53] SWAPE reviewed the DSEIR's CalEEMod analysis and found that several modeling inputs were either unsubstantiated, or inconsistent with information disclosed elsewhere in the DSEIR. As a result, the Project's construction and operational emissions are underestimated, and unsupported by substantial evidence.

First, the DSEIR fails to substantiate the number of Saturday and Sunday operational vehicle trips generated by the Project. CalEEMod uses the operational vehicle trip rates to calculate the emissions associated with the operational on-road vehicles.[54] The DSEIR, in its transportation analysis, states that the Project is expected to generate 4,753 daily operational vehicle trips.[55] But SWAPE's review of

[49] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
[50] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[51] *Id.*; *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[52] *Berkeley Jets*, 91 Cal.App.4th at 1355.
[53] Appendix B, pg. 13.
[54] SWAPE Comments, pg. 4.
[55] Appendix I, pg. 11.

the CalEEMod output files demonstrates that the operational emissions model includes only 2,157.83 Saturday and 1,317.69 Sunday operational vehicle trips.[56] As a result, SWAPE concludes that the Saturday and Sunday vehicle trips are underestimated by 2,595.17 and 3,435.31 trips, respectively.[57] By underestimating operational daily trip rates, the DSEIR fails to analyze and disclose the full extent of the Project's impacts on air quality and climate change.

Second, SWAPE's review of the CalEEMod output files demonstrates that the DSEIR's modeling includes several changes to the default wastewater treatment system percentages.[58] The DSEIR's model assumes that the Project's wastewater would be treated 100% aerobically.[59] The City's justification for this assumption is: "WWTP 100% aerobic no septic tanks or lagoons in downtown San José."[60] However, this justification is incorrect. The DSEIR states that "[w]astewater treatment in San José is provided by the San José-Santa Clara Regional Wastewater Facility."[61] SWAPE's review of the San José-Santa Clara Regional Wastewater Facilities treatment process reveals the use of anaerobic bacteria in the digesters phase of treatment.[62] Thus, the assumption that the Project's wastewater would be treated 100% aerobically is incorrect. SWAPE explains that because each type of wastewater treatment system is associated with different GHG emission factors, the DSEIR's flawed model may underestimate the Project's GHG emissions and should not be relied upon to determine Project significance.

As a result of these errors, the DSEIR's conclusions are not supported by substantial evidence. The DSEIR also fails as an informational document. An updated EIR must be prepared to include an updated air quality analysis that adequately evaluates the impacts that construction and operation of the Project will have on air quality and climate change.

[56] Appendix B, pg. 106.
[57] SWAPE Comments, pg. 4.
[58] *Id.*
[59] Appendix B, pg. 103.
[60] Appendix B, pg. 81.
[61] DSEIR, pg. 115
[62] SWAPE Comments, pg. 4-5.

B. The DSEIR's Discussion of the Project's Greenhouse Gas Impacts is Not Supported by Substantial Evidence.

Under the CEQA Guidelines, a lead agency must analyze a project's impacts on GHG emissions.[63] The Guidelines provide that "[i]n determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulatively considerable."[64] In 2020, the City adopted a Greenhouse Gas Reduction Strategy ("GHGRS") that outlines the actions the City will undertake to achieve its proportional share of State greenhouse gas emission reductions for the interim target year 2030. Appendix H states that "a project's incremental contribution to a cumulative GHG emissions effect may be determined not to be cumulatively considerable if it complies with the requirements of the GHGRS."[65] The GHGRS requires (1) all projects to demonstrate consistency with the Envision San José 2040 General Plan's relevant policies for Land Use & Design, Transportation, Green Building, and Water Conservation, (2) demonstrate consistency with the GHGRS reduction strategies listed in Table B of the GHGRS or document why the strategies are not applicable or are infeasible, and (3) provide an explanation of additional or alternative proposed GHG mitigation measures.[66] Here, the DSEIR has not demonstrated that the Project complies with the GHGRS. As a result, the DSEIR's less-than-significant impact conclusion should not be relied upon.

i. The DSEIR Fails to Demonstrate Consistency with the Envision San José 2040 General Plan

The DSEIR does not demonstrate consistency with Envision San José 2040 General Plan Goal MS-2.2, which states: "Encourage maximized use of on-site generation of renewable energy for all new and existing buildings." The DSEIR's Compliance Checklist states:

[63] 14 C.C.R §15064.4
[64] 14 CCR § 15064.4 (b)(3).
[65] Appendix H, pg. 1.
[66] Appendix H, pg. 2-3.

> "Rooftop areas on this project are used for mechanical equipment, outdoor open space for tenants and stormwater catchment. Solar hot water or solar electrical generation will be applied in areas not covered by these uses"[67]

This response is insufficient because by simply stating that solar panels would occupy open rooftop space, the Project commits to the bare minimum requirements.[68] The response also fails to include any of the analysis implicitly required by MS-2.2: the DSEIR does not state how many solar panels are proposed to be installed, nor does it analyze how many solar panels are necessary to maximize on-site generation of renewable energy. The DSEIR also fails to commit to maximizing on-site generation of energy, merely stating that some solar facilities will be installed in available rooftop areas, without disclosing how much area, if any, will be available for such uses. As such, the Compliance Checklist fails to demonstrate how the Project would encourage maximized use of on-site renewable energy for all new and existing buildings.

Further, the inclusion of rooftop solar is not included as a mitigation measure or a binding condition of approval, making its inclusion speculative and unenforceable. Environmental documents, including SEIRs, must mitigate significant impacts through measures that are "fully enforceable through permit conditions, agreements, or other legally binding instruments."[69] Inconsistency with the Envision San José 2040 General Plan would constitute a significant GHG impact, according to the terms of the GHGRS.[70] Since the Project does not require rooftop solar, the DSEIR fails to demonstrate consistency with MS-2.2.

The DSEIR does not demonstrate consistency with MS-2.3, which states: "Encourage consideration of solar orientation, including building placement, landscaping, design and construction techniques for new construction to minimize energy consumption." The DSEIR's Compliance Checklist responds: "Building will have flat roofs to accommodate appropriate solar orientation."[71] This response is insufficient because it does not demonstrate consideration of building placement, landscaping, design and construction techniques to minimize energy consumption. The DSEIR's response must revised to include analysis of how the Project's building placement, landscaping, design and construction techniques can minimize energy

[67] Appendix H, pg. 5.
[68] SWAPE Comments, pg. 5.
[69] CEQA Guidelines, § 15126.4, subd. (a)(2).
[70] Appendix H, pg. 2.
[71] Appendix H, pg. 5.

consumption. SWAPE explains that as a result of these errors, the DSEIR fails to demonstrate consistency with MS-2.3.[72]

The DSEIR does not demonstrate consistency with MS-2.11, which states:

> Require new development to incorporate green building practices, including those required by the Green Building Ordinance. Specifically, target reduced energy use through construction techniques (e.g., design of building envelopes and systems to maximize energy performance), through architectural design (e.g., design to maximize cross ventilation and interior daylight) and through site design techniques (e.g., orienting buildings on sites to maximize the effectiveness of passive solar design).

In response, the DSEIR's Compliance Checklist states that the Project would comply with the Green Building Ordinance and aim to achieve LEED Silver certification.[73] This response is insufficient because it fails to analyze what green building practices could feasibly be used for the Project. SWAPE explains that the DSEIR fails to analyze a Project design that includes building envelopes and systems to maximize energy performance, the maximization of cross ventilation and interior daylight, and the orientation of buildings, per the directives of MS-2.11.[74] Furthermore, SWAPE explains that the DSEIR fails to provide any evidence of concrete actions designed to target reduced energy use. Thus, the DSEIR fails to demonstrate consistency with MS-2.11.

The DSEIR does not demonstrate consistency with MS-16.2, which states: "Promote neighborhood-based distributed clean/renewable energy generation to improve local energy security and to reduce the amount of energy wasted in transmitting electricity over long distances." Here, the Project's Compliance Checklist states the project "will include solar electrical and/or solar hot water generation (REACH and Title 24 compliance will dictate which are needed)."[75] Further, the DSEIR indicates that the Project "will be served by SJCE's default program (GreenSource), which currently provides 60-percent renewable energy, and this percentage will increase in the future."[76] Similarly to the DSEIR's inconsistency

[72] SWAPE Comments, pg. 6-7.
[73] DSEIR, pg. 146; Appendix H, pg. 5.
[74] SWAPE Comments, pg. 6-7.
[75] Appendix H, pg. 6
[76] DSEIR, pg. 146.

with MS-2.2, the Project is inconsistent with MS-16.2 because the Project does not include solar generation as a mitigation measure or binding condition of approval.

The DSEIR does not demonstrate consistency with CD-2.1, which states: "Promote the Circulation Goals and Policies in the Envision San José 2040 General Plan. Create streets that promote pedestrian and bicycle transportation by following applicable goals and policies in the Circulation section of the Envision San José 2040 General Plan." CD-2.1 identifies specific measures Projects are to consider, such as wider sidewalks, elements that increase driver awareness, attractive street furniture, reduced traffic speeds, pedestrian-oriented lighting, mid-block pedestrian crossings, pedestrian-activated crossing lights, bulb-outs and curb extensions at intersections, Transportation Demand Management strategies, de-coupled parking, or on-street parking that buffers pedestrians from vehicles. The DSEIR's Compliance Checklist only partially complies with CD-2.1 by including a bike network, street trees and added shade elements, as well as reduced parking.[77] By failing to analyze the feasibility of all the measures identified in CD-2.1, the Project fails to demonstrate consistency with this measure.[78] For example, the DSEIR should explain why a Transportation Demand Management program, which is encouraged by CD-2.1, is not feasible for the Project. Otherwise, the DSEIR fails to conduct the requisite analysis to be consistent with this General Plan provision.

The DSEIR does not demonstrate consistency with TR-7.1, which states: "Require large employers to develop TDM programs to reduce the vehicle trips and vehicle miles generated by their employees through the use of shuttles, provision for car-sharing, bicycle sharing, carpool, parking strategies, transit incentives and other measures." Here, the DSEIR's Compliance Checklist states: "The project will not have a TDM plan to further reduce parking. Our shared parking arrangement will reduce overall parking demand. Office tenants may implement their own TDM plan as part of office TIs."[79] The DSEIR's Compliance Checklist acknowledges that TR-7.1 is applicable to the Project, yet fails to include a TDM program, in contradiction of TR-7.1's stated requirement to implement a TDM program. The DSEIR also fails to explain why providing a TDM program is infeasible for the Project. Thus, the Project conflicts with this General Plan provision.

[77] Appendix H, pg. 6.
[78] SWAPE Comments, pg. 8.
[79] Appendix H, pg. 8.

The DSEIR does not demonstrate consistency with MS-3.1, which states: "Require water-efficient landscaping, which conforms to the State's Model Water Efficient Landscape Ordinance, for all new commercial, institutional, industrial and developer-installed residential development unless for recreation needs or other area functions." In response, the Compliance Checklist states: "Project will include proper soils management techniques to reduce evapotranspiration. Planting will include native, adaptive and drought tolerant planting to reduce watering needs. Irrigation designs will be low flow and drip wherever feasible. Stormwater flow-through planters will make use of precipitation, when available, to reduce dependence on irrigation. Irrigation timers will ensure proper timing for all landscape watering."[80] This response is flawed because these measures are not included as binding measures. As stated above, environmental documents, including SEIRs, must mitigate significant impacts through measures that are "fully enforceable through permit conditions, agreements, or other legally binding instruments."[81] Inconsistency with the Envision San José 2040 General Plan would constitute a significant GHG impact, according to the terms of the GHGRS.[82] SWAPE explains that since the measures proposed to comply with MS-3.1 are nonbinding, they are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.[83]

The DSEIR does not demonstrate consistency with MS-19.4, which states: "Require the use of recycled water wherever feasible and cost-effective to serve existing and new development." The DSEIR's Compliance Checklist states: "The Project is currently exploring technology and systems needed to reuse potable water onsite. Cost effectiveness and final commitments to these technologies will not be flushed out until Building Permit phase."[84] The DSEIR's response is insufficient because it defers improperly defers analysis of this measure to a future date. The CEQA Guidelines provide that "[w]hile specific details of a mitigation measure may be developed after project approval, an agency may only do so when it is impracticable or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the types of potential actions that can feasibly achieve that performance standard." Here, the DSEIR does not commit itself to mitigation, adopt performance

[80] Appendix H, pg. 9
[81] CEQA Guidelines, § 15126.4, subd. (a)(2).
[82] Appendix H, pg. 2.
[83] SWAPE Comments, pg. 9.
[84] Appendix H, pg. 9.

standards, or identify potential measures. Thus, the Compliance Checklist does not demonstrate the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.[85]

The DSEIR does not demonstrate consistency with MS-21.3, which states: "Ensure that San José's Community Forest is comprised of species that have low water requirements and are well adapted to its Mediterranean climate. Select and plant diverse species to prevent monocultures that are vulnerable to pest invasions. Furthermore, consider the appropriate placement of tree species and their lifespan to ensure the perpetuation of the Community Forest." The DSEIR's Compliance Checklist states: "We will have diverse landscaping to match the climate, using native and adaptive plants."[86] SWAPE's comments explain that this response is insufficient because it fails to analyze the issues specified in MS-21.3, and does not provide evidence of concrete actions or measures proposed to satisfy this measure.[87] Thus, the Project does not demonstrate consistency with the GHGRS.

ii. The DSEIR Fails to Demonstrate Consistency with GHGRS Reduction Strategies

Table B of the GHGRS identifies GHG reduction strategies and recommended consistency options.[88] Projects need to demonstrate consistency with the GHGRS reduction strategies listed in Table B or document why the strategies are not applicable or are infeasible.[89]

The Project fails to demonstrate consistency with strategies intended to promote "Zero Net Carbon Residential Development."[90] In addition to achieving/exceeding the City's Reach Code, the Project must either (1) exclude natural gas infrastructure, (2) install on-site renewable energy systems or participate in a community solar program to offset 100% of the project's estimated energy demand, or (3) participate in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity). Otherwise, the DSEIR is required to explain why such measures are not feasible. SWAPE explains that the DSEIR's response is

[85] SWAPE Comments, pg. 9.
[86] Appendix H, pg. 9.
[87] SWAPE Comments, pg. 10.
[88] Appendix H, pg. 2.
[89] *Id.*
[90] Appendix H, pg. 11.

insufficient for four reasons.[91] First, the Compliance Checklist indicates that gas infrastructure is only limited, not completely excluded on the Project site. Second, the Compliance Checklist indicates that the Project has not yet been approved for a Reach Code exemption allowing construction of gas infrastructure. Third, while the Project purportedly includes solar panels, the DSEIR fails to require on-site renewable energy generation to offset 100% of the Project's estimated energy demand. Fourth, the Compliance Checklist indicates that the Project would participate only in the SJCE GreenSource level, rather than the TotalGreen level. Thus, the Project's purported enrollment in the SJCE GreenSource program does not satisfy this measure. As a result, SWAPE is unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

The Project fails to demonstrate consistency with strategies intended to promote "Renewable Energy Development."[92] These include (1) installing solar panels, solar hot water, or other clean energy power generation sources on development sites, (2) participating in community solar programs to support development of renewable energy in the community, or (3) participating in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity) for electricity accounts associated with the project. Here, the Compliance Checklist states: "The project will install solar panels and/or solar hot water panels as part of our achievement of the REACH code and Title 24."[93] But as discussed above, the Project fails to identify binding measures requiring installation of solar facilities on the Project site.[94]

The Project fails to demonstrate consistency with strategies intended to promote "Zero Waste Goal."[95] These include: "(1) Provide space for organic waste (e.g., food scraps, yard waste) collection containers, and/or (2) Exceed the City's construction & demolition waste diversion requirement."[96] The DSEIR's Compliance Checklist states: "Will use onsite sorting of materials to exceed the City's construction demo and waste diversion requirement."[97] This response is insufficient because the Project does not commit to onsite sorting via binding mitigation measures or conditions of approval. Further, although the GHGRS

[91] SWAPE Comments, pg. 10.
[92] Appendix H, pg. 11.
[93] Appendix H, pg. 11.
[94] SWAPE Comments, pg. 10-11.
[95] Appendix H, pg. 12.
[96] *Id.*
[97] Appendix H, pg. 11.

requires Applicant-proposed measures like onsite sorting to "[d]emonstrate the effectiveness of the proposed measure to reduce the project's GHG emissions" and "[i]nclude a description of how your measure will reduce emissions and provide supporting quantification documentation/assumptions," the DSEIR's Compliance Checklist fails to provide that information.

Overall, the Project has not demonstrated consistency with the GHGRS, and the less-than-significant GHG impact conclusion is not supported by substantial evidence.

C. The City Fails to Fully Analyze and Mitigate Significant Health Risks from Soil Contamination

The DSEIR states that the Project site contains at least 11 recognized environmental conditions ("RECs") at the Project site, as a result of the operations of a gas station, drycleaner, lumber business, and automobile repair and service. Courts have held that a CEQA document must analyze the impacts from human exposure to toxic substances,[98] and that disturbance of contaminated soil is a potentially significant impact which requires disclosure and analysis of health and safety impacts in an EIR.[99] The DSEIR concludes that the Project's impacts from exposure to hazardous materials are less than significant with mitigation.[100] But this mitigation is inadequate because the DSEIR improperly defers mitigation, and is inconsistent with provisions in the Downtown Strategy 2040 EIR.

To begin with, the Downtown Strategy 2040 EIR states that "[i]f a Phase I site assessment were to indicate that a release of hazardous materials could have affected the site, additional soil and/or groundwater investigations would be completed to assess the presence and extent of contamination at the site."[101] Here, the DSEIR's Phase I ESA identifies significant sources of soil and groundwater contamination. But the DSEIR fails to adopt binding mitigation requiring a Phase II ESA, which would include the soil and/or groundwater investigations required by the Downtown Strategy 2040 EIR. The DSEIR discusses the preparation of a Phase II ESA in Mitigation Measure ("MM") HAZ-1.2, which requires the project applicant

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[98] *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* ("*Berkeley Jets*") (2001) 91 Cal.App.4th 1344, 1369–1371.
[99] *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.*, 62 Cal.4th at 388-90; 14 CCR § 15126.2(a).
[100] DSEIR, pg. x.
[101] Downtown Strategy 2040 FEIR, pg. 160-161.

to enroll in the SCCDEH Site Cleanup Program and determine if additional Phase II soil, soil vapor and groundwater investigations and remediation are required.[102] But HAZ-1.2 does not actually require a Phase II – it merely requires the Applicant to consider whether one is required. Thus, the DSEIR fails to actually require a Phase II ESA be conducted, which conflicts with the terms of the Downtown Strategy 2040 EIR. This constitutes a significant and unmitigated impact under CEQA.

MM HAZ-1.2 is also flawed because it constitutes improperly deferred mitigation. As stated by the CEQA Guidelines, "[w]hile specific details of a mitigation measure may be developed after project approval, an agency may only do so when it is impracticable or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the types of potential actions that can feasibly achieve that performance standard."[103] Here, the DSEIR defers the analysis included in a Phase II ESA until after project approval without satisfying the requisite conditions. MM HAZ-1.2 does not commit to mitigation, as explained above, or adopt specific performance standards. Thus, it improperly defers mitigation. The consequence of this deferred mitigation is that detection and disclosure of contamination beyond the 11 RECs will occur after project approval, beyond the public eye.

MM HAZ-1.4 also constitutes improperly deferred mitigation. MM HAZ-1.4 requires removal of below-grade hydraulic lifts existing on the site, and analysis of soil around the lifts. This constitutes impermissibly deferred mitigation because it fails to specifically require mitigation of any soil contamination that is found – the CEQA Guidelines only permit deferred mitigation when the agency commits itself to the mitigation.[104]

The DSEIR also fails to include applicable mitigation measures identified in the Downtown Strategy 2040 EIR. The Downtown Strategy 2040 EIR outlines specific "Measures Included in the Project to Reduce and Avoid Impacts related to Contamination."[105] The EIR explains that although adherence to existing regulations would generally reduce hazards associated with contaminated soil and groundwater, "future projects under the proposed Downtown Strategy 2040 may be

[102] DSEIR, pg. xi.
[103] CEQA Guidelines, § 15126.4(a)(1)(B).
[104] CEQA Guidelines, § 15126.4(a)(1)(B).
[105] Downtown Strategy 2040 Integrated EIR, pg. 160.

required to complete one or more of the following measures, depending on the extent and magnitude of contamination and regulatory agency requirements."[106] These measures include preparation of a Phase II Environmental Site Assessment, Remedial Action Workplan, Soil Management Plan, Health and Safety Plan, and other analyses. But these analyses are not required by the DSEIR's three mitigation measures, nor does the DSEIR analyze whether they are applicable to the Project. As a result, the DSEIR fails to mitigate the Project's significant soil contamination impacts in accordance with the Downtown Strategy 2040 EIR. The DSEIR's conclusion that the Project's significant impacts are mitigated to a less-than-significant level is unsupported.

D. The DSEIR Fails to Fully Mitigate the Project's Noise Impacts

In Impact NOI-2, the DSEIR states that construction noise would exceed ambient levels by five dBA for a period of more than one year within 500 feet of residential uses or 200 feet of commercial or office uses, which exceeds the City thresholds.[107] But MM NOI-2.1 merely calls for a "noise logistics plan" to be prepared after project approval. This approach conflicts with the requirements of the CEQA Guidelines, which prohibit deferring formulation of mitigation measures unless the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the types of potential actions that can feasibly achieve that performance standard."[108] Here, MM NOI-2.1 states that the proposed noise logistics plan must contain certain noise-reducing features, but lacks any commitment to reduce impacts by a certain level. And the construction noise mitigation plan is not held to any performance metrics. Although "the noise logistics plan shall be submitted to the Director of Planning, Building and Code Enforcement or Director's designee prior to the issuance of any grading or demolition permits,"[109] courts have held that mitigation that does no more than allow approval by a local department without setting enforceable standards is inadequate.[110] Thus, the DSEIR fails to adequately mitigate the Project's significant construction noise impacts.

In addition to deferring formulation of mitigation measures, NOI-2.1 conflicts with the Envision San José 2040 General Plan. Policy EC-1.7 states: "Require

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[106] *Id.*
[107] Envision San José 2040 General Plan, Policy EC-1.7.
[108] CEQA Guidelines, § 15126.4(a)(1)(B).
[109] DSEIR, pg. xiii.
[110] *Endangered Habitats League, Inc. v. County of Orange,* (2005) 131 Cal.App.4th 777, 794.

construction operations within San José to use best available noise suppression devices and techniques and limit construction hours near residential uses per the City's Municipal Code." Here, although NOI-2.1 does require "state-of-the-art" mufflers on construction equipment, the overall noise logistics plan does not clearly require best available technology and techniques. Thus, the Project conflicts with the General Plan.

E. The DSEIR Fails to Adequately Analyze Potentially Significant Growth-Inducing Impacts

The CEQA Guidelines require that an EIR identify the likelihood that a proposed project could "foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment."[111] Here, the Project calls for 525,000 square feet ("sf") of office space, and the Downtown Strategy 2040 assumes a total of 14,200,000 sf of planned office space. The DSEIR claims that the increase in office space is "part of the planned growth in the Downtown Strategy 2040," but fails to conduct the analysis requisite to substantiate this claim.[112] Similarly, the Project's Initial Study states "[t]he increase in the resident population (1,324 new residents) and employee population (3,048 employees) would be within the overall development capacity assumed in the Downtown Strategy 2040.[113] But the IS also fails to substantiate this claim. In order to demonstrate that the Project's proposed increase in office space is within planned capacity, the DSEIR must analyze how much office space has already been constructed or is planned to be constructed (while reviewing cumulative projects in the Downtown Strategy 2040 project area), and then determine whether the Project's contribution to that increase in office space would exceed capacity. Since the DSEIR fails to provide this analysis, it lacks substantial evidence to claim growth-inducing impacts would be less than significant.

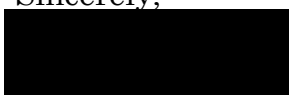
VI. CONCLUSION

The DSEIR is inadequate and must be withdrawn. We urge the City to prepare and circulate a revised DSEIR which accurately describes the project description and the existing environmental setting, discloses all of the Project's potentially significant impacts, and requires all feasible mitigation measures to

[111] CEQA Guidelines, § 15126.2[d].
[112] DSEIR, pg. 145.
[113] Initial Study, pg. 83.

reduce the Project's significant environmental and public health impacts. We thank you for the opportunity to provide these comments on the DSEIR.

Sincerely,



Aidan P. Marshall

Attachment
APM:acp

5693-004acp

EXHIBIT A

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

[redacted]

Matt Hagemann, P.G, C.Hg.
[redacted]

Paul E. Rosenfeld, PhD
[redacted]

July 27, 2022

Richard Franco
Adams Broadwell Joseph & Cardozo
[redacted]

Subject: Comments on the Icon-Echo Mixed-Use Project (SCH No. 2021090554)

Dear Mr. Franco,

We have reviewed the June 2022 Draft Supplemental Environmental Impact Report ("DSEIR") for the Icon-Echo Mixed-Use Project ("Project") located in the City of San Jose ("City"). The Project proposes to demolish 22,527-square-feet ("SF") of existing structures and construct two towers, including 415 residential units, 516,500-SF of office space, and 8,500-SF of retail space, as well as 992 parking spaces on the 2.1-acre site.

Our review concludes that the DSEIR fails to adequately evaluate the hazards, hazardous materials, air quality, and greenhouse gas impacts. As a result, emissions associated with construction and operation of the proposed Project are underestimated and inadequately addressed. A revised EIR should be prepared to adequately assess and mitigate the potential hazards, hazardous materials, air quality, and greenhouse gas impacts that the project may have on the environment.

Hazards and Hazardous Materials

Inadequate Disclosure and Analysis of Impacts

The DSEIR states that the Project site was used for a former gas station, drycleaner, and lumber business. This site is currently used as a gas station and automobile repair and service. A 2020 Phase I Environmental Site Assessment ("ESA"), provided as Appendix E to the DSEIR, found 11 recognized environmental conditions ("RECs") at the Project site, including:

- Oil water separator and the associated auto repair and painting activities;
- Gas station and an auto repair shop, along with a dry cleaner (potential vapor migration)
- Laundry business (potential vapor migration);

- Laundry and baby diaper cleaning service (potential vapor migration);
- Three fuel underground storage tanks (USTs) and one waste oil UST at current gas station;
- Detections in a previous Phase II ESA of soil vapor and groundwater samples above residential Environmental Screening Levels (ESLs) for total petroleum hydrocarbons as gasoline (TPH-g), 1,2-dichloroethane (1,2-DCA), chlorobenzene and benzene;
- Release of hydraulic fluid which could have contained PCBs;
- Former automobile dealership and service businesses;
- Gasoline UST;
- Dry cleaning business; and
- Lumber mill.

To evaluate these conditions, the DSEIR incorporates mitigation to be implemented only after Project approval. Specifically, Mitigation Measure ("MM") HAZ-1.1 calls for evaluation of the RECs prior to grading, MM HAZ-1.2 calls for voluntary enrollment in the County Site Cleanup Program prior to grading, and MM HAZ-1.4 provides for the removal of hydraulic lifts and the oil water separator prior to grading.

This mitigation is inadequate because forestalling completion of these measures until after Project approval defers disclosure of conditions which may be significant and warrant additional, specific mitigation measures. A revised EIR needs to be prepared to include the results of a Phase II ESA to be completed before project approval. On the basis of the Phase II ESA, the revised EIR should include mitigation measures that may be required to address the contamination. These measures may include excavation and offsite disposal of contaminated soil, installation of a soil vapor extraction system and installation of a groundwater extraction and treatment system. The impacts of implementing any necessary mitigation that requires use of heavy machinery and trucks should be evaluated in the EIR, including estimates of emissions of criteria air pollutants and health impacts of the emissions of air toxins, including diesel particulate matter.

Air Quality

Unsubstantiated Input Parameters Used to Estimate Project Emissions

The DSEIR's air quality analysis relies on emissions calculated with the California Emissions Estimator Model ("CalEEMod") Version 2020.4.0 (p. 29).[1] CalEEMod provides recommended default values based on site-specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project type. If more specific project information is known, the user can change the default values and input project-specific values, but the California Environmental Quality Act ("CEQA") requires that such changes be justified by substantial evidence. Once all of the values are inputted into the model, the Project's construction and operational emissions are calculated, and "output files" are generated. These output files disclose to the reader what parameters are utilized in calculating the Project's air pollutant emissions and make known which default values are changed as well as provide justification for the values selected.

[1] "CalEEMod User's Guide Version 2020.4.0." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide.

When reviewing the Project's CalEEMod output files, provided in the Air Quality Assessment and Air Quality Cumulative Memorandum ("AQ Assessment") as Appendix B to the DSEIR, we found that a couple model inputs were not consistent with information disclosed in the DSEIR. As a result, the Project's construction and operational emissions are underestimated. A revised EIR should be prepared to include an updated air quality analysis that adequately evaluates the impacts that construction and operation of the Project will have on local and regional air quality.

Unsubstantiated Number of Saturday and Sunday Operational Vehicle Trips

According to the Local Transportation Analysis ("LTA"), provided as Appendix I to the DSEIR, the proposed Project is expected to generate 4,753 daily operational vehicle trips (see excerpt below) (p. 11, Table 2).

Table 2
Project Trip Generation Estimates

Land Use	% of Vehicle Mode Share	% Reduction	Size	Daily Rate	Daily Trip	AM Peak Hour Pk-Hr Rate	AM Split In	AM Split Out	AM Trip In	AM Trip Out	AM Trip Total	PM Peak Hour Pk-Hr Rate	PM Split In	PM Split Out	PM Trip In	PM Trip Out	PM Trip Total
Proposed Land Uses																	
ITE LU # 222 - Multifamily Housing (High-Rise)[1]			415 Dwelling Units	4.45	1,847	0.31	24%	76%	31	98	129	0.36	61%	39%	91	58	149
- Residential & Office Mixed-Use Reduction[2]		3%			*-55*				*-1*	*-3*	*-4*				*-3*	*-2*	*-5*
- Residential & Retail Mixed-Use Reduction[3]		15%			*-48*				*0*	*-1*	*-1*				*-3*	*-2*	*-5*
- Location-Based Reduction[5]	78%	22%			*-384*				*-7*	*-21*	*-28*				*-19*	*-12*	*-31*
- VMT Reduction[5]		5.87%			*-80*				*-1*	*-4*	*-5*				*-4*	*-2*	*-6*
Residential Sub-Total					**1,280**				**22**	**69**	**91**				**62**	**40**	**102**
ITE LU # 710 - General Office Building[1]			525,000 Square Feet	9.74	5,114	1.16	86%	14%	524	85	609	1.15	16%	84%	97	507	604
- Residential & Office Mixed-Use Reduction[2]		3%			*-55*				*-3*	*-1*	*-4*				*-2*	*-3*	*-5*
- Office & Retail Mixed-Use Reduction[4]		3%			*-161*				*-2*	*-3*	*-5*				*-9*	*-8*	*-17*
- Location-Based Reduction[5]	69%	31%			*-1,518*				*-161*	*-25*	*-186*				*-27*	*-154*	*-181*
Office Sub-Total					**3,380**				**358**	**56**	**414**				**59**	**342**	**401**
ITE LU # 820 - Shopping Center[1]			8,500 Square Feet	37.75	321	0.94	62%	38%	5	3	8	3.81	48%	52%	15	17	32
- Residential & Retail Mixed-Use Reduction[3]		15%			*-48*				*-1*	*0*	*-1*				*-2*	*-3*	*-5*
- Office & Retail Mixed-Use Reduction[4]		3%			*-161*				*-3*	*-2*	*-5*				*-8*	*-9*	*-17*
- Location-Based Reduction[5]	83%	17%			*-19*				*0*	*0*	*0*				*-1*	*-1*	*-2*
Retail Sub-Total					**93**				**1**	**1**	**2**				**4**	**4**	**8**
Baseline Project Trips (Before Reductions)					7,282				560	186	746				203	582	785
Proposed Project Trips (After Reductions)					**4,753**				**381**	**126**	**507**				**125**	**386**	**511**

As such, the Project's model should have included trip rates that reflect the estimated number of average daily vehicle trips. However, review of the CalEEMod output files demonstrates that the "Icon-Echo MU Towers, San Jose - Operational Emissions" model includes only 2,157.83 Saturday and 1,317.69 Sunday operational vehicle trips (see excerpt below) (Appendix B, pp. 106).

	Average Daily Trip Rate		
Land Use	Weekday	Saturday	Sunday
Apartments High Rise	1,278.20	1,303.10	1033.35
Enclosed Parking with Elevator	0.00	0.00	0.00
General Office Building	3,381.00	766.50	241.50
Strip Mall	92.99	88.23	42.84
Total	4,752.19	2,157.83	1,317.69

As demonstrated above, the Saturday and Sunday vehicle trips are underestimated by 2,595.17- and 3,435.31-trips, respectively.[2, 3] As such, the trip rates inputted into the model are underestimated and inconsistent with the information provided by the LTA.

These inconsistencies present an issue, as CalEEMod uses the operational vehicle trip rates to calculate the emissions associated with the operational on-road vehicles.[4] Thus, by including underestimated operational daily vehicle trips, the model underestimates the Project's mobile-source operational emissions and should not be relied upon to determine Project significance.

Unsubstantiated Changes to Wastewater Treatment System Percentages

Review of the CalEEMod output files demonstrates that the "Icon-Echo MU Towers, San Jose - Operational Emissions" model includes several changes to the default wastewater treatment system percentages (see excerpt below) (Appendix B, pp. 103).

Table Name	Column Name	Default Value	New Value
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AerobicPercent	87.46	100.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	AnaerobicandFacultativeLagoonsPercent	2.21	0.00
tblWater	SepticTankPercent	10.33	0.00
tblWater	SepticTankPercent	10.33	0.00
tblWater	SepticTankPercent	10.33	0.00
tblWater	SepticTankPercent	10.33	0.00
tblWoodstoves	WoodstoveWoodMass	582.40	0.00

As you can see in the excerpt above, the model assumes that the Project's wastewater would be treated 100% aerobically. As previously mentioned, the CalEEMod User's Guide requires any changes to model defaults be justified.[5] According to the "User Entered Comments and Non-Default Data" table, the justification provided for these changes is:

> "WWTP 100% aerobic no septic tanks or lagoons in downtown San Jose" (Appendix B, pp. 81).

However, these changes remain unsupported. The IS, provided as Appendix A to the DSEIR, indicates that "[w]astewater treatment in San José is provided by the San José-Santa Clara Regional Wastewater Facility" (p. 115). Review of the San José-Santa Clara Regional Wastewater Facilities treatment process

[2] Calculated: 4,753 proposed daily trips – 2,157.83 modeled Saturday trips = 2,595.17 underestimated Saturday trips.
[3] Calculated: 4,753 proposed daily trips – 1,317.69 modeled Sunday trips = 3,453.31 underestimated Sunday trips.
[4] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 36.
[5] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 1, 14.

reveals the use of anaerobic bacteria in the digesters phase of treatment.[6] As such, the assumption that the Project's wastewater would be treated 100% aerobically is incorrect.

These unsubstantiated changes present an issue, as each type of wastewater treatment system is associated with different GHG emission factors, which are used by CalEEMod to calculate the Project's total GHG emissions.[7] Thus, by including unsubstantiated changes to the default wastewater treatment system percentages, the model may underestimate the Project's GHG emissions and should not be relied upon to determine Project significance.

Greenhouse Gas

Failure to Adequately Evaluate Greenhouse Gas Impacts

The IS, provided as Appendix A to the DSEIR, relies upon the Project's consistency with the City's 2030 Greenhouse Gas Reduction Strategy ("GHGRS") in order to conclude that the Project would result in a less-than-significant greenhouse gas ("GHG") impact (p. 59-60). However, review of *Table A: General Plan Consistency* and *Table B: 2030 Greenhouse Gas Reduction Strategy Compliance* within the Compliance Checklist, provided as Appendix H to the DSEIR, reveal that the Project is inconsistent with numerous measures, including but not limited to those listed below:

GHGRS Project Compliance Checklist[8]	
Table A: General Plan Consistency	
Implementation of Green Building Measures	
MS-2.2: Encourage maximized use of on-site generation of renewable energy for all new and existing buildings.	Here, the Compliance Checklist states: "Rooftop areas on this project are used for mechanical equipment, outdoor open space for tenants and stormwater catchment. Solar hot water or solar electrical generation will be applied in areas not covered by these uses" (Appendix H, p. 5). However, this response is insufficient for two reasons. First, by simply stating that solar panels would occupy open rooftop space, the Project commits to the bare minimum requirements. As such, the Compliance Checklist fails to demonstrate how the Project would encourage *maximized* use of on-site renewable energy for all new and existing buildings. Second, the inclusion of rooftop solar is not included as a mitigation measure or a binding condition of approval, making its inclusion speculative and unenforceable. This

[6] "Treatment Process." San Jose-Santa Clara Regional Wastewater Facility, *available at:* https://www.sanjoseca.gov/your-government/environment/water-utilities/regional-wastewater-facility/treatment-process

[7] "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, *available at:* https://www.aqmd.gov/caleemod/user's-guide, p. 45.

[8] "GHGRS Project Compliance Checklist." City of San Jose Department of Planning, Building, and Code Enforcement, *available at*: https://www.sanjoseca.gov/Home/ShowDocument?id=63603.

	is incorrect, as according to the AEP *CEQA Portal Topic Paper* on mitigation measures: "While not "mitigation", a good practice is to include those project design feature(s) that address environmental impacts in the mitigation monitoring and reporting program (MMRP). Often the MMRP is all that accompanies building and construction plans through the permit process. If the design features are not listed as important to addressing an environmental impact, it is easy for someone not involved in the original environmental process to approve a change to the project that could eliminate one or more of the design features without understanding the resulting environmental impact" (emphasis added).[9] As you can see in the excerpts above, PDFs are not mitigation measures and may be eliminated from the Project's design. Here, as the DSEIR fails to require the Project to incorporate solar, we cannot guarantee that this measure would be implemented, monitored, and enforced on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
MS-2.3: Encourage consideration of solar orientation, including building placement, landscaping, design and construction techniques for new construction to minimize energy consumption.	Here, the Compliance Checklist states: "Building will have flat roofs to accommodate appropriate solar orientation" (Appendix H, p. 5). However, this response is insufficient for two reasons. First, by simply stating that the "[b]uilding will have flat roofs," the Project commits to the bare *minimum* requirements. As such, the Compliance Checklist fails to demonstrate how the Project would encourage consideration of building placement, landscaping, design and construction techniques to minimize energy consumption. Furthermore, the Compliance Checklist fails to provide any evidence of concrete actions or measures proposed to satisfy this measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
MS-2.11*: Require new development to incorporate green building practices, including those required by the Green Building Ordinance. Specifically, target reduced energy use through construction techniques (e.g., design of building envelopes and systems to maximize energy performance),*	Here, the Compliance Checklist states: "Buildings will be targeting LEED NC Silver. We will comply with the City REACH code" (Appendix H, p. 5). Furthermore, the DSEIR states:

[9] "CEQA Portal Topic Paper Mitigation Measures." AEP, February 2020, *available at:* https://ceqaportal.org/tp/CEQA%20Mitigation%202020.pdf, p. 6.

through architectural design (e.g., design to maximize cross ventilation and interior daylight) and through site design techniques (e.g., orienting buildings on sites to maximize the effectiveness of passive solar design).	"[T]he proposed project would be designed to achieve LEED Silver certification and constructed in compliance with CALGreen requirements, the City's Reach Code, the City's Council Policy 6-32 (Private Sector Green Building Policy) and Green Building Ordinance, and would also be required to comply with the City's Reach Code and will be served by SJCE's default program (GreenSource), which currently provides 60-percent renewable energy, and this percentage will increase in the future" (p. 146). However, this response is insufficient, as the Compliance Checklist fails to demonstrate how the Project would incorporate green building practices to minimize energy consumption. Specifically, the Compliance Checklist and DSEIR should have discussed and considered a Project design that includes building envelopes and systems to maximize energy performance), the maximization of cross ventilation and interior daylight, and the orientation of buildings. Furthermore, the DSEIR fails to provide any evidence of concrete actions designed to target reduced energy use. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
MS-16.2: Promote neighborhood-based distributed clean/renewable energy generation to improve local energy security and to reduce the amount of energy wasted in transmitting electricity over long distances.	Here, the Compliance Checklist states: "The project will include solar electrical and/or solar hot water generation (REACH and Title 24 compliance will dictate which are needed). This allows the project to minimize its dependence on the traditional energy grid, thereby reducing the need for the use of electricity transmitted over long distances." (Appendix H, p. 6). Furthermore, the DSEIR indicates that the Project "will be served by SJCE's default program (GreenSource), which currently provides 60-percent renewable energy, and this percentage will increase in the future" (p. 146). However, this response is insufficient. According to the San Jose Clean Energy ("SJCE") website, customers can upgrade to TotalGreen, which provides 100% renewable energy for only $4 more per month.[10] Thus, by failing to opt in to the TotalGreen program, the Project fails to promote neighborhood-based distributed clean/renewable energy generation to the greatest extent available. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

[10] "TotalGreen." San Jose Clean Energy, *available at:* https://sanjosecleanenergy.org/totalgreen/.

Pedestrian, Bicycle & Transit Site Design Measures	
CD-2.1: Promote the Circulation Goals and Policies in the Envision San José 2040 General Plan. Create streets that promote pedestrian and bicycle transportation by following applicable goals and policies in the Circulation section of the Envision San José 2040 General Plan. a) Design the street network for its safe shared use by pedestrians, bicyclists, and vehicles. Include elements that increase driver awareness. b) Create a comfortable and safe pedestrian environment by implementing wider sidewalks, shade structures, attractive street furniture, street trees, reduced traffic speeds, pedestrian-oriented lighting, mid-block pedestrian crossings, pedestrian-activated crossing lights, bulb-outs and curb extensions at intersections, and on-street parking that buffers pedestrians from vehicles. c) Consider support for reduced parking requirements, alternative parking arrangements, and Transportation Demand Management strategies to reduce area dedicated to parking and increase area dedicated to employment, housing, parks, public art, or other amenities. Encourage de-coupled parking to ensure that the value and cost of parking are considered in real estate and business transactions.	Here, the Compliance Checklist states: "Project will expand the bike network along 4th St. We plan to activate the street through enhanced street trees and added shade elements. We will not include mid-block crossings. Reduced parking schemes include shared parking between residential and commercial buildings. The parking garage includes replacement parking for Town Park Towers. The project will not have a TDM plan, but will qualify for a standard 20% reduction in parking" (Appendix H, p. 6). However, this response is insufficient, as the Compliance Checklist fails to mention elements that increase driver awareness, wider sidewalks, attractive street furniture, reduced traffic speeds, pedestrian-oriented lighting, mid-block pedestrian crossings, pedestrian-activated crossing lights, bulb-outs and curb extensions at intersections, Transportation Demand Management strategies, de-coupled parking, or on-street parking that buffers pedestrians from vehicles. Thus, by merely including a bike network, street trees and added shade elements, as well as reduced parking, the Project fails to demonstrate consistency with all aspects of this measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
CD-3.2: Prioritize pedestrian and bicycle connections to transit, community facilities (including schools), commercial areas, and other areas serving daily needs. Ensure that the design of new facilities can accommodate significant anticipated future increases in bicycle and pedestrian activity.	Here, the Compliance Checklist states: "We will prioritize bicycle connections by continuing the 4th St. bicycle along our complete 4th St. frontage. Project will provide ample short and long term bike parking directly adjacent to 4th St. As well, the project will replace street trees. As well, project will allow for clear wayfinding for pedestrians and cyclists" (Appendix H, p. 7). However, this response is insufficient, as the DSEIR fails to mention or support how the proposed bicycle parking will prioritize connections to transit, community facilities, and other areas service daily needs. Furthermore, the DSEIR fails to mention how the proposed Project will accommodate significant anticipated *future* increases in bicycle and pedestrian activity. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
TR-7.1: Require large employers to develop TDM programs to reduce the vehicle trips and vehicle miles generated by their employees through the use of shuttles, provision for	Here, the Compliance Checklist states: "The project will not have a TDM plan to further reduce parking. Our shared parking arrangement will reduce overall parking demand. Office tenants may

car-sharing, bicycle sharing, carpool, parking strategies, transit incentives and other measures.	implement their own TDM plan as part of office TIs" (Appendix H, p. 8). As demonstrated above, the Compliance Checklist clearly indicates the Project will not have a TDM plan. Furthermore, the Compliance Checklist only refers to reductions to parking and fails to address any reductions to vehicle trips and vehicle miles generated by employees using shuttles, provision for car-sharing, bicycle sharing, carpool, parking strategies, transit incentives and other measures. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
Water Conservation and Urban Forestry Measures	
MS-3.1 Require water-efficient landscaping, which conforms to the State's Model Water Efficient Landscape Ordinance, for all new commercial, institutional, industrial and developer-installed residential development unless for recreation needs or other area functions.	Here, the Compliance Checklist states: "Project will include proper soils management techniques to reduce evapotranspiration. Planting will include native, adaptive and drought tolerant planting to reduce watering needs. Irrigation designs will be low flow and drip wherever feasible. Stormwater flow-through planters will make use of precipitation, when available, to reduce dependence on irrigation. Irrigation timers will ensure proper timing for all landscape watering." (Appendix H, p. 9). However, this response is insufficient. As previously discussed, PDFs are not mitigation measures and may be eliminated from the Project's design. Here, the DSEIR fails to require the water-efficient landscaping and irrigation as formal mitigation. As such, we cannot guarantee that this measure would be implemented, monitored, and enforced on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
MS-19.4: Require the use of recycled water wherever feasible and cost-effective to serve existing and new development.	Here, the Compliance Checklist states: "The Project is currently exploring technology and systems needed to reuse potable water onsite. Cost effectiveness and final commitments to these technologies will not be flushed out until Building Permit phase" (Appendix H, p. 9). However, this response is insufficient, as the Compliance Checklist only indicates the Project is exploring systems needed to reuse potable water but does not explicitly require them. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

MS-21.3: Ensure that San José's Community Forest is comprised of species that have low water requirements and are well adapted to its Mediterranean climate. Select and plant diverse species to prevent monocultures that are vulnerable to pest invasions. Furthermore, consider the appropriate placement of tree species and their lifespan to ensure the perpetuation of the Community Forest.	Here, the Compliance Checklist states: "We will have diverse landscaping to match the climate, using native and adaptive plants" (Appendix H, p. 9). However, this response is insufficient. By simply stating that the Project "will have diverse landscaping" the Project commits to the bare ***minimum*** requirements. As such, the Compliance Checklist fails to demonstrate how the Project would ensure the perpetuation of the Community Forest. Furthermore, the Compliance Checklist fails to provide any evidence of concrete actions or measures proposed to satisfy this measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
Table B: 2030 Greenhouse Gas Reduction Strategy Compliance	
PART 2: RESIDENTIAL AND NON-RESIDENTIAL PROJECTS	
Zero Net Carbon Residential Development 1. Achieve/exceed the City's Reach Code, and 2. Exclude natural gas infrastructure in new construction, or 3. Install on-site renewable energy systems or participate in a community solar program to offset 100% of the project's estimated energy demand, or 4. Participate in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity) for electricity accounts associated with the project until which time SJCE achieves 100% carbon-free electricity for all accounts. Supports Strategies: GHGRS #1, GHGRS #2, GHGRS #3	Here, the Compliance Checklist states: "Gas infrastructure is limited for future commercial cooking establishment within the future retail space only. Reach code has the following exemption (17.845.045) the project will request before end of the year to comply with this requirement. The project will participate in San Jose Clean Energy's GreenSource/default program for this residential portion of the project" (Appendix H, p. 11). However, this response is insufficient for four reasons. First, the Compliance Checklist indicates that gas infrastructure is only limited, not completely excluded on the Project site. Second, the Compliance Checklist indicates that the Project has not yet been approved for the above-mentioned Reach Code exemption. Third, while the Project purportedly includes solar panels, the DSEIR fails to require on-site renewable energy generation to offset 100% of the Project's estimated energy demand. Fourth, the Compliance Checklist indicates that the Project would participate only in the SJCE GreenSource level, rather than the TotalGreen level.[11] Thus, the Project's purported enrollment in the SJCE GreenSource program does not satisfy this measure. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
Renewable Energy Development 1. Install solar panels, solar hot water, or other clean energy power generation sources on development sites, or	Here, the Compliance Checklist states:

[11] "GREENSOURCE." San José Clean Energy, *available at:* https://sanjosecleanenergy.org/greensource/.

2. Participate in community solar programs to support development of renewable energy in the community, or 3. Participate in San José Clean Energy at the Total Green level (i.e., 100% carbon-free electricity) for electricity accounts associated with the project. Supports Strategies: GHGRS #1, GHGRS #3.	"The project will install solar panels and/or solar hot water panels as part of our achievement of the REACH code and Title 24." (Appendix H, p. 11). However, this response is insufficient. As previously discussed, PDFs are not mitigation measures and may be eliminated from the Project's design. Here, the DSEIR fails to require "solar panels and/or solar hot water panels" as formal mitigation. As such, we cannot guarantee that this measure would be implemented, monitored, and enforced on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.
Zero Waste Goal 1. Provide space for organic waste (e.g., food scraps, yard waste) collection containers, and/or 2. Exceed the City's construction & demolition waste diversion requirement. Supports Strategies: GHGRS #5	Here, the Compliance Checklist states: "Will use onsite sorting of materials to exceed the City's construction demo and waste diversion requirement." (Appendix H, p. 11). However, this response is insufficient. Simply stating that the Project would exceed the City's construction demolition and waste diversion requirement fails to provide substantial evidence that this goal would be implemented, monitored, and enforced on the Project site. As a result, we are unable to verify the Project's consistency with the GHGRS, and the less-than-significant impact conclusion should not be relied upon.

As the above table indicates, the DSEIR fails to provide sufficient information and analysis to determine Project consistency with all of the measures required by the GHGRS. As a result, we cannot verify that the Project is consistent with the GHGRS, and the DSEIR's less-than-significant GHG impact conclusion should not be relied upon. We recommend that a revised EIR include further information and analysis demonstrating the Project's consistency with the GHGRS.

Disclaimer

SWAPE has received limited discovery regarding this project. Additional information may become available in the future; thus, we retain the right to revise or amend this report when additional information becomes available. Our professional services have been performed using that degree of care and skill ordinarily exercised, under similar circumstances, by reputable environmental consultants practicing in this or similar localities at the time of service. No other warranty, expressed or implied, is made as to the scope of work, work methodologies and protocols, site conditions, analytical testing results, and findings presented. This report reflects efforts which were limited to information that was reasonably accessible at the time of the work, and may contain informational gaps, inconsistencies, or otherwise be incomplete due to the unavailability or uncertainty of information obtained or provided by third parties.

Sincerely,

Matt Hagemann, P.G., C.Hg.

Paul E. Rosenfeld, Ph.D.

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

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Matt has 30 years of experience in environmental policy, contaminant assessment and remediation, stormwater compliance, and CEQA review. He spent nine years with the U.S. EPA in the RCRA and Superfund programs and served as EPA's Senior Science Policy Advisor in the Western Regional Office where he identified emerging threats to groundwater from perchlorate and MTBE. While with EPA, Matt also served as a Senior Hydrogeologist in the oversight of the assessment of seven major military facilities undergoing base closure. He led numerous enforcement actions under provisions of the Resource Conservation and Recovery Act (RCRA) and directed efforts to improve hydrogeologic characterization and water quality monitoring. For the past 15 years, as a founding partner with SWAPE, Matt has developed extensive client relationships and has managed complex projects that include consultation as an expert witness and a regulatory specialist, and a manager of projects ranging from industrial stormwater compliance to CEQA review of impacts from hazardous waste, air quality and greenhouse gas emissions.

Positions Matt has held include:

- Founding Partner, Soil/Water/Air Protection Enterprise (SWAPE) (2003 – present);
- Geology Instructor, Golden West College, 2010 – 2104, 2017;
- Senior Environmental Analyst, Komex H2O Science, Inc. (2000 -- 2003);

- Executive Director, Orange Coast Watch (2001 – 2004);
- Senior Science Policy Advisor and Hydrogeologist, U.S. Environmental Protection Agency (1989–1998);
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- Adjunct Faculty Member, San Francisco State University, Department of Geosciences (1993 – 1998);
- Instructor, College of Marin, Department of Science (1990 – 1995);
- Geologist, U.S. Forest Service (1986 – 1998); and
- Geologist, Dames & Moore (1984 – 1986).

Senior Regulatory and Litigation Support Analyst:

With SWAPE, Matt's responsibilities have included:

- Lead analyst and testifying expert in the review of over 300 environmental impact reports and negative declarations since 2003 under CEQA that identify significant issues with regard to hazardous waste, water resources, water quality, air quality, greenhouse gas emissions, and geologic hazards. Make recommendations for additional mitigation measures to lead agencies at the local and county level to include additional characterization of health risks and implementation of protective measures to reduce worker exposure to hazards from toxins and Valley Fever.
- Stormwater analysis, sampling and best management practice evaluation at more than 100 industrial facilities.
- Expert witness on numerous cases including, for example, perfluorooctanoic acid (PFOA) contamination of groundwater, MTBE litigation, air toxins at hazards at a school, CERCLA compliance in assessment and remediation, and industrial stormwater contamination.
- Technical assistance and litigation support for vapor intrusion concerns.
- Lead analyst and testifying expert in the review of environmental issues in license applications for large solar power plants before the California Energy Commission.
- Manager of a project to evaluate numerous formerly used military sites in the western U.S.
- Manager of a comprehensive evaluation of potential sources of perchlorate contamination in Southern California drinking water wells.
- Manager and designated expert for litigation support under provisions of Proposition 65 in the review of releases of gasoline to sources drinking water at major refineries and hundreds of gas stations throughout California.

With Komex H2O Science Inc., Matt's duties included the following:

- Senior author of a report on the extent of perchlorate contamination that was used in testimony by the former U.S. EPA Administrator and General Counsel.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of MTBE use, research, and regulation.
- Senior researcher in the development of a comprehensive, electronically interactive chronology of perchlorate use, research, and regulation.
- Senior researcher in a study that estimates nationwide costs for MTBE remediation and drinking water treatment, results of which were published in newspapers nationwide and in testimony against provisions of an energy bill that would limit liability for oil companies.
- Research to support litigation to restore drinking water supplies that have been contaminated by MTBE in California and New York.

- Expert witness testimony in a case of oil production-related contamination in Mississippi.
- Lead author for a multi-volume remedial investigation report for an operating school in Los Angeles that met strict regulatory requirements and rigorous deadlines.
- Development of strategic approaches for cleanup of contaminated sites in consultation with clients and regulators.

Executive Director:

As Executive Director with Orange Coast Watch, Matt led efforts to restore water quality at Orange County beaches from multiple sources of contamination including urban runoff and the discharge of wastewater. In reporting to a Board of Directors that included representatives from leading Orange County universities and businesses, Matt prepared issue papers in the areas of treatment and disinfection of wastewater and control of the discharge of grease to sewer systems. Matt actively participated in the development of countywide water quality permits for the control of urban runoff and permits for the discharge of wastewater. Matt worked with other nonprofits to protect and restore water quality, including Surfrider, Natural Resources Defense Council and Orange County CoastKeeper as well as with business institutions including the Orange County Business Council.

Hydrogeology:

As a Senior Hydrogeologist with the U.S. Environmental Protection Agency, Matt led investigations to characterize and cleanup closing military bases, including Mare Island Naval Shipyard, Hunters Point Naval Shipyard, Treasure Island Naval Station, Alameda Naval Station, Moffett Field, Mather Army Airfield, and Sacramento Army Depot. Specific activities were as follows:

- Led efforts to model groundwater flow and contaminant transport, ensured adequacy of monitoring networks, and assessed cleanup alternatives for contaminated sediment, soil, and groundwater.
- Initiated a regional program for evaluation of groundwater sampling practices and laboratory analysis at military bases.
- Identified emerging issues, wrote technical guidance, and assisted in policy and regulation development through work on four national U.S. EPA workgroups, including the Superfund Groundwater Technical Forum and the Federal Facilities Forum.

At the request of the State of Hawaii, Matt developed a methodology to determine the vulnerability of groundwater to contamination on the islands of Maui and Oahu. He used analytical models and a GIS to show zones of vulnerability, and the results were adopted and published by the State of Hawaii and County of Maui.

As a hydrogeologist with the EPA Groundwater Protection Section, Matt worked with provisions of the Safe Drinking Water Act and NEPA to prevent drinking water contamination. Specific activities included the following:

- Received an EPA Bronze Medal for his contribution to the development of national guidance for the protection of drinking water.
- Managed the Sole Source Aquifer Program and protected the drinking water of two communities through designation under the Safe Drinking Water Act. He prepared geologic reports, conducted

public hearings, and responded to public comments from residents who were very concerned about the impact of designation.

- Reviewed a number of Environmental Impact Statements for planned major developments, including large hazardous and solid waste disposal facilities, mine reclamation, and water transfer.

Matt served as a hydrogeologist with the RCRA Hazardous Waste program. Duties were as follows:

- Supervised the hydrogeologic investigation of hazardous waste sites to determine compliance with Subtitle C requirements.
- Reviewed and wrote "part B" permits for the disposal of hazardous waste.
- Conducted RCRA Corrective Action investigations of waste sites and led inspections that formed the basis for significant enforcement actions that were developed in close coordination with U.S. EPA legal counsel.
- Wrote contract specifications and supervised contractor's investigations of waste sites.

With the National Park Service, Matt directed service-wide investigations of contaminant sources to prevent degradation of water quality, including the following tasks:

- Applied pertinent laws and regulations including CERCLA, RCRA, NEPA, NRDA, and the Clean Water Act to control military, mining, and landfill contaminants.
- Conducted watershed-scale investigations of contaminants at parks, including Yellowstone and Olympic National Park.
- Identified high-levels of perchlorate in soil adjacent to a national park in New Mexico and advised park superintendent on appropriate response actions under CERCLA.
- Served as a Park Service representative on the Interagency Perchlorate Steering Committee, a national workgroup.
- Developed a program to conduct environmental compliance audits of all National Parks while serving on a national workgroup.
- Co-authored two papers on the potential for water contamination from the operation of personal watercraft and snowmobiles, these papers serving as the basis for the development of nation-wide policy on the use of these vehicles in National Parks.
- Contributed to the Federal Multi-Agency Source Water Agreement under the Clean Water Action Plan.

Policy:

Served senior management as the Senior Science Policy Advisor with the U.S. Environmental Protection Agency, Region 9.

Activities included the following:

- Advised the Regional Administrator and senior management on emerging issues such as the potential for the gasoline additive MTBE and ammonium perchlorate to contaminate drinking water supplies.
- Shaped EPA's national response to these threats by serving on workgroups and by contributing to guidance, including the Office of Research and Development publication, Oxygenates in Water: Critical Information and Research Needs.
- Improved the technical training of EPA's scientific and engineering staff.
- Earned an EPA Bronze Medal for representing the region's 300 scientists and engineers in negotiations with the Administrator and senior management to better integrate scientific

principles into the policy-making process.
- Established national protocol for the peer review of scientific documents.

Geology:

With the U.S. Forest Service, Matt led investigations to determine hillslope stability of areas proposed for timber harvest in the central Oregon Coast Range. Specific activities were as follows:

- Mapped geology in the field, and used aerial photographic interpretation and mathematical models to determine slope stability.
- Coordinated his research with community members who were concerned with natural resource protection.
- Characterized the geology of an aquifer that serves as the sole source of drinking water for the city of Medford, Oregon.

As a consultant with Dames and Moore, Matt led geologic investigations of two contaminated sites (later listed on the Superfund NPL) in the Portland, Oregon, area and a large hazardous waste site in eastern Oregon. Duties included the following:

- Supervised year-long effort for soil and groundwater sampling.
- Conducted aquifer tests.
- Investigated active faults beneath sites proposed for hazardous waste disposal.

Teaching:

From 1990 to 1998, Matt taught at least one course per semester at the community college and university levels:

- At San Francisco State University, held an adjunct faculty position and taught courses in environmental geology, oceanography (lab and lecture), hydrogeology, and groundwater contamination.
- Served as a committee member for graduate and undergraduate students.
- Taught courses in environmental geology and oceanography at the College of Marin.

Matt is currently a part time geology instructor at Golden West College in Huntington Beach, California where he taught from 2010 to 2014 and in 2017.

Invited Testimony, Reports, Papers and Presentations:

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Presentation to the Public Environmental Law Conference, Eugene, Oregon.

Hagemann, M.F., 2008. Disclosure of Hazardous Waste Issues under CEQA. Invited presentation to U.S. EPA Region 9, San Francisco, California.

Hagemann, M.F., 2005. Use of Electronic Databases in Environmental Regulation, Policy Making and Public Participation. Brownfields 2005, Denver, Coloradao.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Nevada and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Las Vegas, NV (served on conference organizing committee).

Hagemann, M.F., 2004. Invited testimony to a California Senate committee hearing on air toxins at schools in Southern California, Los Angeles.

Brown, A., Farrow, J., Gray, A. and **Hagemann, M.**, 2004. An Estimate of Costs to Address MTBE Releases from Underground Storage Tanks and the Resulting Impact to Drinking Water Wells. Presentation to the Ground Water and Environmental Law Conference, National Groundwater Association.

Hagemann, M.F., 2004. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in Arizona and the Southwestern U.S. Presentation to a meeting of the American Groundwater Trust, Phoenix, AZ (served on conference organizing committee).

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River and Impacts to Drinking Water in the Southwestern U.S. Invited presentation to a special committee meeting of the National Academy of Sciences, Irvine, CA.

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River. Invited presentation to a tribal EPA meeting, Pechanga, CA.

Hagemann, M.F., 2003. Perchlorate Contamination of the Colorado River. Invited presentation to a meeting of tribal repesentatives, Parker, AZ.

Hagemann, M.F., 2003. Impact of Perchlorate on the Colorado River and Associated Drinking Water Supplies. Invited presentation to the Inter-Tribal Meeting, Torres Martinez Tribe.

Hagemann, M.F., 2003. The Emergence of Perchlorate as a Widespread Drinking Water Contaminant. Invited presentation to the U.S. EPA Region 9.

Hagemann, M.F., 2003. A Deductive Approach to the Assessment of Perchlorate Contamination. Invited presentation to the California Assembly Natural Resources Committee.

Hagemann, M.F., 2003. Perchlorate: A Cold War Legacy in Drinking Water. Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. From Tank to Tap: A Chronology of MTBE in Groundwater. Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. A Chronology of MTBE in Groundwater and an Estimate of Costs to Address Impacts to Groundwater. Presentation to the annual meeting of the Society of Environmental Journalists.

Hagemann, M.F., 2002. An Estimate of the Cost to Address MTBE Contamination in Groundwater (and Who Will Pay). Presentation to a meeting of the National Groundwater Association.

Hagemann, M.F., 2002. An Estimate of Costs to Address MTBE Releases from Underground Storage Tanks and the Resulting Impact to Drinking Water Wells. Presentation to a meeting of the U.S. EPA and State Underground Storage Tank Program managers.

Hagemann, M.F., 2001. From Tank to Tap: A Chronology of MTBE in Groundwater. Unpublished report.

Hagemann, M.F., 2001. Estimated Cleanup Cost for MTBE in Groundwater Used as Drinking Water. Unpublished report.

Hagemann, M.F., 2001. Estimated Costs to Address MTBE Releases from Leaking Underground Storage Tanks. Unpublished report.

Hagemann, M.F., and VanMouwerik, M., 1999. Potential Water Quality Concerns Related to Snowmobile Usage. Water Resources Division, National Park Service, Technical Report.

VanMouwerik, M. and **Hagemann, M.F**. 1999, Water Quality Concerns Related to Personal Watercraft Usage. Water Resources Division, National Park Service, Technical Report.

Hagemann, M.F., 1999, Is Dilution the Solution to Pollution in National Parks? The George Wright Society Biannual Meeting, Asheville, North Carolina.

Hagemann, M.F., 1997, The Potential for MTBE to Contaminate Groundwater. U.S. EPA Superfund Groundwater Technical Forum Annual Meeting, Las Vegas, Nevada.

Hagemann, M.F., and Gill, M., 1996, Impediments to Intrinsic Remediation, Moffett Field Naval Air Station, Conference on Intrinsic Remediation of Chlorinated Hydrocarbons, Salt Lake City.

Hagemann, M.F., Fukunaga, G.L., 1996, The Vulnerability of Groundwater to Anthropogenic Contaminants on the Island of Maui, Hawaii. Hawaii Water Works Association Annual Meeting, Maui, October 1996.

Hagemann, M. F., Fukanaga, G. L., 1996, Ranking Groundwater Vulnerability in Central Oahu, Hawaii. Proceedings, Geographic Information Systems in Environmental Resources Management, Air and Waste Management Association Publication VIP-61.

Hagemann, M.F., 1994. Groundwater Characterization and Cleanup at Closing Military Bases in California. Proceedings, California Groundwater Resources Association Meeting.

Hagemann, M.F. and Sabol, M.A., 1993. Role of the U.S. EPA in the High Plains States Groundwater Recharge Demonstration Program. Proceedings, Sixth Biennial Symposium on the Artificial Recharge of Groundwater.

Hagemann, M.F., 1993. U.S. EPA Policy on the Technical Impracticability of the Cleanup of DNAPL-contaminated Groundwater. California Groundwater Resources Association Meeting.

Hagemann, M.F., 1992. Dense Nonaqueous Phase Liquid Contamination of Groundwater: An Ounce of Prevention... Proceedings, Association of Engineering Geologists Annual Meeting, v. 35.

Other Experience:

Selected as subject matter expert for the California Professional Geologist licensing examinations, 2009-2011.

SWAPE Technical Consultation, Data Analysis and Litigation Support for the Environment

SOIL WATER AIR PROTECTION ENTERPRISE
[redacted]
Attn: Paul Rosenfeld, Ph.D.
Mobil: [redacted]
Office: [redacted]
Fax: [redacted]
Email: [redacted]

Paul Rosenfeld, Ph.D.

Chemical Fate and Transport & Air Dispersion Modeling

Principal Environmental Chemist

Risk Assessment & Remediation Specialist

Education

Ph.D. Soil Chemistry, University of Washington, 1999. Dissertation on volatile organic compound filtration.

M.S. Environmental Science, U.C. Berkeley, 1995. Thesis on organic waste economics.

B.A. Environmental Studies, U.C. Santa Barbara, 1991. Thesis on wastewater treatment.

Professional Experience

Dr. Rosenfeld has over 25 years' experience conducting environmental investigations and risk assessments for evaluating impacts to human health, property, and ecological receptors. His expertise focuses on the fate and transport of environmental contaminants, human health risk, exposure assessment, and ecological restoration. Dr. Rosenfeld has evaluated and modeled emissions from oil spills, landfills, boilers and incinerators, process stacks, storage tanks, confined animal feeding operations, industrial, military and agricultural sources, unconventional oil drilling operations, and locomotive and construction engines. His project experience ranges from monitoring and modeling of pollution sources to evaluating impacts of pollution on workers at industrial facilities and residents in surrounding communities. Dr. Rosenfeld has also successfully modeled exposure to contaminants distributed by water systems and via vapor intrusion.

Dr. Rosenfeld has investigated and designed remediation programs and risk assessments for contaminated sites containing lead, heavy metals, mold, bacteria, particulate matter, petroleum hydrocarbons, chlorinated solvents, pesticides, radioactive waste, dioxins and furans, semi- and volatile organic compounds, PCBs, PAHs, creosote, perchlorate, asbestos, per- and poly-fluoroalkyl substances (PFOA/PFOS), unusual polymers, fuel oxygenates (MTBE), among other pollutants. Dr. Rosenfeld also has experience evaluating greenhouse gas emissions from various projects and is an expert on the assessment of odors from industrial and agricultural sites, as well as the evaluation of odor nuisance impacts and technologies for abatement of odorous emissions. As a principal scientist at SWAPE, Dr. Rosenfeld directs air dispersion modeling and exposure assessments. He has served as an expert witness and testified about pollution sources causing nuisance and/or personal injury at sites and has testified as an expert witness on numerous cases involving exposure to soil, water and air contaminants from industrial, railroad, agricultural, and military sources.

Professional History:

Soil Water Air Protection Enterprise (SWAPE); 2003 to present; Principal and Founding Partner
UCLA School of Public Health; 2007 to 2011; Lecturer (Assistant Researcher)
UCLA School of Public Health; 2003 to 2006; Adjunct Professor
UCLA Environmental Science and Engineering Program; 2002-2004; Doctoral Intern Coordinator
UCLA Institute of the Environment, 2001-2002; Research Associate
Komex H_2O Science, 2001 to 2003; Senior Remediation Scientist
National Groundwater Association, 2002-2004; Lecturer
San Diego State University, 1999-2001; Adjunct Professor
Anteon Corp., San Diego, 2000-2001; Remediation Project Manager
Ogden (now Amec), San Diego, 2000-2000; Remediation Project Manager
Bechtel, San Diego, California, 1999 – 2000; Risk Assessor
King County, Seattle, 1996 – 1999; Scientist
James River Corp., Washington, 1995-96; Scientist
Big Creek Lumber, Davenport, California, 1995; Scientist
Plumas Corp., California and USFS, Tahoe 1993-1995; Scientist
Peace Corps and World Wildlife Fund, St. Kitts, West Indies, 1991-1993; Scientist

Publications:

Remy, L.L., Clay T., Byers, V., **Rosenfeld P. E.** (2019) Hospital, Health, and Community Burden After Oil Refinery Fires, Richmond, California 2007 and 2012. *Environmental Health.* 18:48

Simons, R.A., Seo, Y. **Rosenfeld, P**., (2015) Modeling the Effect of Refinery Emission On Residential Property Value. Journal of Real Estate Research. 27(3):321-342

Chen, J. A, Zapata A. R., Sutherland A. J., Molmen, D.R., Chow, B. S., Wu, L. E., **Rosenfeld, P. E.,** Hesse, R. C., (2012) Sulfur Dioxide and Volatile Organic Compound Exposure To A Community In Texas City Texas Evaluated Using Aermod and Empirical Data. *American Journal of Environmental Science*, 8(6), 622-632.

Rosenfeld, P.E. & Feng, L. (2011). *The Risks of Hazardous Waste.* Amsterdam: Elsevier Publishing.

Cheremisinoff, N.P., & **Rosenfeld, P.E.** (2011). *Handbook of Pollution Prevention and Cleaner Production: Best Practices in the Agrochemical Industry*, Amsterdam: Elsevier Publishing.

Gonzalez, J., Feng, L., Sutherland, A., Waller, C., Sok, H., Hesse, R., **Rosenfeld, P.** (2010). PCBs and Dioxins/Furans in Attic Dust Collected Near Former PCB Production and Secondary Copper Facilities in Sauget, IL. *Procedia Environmental Sciences*. 113–125.

Feng, L., Wu, C., Tam, L., Sutherland, A.J., Clark, J.J., **Rosenfeld, P.E.** (2010). Dioxin and Furan Blood Lipid and Attic Dust Concentrations in Populations Living Near Four Wood Treatment Facilities in the United States. *Journal of Environmental Health*. 73(6), 34-46.

Cheremisinoff, N.P., & **Rosenfeld, P.E.** (2010). *Handbook of Pollution Prevention and Cleaner Production: Best Practices in the Wood and Paper Industries.* Amsterdam: Elsevier Publishing.

Cheremisinoff, N.P., & **Rosenfeld, P.E.** (2009). *Handbook of Pollution Prevention and Cleaner Production: Best Practices in the Petroleum Industry*. Amsterdam: Elsevier Publishing.

Wu, C., Tam, L., Clark, J., **Rosenfeld, P**. (2009). Dioxin and furan blood lipid concentrations in populations living near four wood treatment facilities in the United States. *WIT Transactions on Ecology and the Environment, Air Pollution,* 123 (17), 319-327.

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008). A Statistical Analysis Of Attic Dust And Blood Lipid Concentrations Of Tetrachloro-p-Dibenzodioxin (TCDD) Toxicity Equivalency Quotients (TEQ) In Two Populations Near Wood Treatment Facilities. *Organohalogen Compounds*, 70, 002252-002255.

Tam L. K.., Wu C. D., Clark J. J. and **Rosenfeld, P.E.** (2008). Methods For Collect Samples For Assessing Dioxins And Other Environmental Contaminants In Attic Dust: A Review. *Organohalogen Compounds*, 70, 000527-000530.

Hensley, A.R. A. Scott, J. J. J. Clark, **Rosenfeld, P.E.** (2007). Attic Dust and Human Blood Samples Collected near a Former Wood Treatment Facility. *Environmental Research*. 105, 194-197.

Rosenfeld, P.E., J. J. J. Clark, A. R. Hensley, M. Suffet. (2007). The Use of an Odor Wheel Classification for Evaluation of Human Health Risk Criteria for Compost Facilities. *Water Science & Technology* 55(5), 345-357.

Rosenfeld, P. E., M. Suffet. (2007). The Anatomy Of Odour Wheels For Odours Of Drinking Water, Wastewater, Compost And The Urban Environment. *Water Science & Technology* 55(5), 335-344.

Sullivan, P. J. Clark, J.J.J., Agardy, F. J., **Rosenfeld, P.E.** (2007). *Toxic Legacy, Synthetic Toxins in the Food, Water, and Air in American Cities.* Boston Massachusetts: Elsevier Publishing

Rosenfeld, P.E., and Suffet I.H. (2004). Control of Compost Odor Using High Carbon Wood Ash. *Water Science and Technology*. 49(9),171-178.

Rosenfeld P. E., J.J. Clark, I.H. (Mel) Suffet (2004). The Value of An Odor-Quality-Wheel Classification Scheme For The Urban Environment. *Water Environment Federation's Technical Exhibition and Conference (WEFTEC) 2004.* New Orleans, October 2-6, 2004.

Rosenfeld, P.E., and Suffet, I.H. (2004). Understanding Odorants Associated With Compost, Biomass Facilities, and the Land Application of Biosolids. *Water Science and Technology*. 49(9), 193-199.

Rosenfeld, P.E., and Suffet I.H. (2004). Control of Compost Odor Using High Carbon Wood Ash, *Water Science and Technology*, 49(9), 171-178.

Rosenfeld, P. E., Grey, M. A., Sellew, P. (2004). Measurement of Biosolids Odor and Odorant Emissions from Windrows, Static Pile and Biofilter. *Water Environment Research*. 76(4), 310-315.

Rosenfeld, P.E., Grey, M and Suffet, M. (2002). Compost Demonstration Project, Sacramento California Using High-Carbon Wood Ash to Control Odor at a Green Materials Composting Facility. *Integrated Waste Management Board Public Affairs Office*, Publications Clearinghouse (MS–6), Sacramento, CA Publication #442-02-008.

Rosenfeld, P.E., and C.L. Henry. (2001). Characterization of odor emissions from three different biosolids. *Water Soil and Air Pollution*. 127(1-4), 173-191.

Rosenfeld, P.E., and Henry C. L., (2000). Wood ash control of odor emissions from biosolids application. *Journal of Environmental Quality.* 29, 1662-1668.

Rosenfeld, P.E., C.L. Henry and D. Bennett. (2001). Wastewater dewatering polymer affect on biosolids odor emissions and microbial activity. *Water Environment Research*. 73(4), 363-367.

Rosenfeld, P.E., and C.L. Henry. (2001). Activated Carbon and Wood Ash Sorption of Wastewater, Compost, and Biosolids Odorants. *Water Environment Research*, 73, 388-393.

Rosenfeld, P.E., and Henry C. L., (2001). High carbon wood ash effect on biosolids microbial activity and odor. *Water Environment Research*. 131(1-4), 247-262.

Chollack, T. and **P. Rosenfeld. (**1998). Compost Amendment Handbook For Landscaping. Prepared for and distributed by the City of Redmond, Washington State.

Rosenfeld, P. E. (1992). The Mount Liamuiga Crater Trail. *Heritage Magazine of St. Kitts*, 3(2).

Rosenfeld, P. E. (1993). High School Biogas Project to Prevent Deforestation On St. Kitts. *Biomass Users Network*, 7(1).

Rosenfeld, P. E. (1998). Characterization, Quantification, and Control of Odor Emissions From Biosolids Application To Forest Soil. Doctoral Thesis. University of Washington College of Forest Resources.

Rosenfeld, P. E. (1994). Potential Utilization of Small Diameter Trees on Sierra County Public Land. Masters thesis reprinted by the Sierra County Economic Council. Sierra County, California.

Rosenfeld, P. E. (1991). How to Build a Small Rural Anaerobic Digester & Uses Of Biogas In The First And Third World. Bachelors Thesis. University of California.

Presentations:

Rosenfeld, P.E., "The science for Perfluorinated Chemicals (PFAS): What makes remediation so hard?" Law Seminars International, (May 9-10, 2018) 800 Fifth Avenue, Suite 101 Seattle, WA.

Rosenfeld, P.E., Sutherland, A; Hesse, R.; Zapata, A. (October 3-6, 2013). Air dispersion modeling of volatile organic emissions from multiple natural gas wells in Decatur, TX. *44th Western Regional Meeting, American Chemical Society.* Lecture conducted from Santa Clara, CA.

Sok, H.L.; Waller, C.C.; Feng, L.; Gonzalez, J.; Sutherland, A.J.; Wisdom-Stack, T.; Sahai, R.K.; Hesse, R.C.; **Rosenfeld, P.E.** (June 20-23, 2010). Atrazine: A Persistent Pesticide in Urban Drinking Water. *Urban Environmental Pollution*. Lecture conducted from Boston, MA.

Feng, L.; Gonzalez, J.; Sok, H.L.; Sutherland, A.J.; Waller, C.C.; Wisdom-Stack, T.; Sahai, R.K.; La, M.; Hesse, R.C.; **Rosenfeld, P.E.** (June 20-23, 2010). Bringing Environmental Justice to East St. Louis, Illinois. *Urban Environmental Pollution.* Lecture conducted from Boston, MA.

Rosenfeld, P.E. (April 19-23, 2009). Perfluoroctanoic Acid (PFOA) and Perfluoroactane Sulfonate (PFOS) Contamination in Drinking Water From the Use of Aqueous Film Forming Foams (AFFF) at Airports in the United States. *2009 Ground Water Summit and 2009 Ground Water Protection Council Spring Meeting*, Lecture conducted from Tuscon, AZ.

Rosenfeld, P.E. (April 19-23, 2009). Cost to Filter Atrazine Contamination from Drinking Water in the United States" Contamination in Drinking Water From the Use of Aqueous Film Forming Foams (AFFF) at Airports in the United States. *2009 Ground Water Summit and 2009 Ground Water Protection Council Spring Meeting*. Lecture conducted from Tuscon, AZ.

Wu, C., Tam, L., Clark, J., **Rosenfeld, P**. (20-22 July, 2009). Dioxin and furan blood lipid concentrations in populations living near four wood treatment facilities in the United States. Brebbia, C.A. and Popov, V., eds., *Air Pollution XVII: Proceedings of the Seventeenth International Conference on Modeling, Monitoring and Management of Air Pollution*. Lecture conducted from Tallinn, Estonia.

Rosenfeld, P. E. (October 15-18, 2007). Moss Point Community Exposure To Contaminants From A Releasing Facility. *The 23rd Annual International Conferences on Soils Sediment and Water.* Platform lecture conducted from University of Massachusetts, Amherst MA.

Rosenfeld, P. E. (October 15-18, 2007). The Repeated Trespass of Tritium-Contaminated Water Into A Surrounding Community Form Repeated Waste Spills From A Nuclear Power Plant. *The 23rd Annual International*

Conferences on Soils Sediment and Water. Platform lecture conducted from University of Massachusetts, Amherst MA.

Rosenfeld, P. E. (October 15-18, 2007). Somerville Community Exposure To Contaminants From Wood Treatment Facility Emissions. The *23rd Annual International Conferences on Soils Sediment and Water*. Lecture conducted from University of Massachusetts, Amherst MA.

Rosenfeld P. E. (March 2007). Production, Chemical Properties, Toxicology, & Treatment Case Studies of 1,2,3-Trichloropropane (TCP). *The Association for Environmental Health and Sciences (AEHS) Annual Meeting*. Lecture conducted from San Diego, CA.

Rosenfeld P. E. (March 2007). Blood and Attic Sampling for Dioxin/Furan, PAH, and Metal Exposure in Florala, Alabama. *The AEHS Annual Meeting.* Lecture conducted from San Diego, CA.

Hensley A.R., Scott, A., **Rosenfeld P.E.,** Clark, J.J.J. (August 21 – 25, 2006). Dioxin Containing Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility. *The 26th International Symposium on Halogenated Persistent Organic Pollutants – DIOXIN2006*. Lecture conducted from Radisson SAS Scandinavia Hotel in Oslo Norway.

Hensley A.R., Scott, A., **Rosenfeld P.E.,** Clark, J.J.J. (November 4-8, 2006). Dioxin Containing Attic Dust And Human Blood Samples Collected Near A Former Wood Treatment Facility. *APHA 134 Annual Meeting & Exposition.* Lecture conducted from Boston Massachusetts.

Paul Rosenfeld Ph.D. (October 24-25, 2005). Fate, Transport and Persistence of PFOA and Related Chemicals. Mealey's C8/PFOA. *Science, Risk & Litigation Conference.* Lecture conducted from The Rittenhouse Hotel, Philadelphia, PA.

Paul Rosenfeld Ph.D. (September 19, 2005). Brominated Flame Retardants in Groundwater: Pathways to Human Ingestion, *Toxicology and Remediation PEMA Emerging Contaminant Conference*. Lecture conducted from Hilton Hotel, Irvine California.

Paul Rosenfeld Ph.D. (September 19, 2005). Fate, Transport, Toxicity, And Persistence of 1,2,3-TCP. *PEMA Emerging Contaminant Conference.* Lecture conducted from Hilton Hotel in Irvine, California.

Paul Rosenfeld Ph.D. (September 26-27, 2005). Fate, Transport and Persistence of PDBEs. *Mealey's Groundwater Conference.* Lecture conducted from Ritz Carlton Hotel, Marina Del Ray, California.

Paul Rosenfeld Ph.D. (June 7-8, 2005). Fate, Transport and Persistence of PFOA and Related Chemicals. *International Society of Environmental Forensics: Focus On Emerging Contaminants*. Lecture conducted from Sheraton Oceanfront Hotel, Virginia Beach, Virginia.

Paul Rosenfeld Ph.D. (July 21-22, 2005). Fate Transport, Persistence and Toxicology of PFOA and Related Perfluorochemicals. *2005 National Groundwater Association Ground Water And Environmental Law Conference*. Lecture conducted from Wyndham Baltimore Inner Harbor, Baltimore Maryland.

Paul Rosenfeld Ph.D. (July 21-22, 2005). Brominated Flame Retardants in Groundwater: Pathways to Human Ingestion, Toxicology and Remediation. *2005 National Groundwater Association Ground Water and Environmental Law Conference.* Lecture conducted from Wyndham Baltimore Inner Harbor, Baltimore Maryland.

Paul Rosenfeld, Ph.D. and James Clark Ph.D. and Rob Hesse R.G. (May 5-6, 2004). Tert-butyl Alcohol Liability and Toxicology, A National Problem and Unquantified Liability. *National Groundwater Association. Environmental Law Conference*. Lecture conducted from Congress Plaza Hotel, Chicago Illinois.

Paul Rosenfeld, Ph.D. (March 2004). Perchlorate Toxicology. *Meeting of the American Groundwater Trust*. Lecture conducted from Phoenix Arizona.

Hagemann, M.F., **Paul Rosenfeld, Ph.D.** and Rob Hesse (2004). Perchlorate Contamination of the Colorado River. *Meeting of tribal representatives*. Lecture conducted from Parker, AZ.

Paul Rosenfeld, Ph.D. (April 7, 2004). A National Damage Assessment Model For PCE and Dry Cleaners. *Drycleaner Symposium. California Ground Water Association*. Lecture conducted from Radison Hotel, Sacramento, California.

Rosenfeld, P. E., Grey, M., (June 2003) Two stage biofilter for biosolids composting odor control. *Seventh International In Situ And On Site Bioremediation Symposium Battelle Conference* Orlando, FL.

Paul Rosenfeld, Ph.D. and James Clark Ph.D. (February 20-21, 2003) Understanding Historical Use, Chemical Properties, Toxicity and Regulatory Guidance of 1,4 Dioxane. *National Groundwater Association. Southwest Focus Conference. Water Supply and Emerging Contaminants*.. Lecture conducted from Hyatt Regency Phoenix Arizona.

Paul Rosenfeld, Ph.D. (February 6-7, 2003). Underground Storage Tank Litigation and Remediation. *California CUPA Forum*. Lecture conducted from Marriott Hotel, Anaheim California.

Paul Rosenfeld, Ph.D. (October 23, 2002) Underground Storage Tank Litigation and Remediation. *EPA Underground Storage Tank Roundtable*. Lecture conducted from Sacramento California.

Rosenfeld, P.E. and Suffet, M. (October 7- 10, 2002). Understanding Odor from Compost, *Wastewater and Industrial Processes. Sixth Annual Symposium On Off Flavors in the Aquatic Environment. International Water Association*. Lecture conducted from Barcelona Spain.

Rosenfeld, P.E. and Suffet, M. (October 7- 10, 2002). Using High Carbon Wood Ash to Control Compost Odor. *Sixth Annual Symposium On Off Flavors in the Aquatic Environment. International Water Association*. Lecture conducted from Barcelona Spain.

Rosenfeld, P.E. and Grey, M. A. (September 22-24, 2002). Biocycle Composting For Coastal Sage Restoration. *Northwest Biosolids Management Association*. Lecture conducted from Vancouver Washington..

Rosenfeld, P.E. and Grey, M. A. (November 11-14, 2002). Using High-Carbon Wood Ash to Control Odor at a Green Materials Composting Facility. *Soil Science Society Annual Conferenc*e. Lecture conducted from Indianapolis, Maryland.

Rosenfeld. P.E. (September 16, 2000). Two stage biofilter for biosolids composting odor control. *Water Environment Federation.* Lecture conducted from Anaheim California.

Rosenfeld. P.E. (October 16, 2000). Wood ash and biofilter control of compost odor. *Biofest.* Lecture conducted from Ocean Shores, California.

Rosenfeld, P.E. (2000). Bioremediation Using Organic Soil Amendments. *California Resource Recovery Association*. Lecture conducted from Sacramento California.

Rosenfeld, P.E., C.L. Henry, R. Harrison. (1998). Oat and Grass Seed Germination and Nitrogen and Sulfur Emissions Following Biosolids Incorporation With High-Carbon Wood-Ash. *Water Environment Federation 12th Annual Residuals and Biosolids Management Conference Proceedings*. Lecture conducted from Bellevue Washington.

Rosenfeld, P.E., and C.L. Henry. (1999). An evaluation of ash incorporation with biosolids for odor reduction. *Soil Science Society of America*. Lecture conducted from Salt Lake City Utah.

Rosenfeld, P.E., C.L. Henry, R. Harrison. (1998). Comparison of Microbial Activity and Odor Emissions from Three Different Biosolids Applied to Forest Soil. *Brown and Caldwell.* Lecture conducted from Seattle Washington.

Rosenfeld, P.E., C.L. Henry. (1998). Characterization, Quantification, and Control of Odor Emissions from Biosolids Application To Forest Soil. *Biofest.* Lecture conducted from Lake Chelan, Washington.

Rosenfeld, P.E, C.L. Henry, R. Harrison. (1998). Oat and Grass Seed Germination and Nitrogen and Sulfur Emissions Following Biosolids Incorporation With High-Carbon Wood-Ash. Water Environment Federation 12th Annual Residuals and Biosolids Management Conference Proceedings. Lecture conducted from Bellevue Washington.

Rosenfeld, P.E., C.L. Henry, R. B. Harrison, and R. Dills. (1997). Comparison of Odor Emissions From Three Different Biosolids Applied to Forest Soil. *Soil Science Society of America*. Lecture conducted from Anaheim California.

Teaching Experience:

UCLA Department of Environmental Health (Summer 2003 through 20010) Taught Environmental Health Science 100 to students, including undergrad, medical doctors, public health professionals and nurses. Course focused on the health effects of environmental contaminants.

National Ground Water Association, Successful Remediation Technologies. Custom Course in Sante Fe, New Mexico. May 21, 2002. Focused on fate and transport of fuel contaminants associated with underground storage tanks.

National Ground Water Association; Successful Remediation Technologies Course in Chicago Illinois. April 1, 2002. Focused on fate and transport of contaminants associated with Superfund and RCRA sites.

California Integrated Waste Management Board, April and May, 2001. Alternative Landfill Caps Seminar in San Diego, Ventura, and San Francisco. Focused on both prescriptive and innovative landfill cover design.

UCLA Department of Environmental Engineering, February 5, 2002. Seminar on Successful Remediation Technologies focusing on Groundwater Remediation.

University Of Washington, Soil Science Program, Teaching Assistant for several courses including: Soil Chemistry, Organic Soil Amendments, and Soil Stability.

U.C. Berkeley, Environmental Science Program Teaching Assistant for Environmental Science 10.

Academic Grants Awarded:

California Integrated Waste Management Board. $41,000 grant awarded to UCLA Institute of the Environment. Goal: To investigate effect of high carbon wood ash on volatile organic emissions from compost. 2001.

Synagro Technologies, Corona California: $10,000 grant awarded to San Diego State University.
Goal: investigate effect of biosolids for restoration and remediation of degraded coastal sage soils. 2000.

King County, Department of Research and Technology, Washington State. $100,000 grant awarded to University of Washington: Goal: To investigate odor emissions from biosolids application and the effect of polymers and ash on VOC emissions. 1998.

Northwest Biosolids Management Association, Washington State. $20,000 grant awarded to investigate effect of polymers and ash on VOC emissions from biosolids. 1997.

James River Corporation, Oregon: $10,000 grant was awarded to investigate the success of genetically engineered Poplar trees with resistance to round-up. 1996.

United State Forest Service, Tahoe National Forest: $15,000 grant was awarded to investigating fire ecology of the Tahoe National Forest. 1995.

Kellogg Foundation, Washington D.C. $500 grant was awarded to construct a large anaerobic digester on St. Kitts in West Indies. 1993

Deposition and/or Trial Testimony:

In the Circuit Court Of The Twentieth Judicial Circuit, St Clair County, Illinois
Martha Custer et al., Plaintiff vs. Cerro Flow Products, Inc., Defendants
Case No.: No. 0i9-L-2295
Rosenfeld Deposition, 5-14-2021
Trial, October 8-4-2021

In the Circuit Court of Cook County Illinois
Joseph Rafferty, Plaintiff vs. Consolidated Rail Corporation and National Railroad Passenger Corporation d/b/a AMTRAK,
Case No.: No. 18-L-6845
Rosenfeld Deposition, 6-28-2021

In the United States District Court For the Northern District of Illinois
Theresa Romcoe, Plaintiff vs. Northeast Illinois Regional Commuter Railroad Corporation d/b/a METRA Rail, Defendants
Case No.: No. 17-cv-8517
Rosenfeld Deposition, 5-25-2021

In the Superior Court of the State of Arizona In and For the Cunty of Maricopa
Mary Tryon et al., Plaintiff vs. The City of Pheonix v. Cox Cactus Farm, L.L.C., Utah Shelter Systems, Inc.
Case Number CV20127-094749
Rosenfeld Deposition: 5-7-2021

In the United States District Court for the Eastern District of Texas Beaumont Division
Robinson, Jeremy et al *Plaintiffs*, vs. CNA Insurance Company et al.
Case Number 1:17-cv-000508
Rosenfeld Deposition: 3-25-2021

In the Superior Court of the State of California, County of San Bernardino
Gary Garner, Personal Representative for the Estate of Melvin Garner vs. BNSF Railway Company.
Case No. 1720288
Rosenfeld Deposition 2-23-2021

In the Superior Court of the State of California, County of Los Angeles, Spring Street Courthouse
Benny M Rodriguez vs. Union Pacific Railroad, A Corporation, et al.
Case No. 18STCV01162
Rosenfeld Deposition 12-23-2020

In the Circuit Court of Jackson County, Missouri
Karen Cornwell, *Plaintiff,* vs. Marathon Petroleum, LP, *Defendant.*
Case No.: 1716-CV10006
Rosenfeld Deposition. 8-30-2019

In the United States District Court For The District of New Jersey
Duarte et al, *Plaintiffs,* vs. United States Metals Refining Company et. al. *Defendant.*
Case No.: 2:17-cv-01624-ES-SCM
Rosenfeld Deposition. 6-7-2019

In the United States District Court of Southern District of Texas Galveston Division
M/T Carla Maersk, *Plaintiffs,* vs. Conti 168., Schiffahrts-GMBH & Co. Bulker KG MS "Conti Perdido" *Defendant.*
Case No.: 3:15-CV-00106 consolidated with 3:15-CV-00237
Rosenfeld Deposition. 5-9-2019

In The Superior Court of the State of California In And For The County Of Los Angeles – Santa Monica
Carole-Taddeo-Bates et al., vs. Ifran Khan et al., Defendants
Case No.: No. BC615636
Rosenfeld Deposition, 1-26-2019

In The Superior Court of the State of California In And For The County Of Los Angeles – Santa Monica
The San Gabriel Valley Council of Governments et al. vs El Adobe Apts. Inc. et al., Defendants
Case No.: No. BC646857
Rosenfeld Deposition, 10-6-2018; Trial 3-7-19

In United States District Court For The District of Colorado
Bells et al. Plaintiff vs. The 3M Company et al., Defendants
Case No.: 1:16-cv-02531-RBJ
Rosenfeld Deposition, 3-15-2018 and 4-3-2018

In The District Court Of Regan County, Texas, 112th Judicial District
Phillip Bales et al., Plaintiff vs. Dow Agrosciences, LLC, et al., Defendants
Cause No.: 1923
Rosenfeld Deposition, 11-17-2017

In The Superior Court of the State of California In And For The County Of Contra Costa
Simons et al., Plaintiffs vs. Chevron Corporation, et al., Defendants
Cause No C12-01481
Rosenfeld Deposition, 11-20-2017

In The Circuit Court Of The Twentieth Judicial Circuit, St Clair County, Illinois
Martha Custer et al., Plaintiff vs. Cerro Flow Products, Inc., Defendants
Case No.: No. 0i9-L-2295
Rosenfeld Deposition, 8-23-2017

In United States District Court For The Southern District of Mississippi
Guy Manuel vs. The BP Exploration et al., Defendants
Case: No 1:19-cv-00315-RHW
Rosenfeld Deposition, 4-22-2020

In The Superior Court of the State of California, For The County of Los Angeles
Warrn Gilbert and Penny Gilber, Plaintiff vs. BMW of North America LLC
Case No.: LC102019 (c/w BC582154)
Rosenfeld Deposition, 8-16-2017, Trail 8-28-2018

In the Northern District Court of Mississippi, Greenville Division
Brenda J. Cooper, et al., *Plaintiffs,* vs. Meritor Inc., et al., *Defendants*
Case Number: 4:16-cv-52-DMB-JVM
Rosenfeld Deposition: July 2017

In The Superior Court of the State of Washington, County of Snohomish
Michael Davis and Julie Davis et al., Plaintiff vs. Cedar Grove Composting Inc., Defendants
Case No.: No. 13-2-03987-5
Rosenfeld Deposition, February 2017
Trial, March 2017

In The Superior Court of the State of California, County of Alameda
Charles Spain., Plaintiff vs. Thermo Fisher Scientific, et al., Defendants
Case No.: RG14711115
Rosenfeld Deposition, September 2015

In The Iowa District Court In And For Poweshiek County
Russell D. Winburn, et al., Plaintiffs vs. Doug Hoksbergen, et al., Defendants
Case No.: LALA002187
Rosenfeld Deposition, August 2015

In The Circuit Court of Ohio County, West Virginia
Robert Andrews, et al. v. Antero, et al.
Civil Action N0. 14-C-30000
Rosenfeld Deposition, June 2015

In The Iowa District Court For Muscatine County
Laurie Freeman et. al. Plaintiffs vs. Grain Processing Corporation, Defendant
Case No 4980
Rosenfeld Deposition: May 2015

In the Circuit Court of the 17th Judicial Circuit, in and For Broward County, Florida
Walter Hinton, et. al. Plaintiff, vs. City of Fort Lauderdale, Florida, a Municipality, Defendant.
Case Number CACE07030358 (26)
Rosenfeld Deposition: December 2014

In the County Court of Dallas County Texas
Lisa Parr et al, *Plaintiff*, vs. Aruba et al, *Defendant.*
Case Number cc-11-01650-E
Rosenfeld Deposition: March and September 2013
Rosenfeld Trial: April 2014

In the Court of Common Pleas of Tuscarawas County Ohio
John Michael Abicht, et al., *Plaintiffs,* vs. Republic Services, Inc., et al., *Defendants*
Case Number: 2008 CT 10 0741 (Cons. w/ 2009 CV 10 0987)
Rosenfeld Deposition: October 2012

In the United States District Court for the Middle District of Alabama, Northern Division
James K. Benefield, et al., *Plaintiffs*, vs. International Paper Company, *Defendant*.
Civil Action Number 2:09-cv-232-WHA-TFM
Rosenfeld Deposition: July 2010, June 2011

In the Circuit Court of Jefferson County Alabama
Jaeanette Moss Anthony, et al., *Plaintiffs*, vs. Drummond Company Inc., et al., *Defendants*
Civil Action No. CV 2008-2076
Rosenfeld Deposition: September 2010

In the United States District Court, Western District Lafayette Division
Ackle et al., *Plaintiffs*, vs. Citgo Petroleum Corporation, et al., *Defendants*.
Case Number 2:07CV1052
Rosenfeld Deposition: July 2009

ATTACHMENT B

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October 26, 2022

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Re: **Agenda Item 5(c) – Comments on the Icon-Echo Mixed-Use Project (File Nos. SP21-031, T21-033, ER21-134 & HP21-007).**

Dear Honorable Planning Commission Members, Mr. Burton, and Ms. Hill:

We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents") to provide comments on the Icon-Echo Mixed-Use Project (File Nos. SP21-031/ER21-134, T21-033; SCH 2021090554) ("Project") proposed by Urban Catalyst ("Applicant"). The Project appears as Item 5(c) on the agenda for the October 26, 2022 City of San José ("City") Planning Commission ("Commission") hearing. The Commission will consider recommendation to the City Council of the Project's Final Supplemental Environmental Impact Report ("FSEIR"), Special Use Permits, Vesting Tentative Map, and Historic Preservation Permit ("Approvals").

The Project proposes to construct a 21-story office/retail tower and a 27-story, 415-unit residential tower connected by a podium on floors 1-4. The Project calls for approximately 525,000 square feet of commercial space and 8,500 square feet of retail space. One level of below-grade parking is included with a total of 1,151 parking spaces. The following addresses are associated with the Project site: 128 East St. John Street, 95 North Fourth Street, and 77 North Fourth Street (Accessor's Parcel Number 467-20-060), 147 East Santa Clara Street (Accessor's

Parcel Number 467-20-079), 49 North Fourth Street (Accessor's Parcel Number 467-20-081), and 60 North Third Street (Accessor's Parcel Number 467-20-080).

The Project's Approvals include the following:

- Special Use Permit (SP21-031) to allow the demolition of all existing buildings on site totaling approximately 22,527 square feet, the removal of 39 trees (four ordinance-size, 35 non-ordinance-size) for the construction of a mixed-use project consisting of up to 415 multifamily residential units, 525,000 square feet of retail space, 8,500 square feet of retail space and allow up to 10 commercial condominiums with extended construction hours from 7:00 am to 7:00 pm Monday through Saturday on an approximately 2.10-gross acre site;
- Vesting Tentative Map (T21-033) to reconfigure four parcels into two parcels and allow up to 10 commercial condominiums and 415 residential condominiums on an approximately 2.10-gross acre site.
- Historic Preservation Permit (HP21-007) to allow the demolition of three non-contributing buildings and the construction of a 267-foot-high tower consisting of 415 multifamily residential units within the St. James Square City Landmark District. The Project would be approved under Section 13.48.260 (Hardship) of the Historic Preservation Ordinance.

On October 5, 2022, the Historic Landmarks Commission ("HLC") recommended to the City Council that there was insufficient evidence to grant a hardship under Section 13.48.260.

The City, as the lead agency for the project, prepared a Draft Supplemental Environmental Impact Report ("DSEIR") to the Downtown Strategy 2040 Final EIR, which was circulated for public review and comment for 45 days, from June 17, 2022 through August 1, 2022. Silicon Valley Residents submitted comments on the DSEIR during this comment period. Our comments on the DSEIR show that the DSEIR failed to accurately analyze, disclose, and mitigate the Project's air quality, greenhouse gas ("GHG"), hazards, noise, transportation, and growth-inducing impacts. We incorporate these prior comments by reference.

The City's FSEIR contains responses to our comments, and makes revisions to the DSEIR aiming to address some of the issues we raised. These revisions include a condition of approval requiring enrollment in SJCE's TotalGreen level (100 percent renewables) program, changing the Project to no longer propose

natural gas usage, and edits to the Project's hazards mitigation. But the FSEIR fails to resolve or mitigate all of the Project's potentially significant impacts. As will be discussed herein, the Project contributes to a significant cumulative health risk through emissions of Toxic Air Contaminants. The Project's construction will generate significant noise impacts, but fails to adopt mitigation committing to meaningfully reduce these impacts. And the Project conflicts with state and local policies requiring generation of affordable housing by failing to include affordable housing units. For these reasons, and others discussed herein, the City lacks substantial evidence to make the requisite findings to make the Project's Approvals. Silicon Valley Residents urges the Planning Commission to recommend that the City revise and recirculate the FSEIR before any further action is taken on the Project, and to require the Applicant to bring the Project into compliance with all State and local land use policies before the Project can be considered for approval.

I. STATEMENT OF INTEREST

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of San José and Santa Clara County.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

I. THE FSEIR FAILS TO ADEQUATELY RESOLVE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

A. The FSEIR Fails to Adequately Mitigate Significant Noise Impacts

In our comments on the DSEIR, we explained that the City's construction noise mitigation fails to adequately mitigate the Project's construction noise impacts. The DSEIR acknowledged that the Project's construction would cause significant noise impacts, exceeding ambient noise levels at nearby residences by five dBA Leq or more throughout construction.[1] But MM NOI-2.1 merely calls for a "noise logistics plan" to be prepared after project approval. In our comments on the DSEIR, we explained by failing to include performance standards in MM NOI-2.1, the City improperly defers mitigation.

The City's response to this comment in the FSEIR argues that the mitigation is sufficient because "[t]here are no quantifiable construction noise level thresholds at the federal, state, or local level, only operational noise,"[2] and by requiring preparation of a construction noise logistics plan, the Project would be consistent with General Plan Policy EC-1.7.[3] Policy EC-1.7 provides:

> The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would: […] Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months.[4]

This reasoning ignores that the CEQA Guidelines explicitly prohibits deferring formulation of mitigation measures unless the agency (1) commits itself to the mitigation, (2) **adopts specific performance standards the mitigation will achieve**, and (3) identifies the types of potential actions that can feasibly achieve that performance standard" [emphasis added].[5]

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[1] DSEIR, pg. 131, Table 3.6-5; *See also* Appendix F, pg. 29 ("ambient levels at the surrounding uses would potentially be exceeded by 5 dBA Leq or more at various times throughout construction.").
[2] FSEIR, pg. 42, Response E.26.
[3] *Id.*
[4] Envision San José 2040 General Plan, EC-1.7.
[5] CEQA Guidelines, § 15126.4(a)(1)(B).

Further, courts have held that Courts have held that compliance with noise regulations alone is not substantial evidence of a less-than-significant impact.[6] In *Keep our Mountains Quiet v. County of Santa Clara*,[7] neighbors of a wedding venue sued over the County of Santa Clara's failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors' homes and disrupted the use and enjoyment of their property.[8] The County's Mitigated Negative Declaration relied on the noise standards set forth in its noise ordinance as its thresholds for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.[9] The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts[10] in holding that the County's reliance on the project's compliance with noise regulations did not constitute substantial evidence supporting the County's finding of no significant impacts.[11]

Here, the SEIR relies on consistency with the City's noise standards (Policy EC-1.7) to conclude that the Project's significant noise impacts are reduced to a less-than-significant level. As in *Keep Our Mountains Quiet*, the standards in Policy EC-1.7 do not address the actual increase in noise caused by the Project. And whereas the noise threshold in *Keep Our Mountains Quiet* was held insufficient for merely setting a maximum noise level, Policy EC-1.7 does not even set a maximum allowable noise level or increase.

Additionally, the DSEIR seems to adopt a 5 dBA noise threshold in Impact NOI-2: "[c]onstruction noise **would exceed ambient levels by five dBA** for a

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[6] *King & Gardiner Farms, LLC v. Cnty. of Kern* (2020) 45 Cal.App.5th 814, 865.
[7] *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.
[8] *Id.* at 724.
[9] *Id.* at 732.
[10] *Id., citing Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1338; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 (project's effects can be significant even if "they are not greater than those deemed acceptable in a general plan"); *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354, ("CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan").
[11] *Id.* at 732-734; see also *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 893, as modified on denial of rehearing (Mar. 20, 2020).

period of more than one year within 500 feet of residential uses or 200 feet of commercial or office uses, which exceeds the City thresholds defined in General Plan Policy EC-1.7" [emphasis added].[12] The DSEIR also provides analysis showing that ambient noise levels at the nearby land uses would be exceeded by approximately five dBA Leq or more throughout construction.[13] Since the DSEIR seems to identify 5 dBA as the relevant noise increase threshold, the City's mitigation must commit to reducing increases in noise to below 5 dBA (or some other specific performance standard) and identify specific types of actions that can feasibly achieve that standard .

B. The Project Fails to Adequately Analyze and Mitigate Cumulative Health Risk Impacts

The FSEIR states that the Project would not have a cumulatively significant health risk impact due to emission of Toxic Air Contaminants ("TACs"). The combined PM2.5 concentration from existing sources and construction of nearby projects have a pre-existing cumulative health risk impact, and the Project would contribute to this impact during the Project's construction and operation.[14] The FSEIR provides the following as the significance threshold for a cumulatively significant contribution to this impact:

> As mentioned on pages 40-41 and Appendix B of the Draft SEIR, BAAQMD CEQA Guidelines state that in instances where a pre-existing cumulative health risk impact exists, the project's individual contribution to that cumulative impact should be analyzed and if project health risks would be reduced to below the single-source thresholds **with best available mitigation measures**, the project's contribution to pre-existing cumulative impacts would not be cumulatively considerable. [emphasis added][15]

According to the City's significance threshold, the Project must adopt best available mitigation measures to conclude its impacts are not cumulatively considerable. BAAQMD, in comments on the DSEIR, proposed that the Project require additional controls to mitigate construction-related exhaust emissions:

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[12] DSEIR, pg. 131.
[13] *Id.*
[14] FSEIR, pg. 9, Response B.2
[15] *Id.*

- Off-road construction equipment should be zero-emission, where available; the City should require commitments to zero-emission equipment in applicable bid documents, purchase orders, and contracts; successful contractors should demonstrate the ability to supply the compliant construction equipment for use prior to any ground-disturbing and construction activities. At minimum off-road diesel construction equipment should meet Tier 4 emissions standards.
- Medium and Heavy-Duty diesel on-road vehicles should be equipped with engine model year 2010 or newer, or powered by zero or near zero-emissions technology, as certified by the California Air Resources Board, whenever feasible.
- Provide electrical hook ups to the power grid, rather than using diesel-fueled generators, for electric construction tools, such as saws, drills, and compressors, and using electric tools whenever feasible.[16]

BAAQMD also proposed that the City should require a site-specific dust control plan that includes measures that go beyond the Air District's Basic and Enhanced Air Quality Construction Measures.[17]

BAAQMD's recommended measures represent examples of the best available mitigation measures. Thus, the City should include these measures as binding mitigation measures to ensure the Project's contribution to the community's health risk is not cumulatively considerable.

II. THE PROJECT DOES NOT PROVIDE AFFORDABLE HOUSING, IN CONFLICT WITH LOCAL LAND USE GOALS, OBJECTIVES, AND POLICIES

The Project proposes to construct 415 multi-family residential units, but fails to provide any of the residential units at a below-market rate.[18] The SEIR does not provide any information regarding whether any these units will be offered as affordable housing. This lack of affordable housing conflicts with applicable local goals, objectives, and policies promoting affordable housing. CEQA Guidelines section 15125(d) requires that an environmental impact report "discuss any inconsistencies between the proposed project and applicable general plans, specific

[16] FSEIR, pg. 12, Comment B.4.
[17] FSEIR, pg. 10, Comment B.3
[18] DSEIR, pg. 4.

plans and regional plans," which includes regional housing plans.[19] Therefore, the Project's inconsistency with affordable housing goals, objectives, and policies is also a violation of CEQA.

A. The Project is Inconsistent with the Housing Element Update of the General Plan

The Regional Housing Needs Assessment ("RHNA") is the California State-required process that seeks to ensure cities and counties plan for enough housing in their Housing Element cycle to accommodate all economic segments of the community.[20] Accordingly, the Housing Element of the City's General Plan identifies the City's housing conditions and needs, evaluates the City's ability to meet its RHNA numbers, and establishes the goals, objectives, and policies of the City's housing strategy. The Housing Element Annual Progress Report ("APR"), as required by Government Code Section 65400, requires jurisdictions to report on the annual progress towards meeting the RHNA during the calendar year, as well as on the status of implementation programs identified in the Housing Element.

The City's 2021 Housing Element APR shows that "San José is ahead of schedule in delivering market-rate housing and is behind schedule in delivering all other income levels of affordable housing."[21] Affordable units are those offering rents affordable to extremely low-, very low-, low- and moderate-income households.[22] The APR states that "[t]he City's annual production of "extremely low-, very low-, low- and moderate-income housing remained well below the annual goals for each income level."[23]

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[19] *See also Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal. App. 5th 467, 543.
[20] Cal. Gov. Code Section 65580 – 65589.9; *see* City of San Jose, 2014-2023 San José Housing Element (January 27, 2015), pg. 1-2.
[21] City of San Jose, 2021 Housing Element and FY 2020-21 Housing Successor Annual Report to State of California ("2021 APR"), pg. 12, available at https://www.sanjoseca.gov/home/showpublisheddocument/87578/637926224037070000.
[22] *Id.* at 10.
[23] *Id.*

Income Level		RHNA Allocation by Income Level	Total Units to Date (all years)	Total Remaining RHNA by Income Level
Very Low	Deed Restricted	9,233	1,796	7,437
	Non-Deed Restricted			
Low	Deed Restricted	5,428	162	5,266
	Non-Deed Restricted			
Moderate	Deed Restricted	6,188	2,591	3,597
	Non-Deed Restricted			
Above Moderate		14,231	11,106	3,125
Total RHNA		**35,080**		
Total Units			**15,655**	**19,425**

As shown in the table[24] above, excerpted from the 2021 APR, the City still has not produced enough affordable housing at any level (extremely low-, very low-, low- and moderate-income). San Jose was obligated to identify capacity for 35,080 new units of housing in the 2015-2023 RHNA cycle. And while the City produced more than 15,655 new units, the City has a deficit of 19,425 units. The 2021 APR concludes that "[a]s the City remains far short of meeting its RHNA housing goals, despite diligent staff work and the dedication of considerable resources, San José will need to be aggressive in pursuing all production strategies appropriate and feasible to grow and diversify its housing stock – both with new types of housing and with more housing affordable to lower- and moderate-income residents."[25]

Because the City has not produced and is not expected to produce enough affordable housing to meet its RHNA, projects that do not contribute to the City's RHNA are inconsistent with the City's Housing Element, a primary goal of which is to meet the RHNA. The Project does not state it will provide any affordable units, and is therefore inconsistent with the Housing Element affordable housing goals.

B. The Project Does Not Provide Information Regarding Compliance with the Inclusionary Housing Ordinance

The City has a city-wide inclusionary housing ordinance ("IHO") that requires a minimum of 15% of residential units built on-site to be affordable, or pay

[24] *Id.*, Table B.
[25] *Id.* at 16.

an in lieu fee.[26] The IHO contains exemptions and waivers for "Downtown High Rises." According to the City's 2022 Inclusionary Housing Guidelines,

> "Downtown High Rise" shall mean a Residential Development that:
>
> 1. is located in the Downtown Core Area (as described in Resolution Number 73587 adopted January 9, 2007) or located in such other geographic area as may be specified in a Resolution adopted to implement SJMC Section 5.08.520(F);
> 2. has ten (10) or more floors or stories in height, not including any nonresidential uses, with the highest occupied floor at an elevation at least 150 feet above street level;
> 3. for which the Developer has provided the information requested by the City for compliance with Government Code (GC) Section 53053 and Resolution 77135 for disclosure of public subsidies and the public hearing has been held; and
> 4. receives its final certificates of occupancy for 80% of the dwelling units on or prior to June 30, 2025 or such deadline as may be specified in a Resolution implementing SJMC Section 5.08.520(F).
>
> If all these criteria are met, then the Downtown High Rise may request that the applicable reduced In Lieu Fee rate be applied in the Residential Development's Affordable Housing Compliance Plan and Inclusionary Housing Agreement and a waiver letter or partial waiver letter be provided at the time the In Lieu Fee is due.[27]

The In Lieu fees for qualifying Downtown High Rise Developments that obtain all Certificates of Occupancy on or prior to June 30, 2025 are as follows:

> Building permit by June 30, 2021 – $0/Square Foot
> Building permit by June 30, 2022 – $0/Square Foot
> Building permit by June 30, 2023 – $0/Square Foot
> Building permit by June 30, 2024 – $13/Square Foot

[26] City of San José. Inclusionary Housing Ordinance, available at: http://www.sanjoseca.gov/index.aspx?nid=3979.
[27] Revised Guidelines for Implementation of the Inclusionary Housing Ordinance of the City of San José, Chapter 5.08 of the San José Municipal Code (August 24, 2022), pg. 4-5, available at https://www.sanjoseca.gov/home/showpublisheddocument/89225/637980703088770000.

Building permit by June 30, 2025 – $23/Square Foot[28]

Here, the Project's documentation does not provide any information on whether it would construct affordable housing, or would seek a waiver from the IHO. A waiver could result in the Project paying $0 in In Lieu fees. Thus, compliance with the IHO may not resolve the Project's inconsistency with the Housing Element affordable housing goals.

C. The Project is Inconsistent with the Downtown Strategy 2040

The Project's lack of affordable housing conflicts with the Downtown Strategy 2040. The policy document states that its "top priorities" are to "[d]evelop housing with an emphasis on very high densities, and at least 20 percent of which is deed-restricted affordable to extremely low, very low, low, and moderate-income households."[29] The Project lacks deed-restricted affordable housing, and is thus inconsistent with this goal.

D. The Project is Inconsistent with the Envision San José 2040 General Plan

The Envision San José 2040 General Plan contains goals and policies promoting development of affordable housing:

> H-2.1 Facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs.
>
> H-2.2 Integrate affordable housing in identified growth locations and where other housing opportunities may exist, consistent with the Envision General Plan.

The Project's DSEIR and FSEIR fails to analyze consistency with these provisions. The instant Project's lack of affordable housing is inconsistent with these goals.

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[28] Revised Guidelines for Implementation of the Inclusionary Housing Ordinance of the City of San José, Chapter 5.08 of the San José Municipal Code (August 24, 2022), Attachment 3, available at https://www.sanjoseca.gov/home/showpublisheddocument/89231/637980706325400000.
[29] Downtown Strategy Update (Downtown Strategy 2040), pg. 13.

III. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO APPROVE THE PROJECT

In order for the Project to be approved, the City must be able to make all required findings for a Special Use Development Permit, Site Development Permit, Tree Removal Permit, Demolition Permit, and Historic Preservation Permit.

A. The City Cannot Make the Findings to Approve the Special Use Permits

Pursuant to San José Municipal Code Section 20.100.820, the City can only approve the Project's Special Use Permits if the following findings are made:

- The special use permit, as approved, is consistent with and will further the policies of the general plan and applicable specific plans and area development policies; and
- The special use permit, as approved, is consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency; and
- The proposed use at the location requested will not:
    - Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
    - Impair the utility or value of property of other persons located in the vicinity of the site; or
    - Be detrimental to public health, safety, or general welfare; and
- The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.

Here, this Project conflicts with the policies of the general plan by failing to provide affordable housing necessary to meet Housing Element goals. And as demonstrated in the comments herein, as well as our comments on the DSEIR, the project has potentially significant environmental and public health impacts. Thus, the City lacks substantial evidence to make the requisite findings to approve the Special Use Permits.

B. The City Cannot Make the Findings to Approve the Site Development Permit

To make the Site Development Permit findings pursuant to San José Municipal Code Section 20.100.630, and recommend approval to the City Council, the Planning Commission must determine that:

1. The Site Development Permit, as approved, is consistent with and will further the policies of the General Plan, applicable specific plans and area development policies; and

2. The Site Development Permit, as approved, conforms with the Zoning Code and all other Provisions of the San José Municipal Code applicable to the project; and Analysis:

3. The Site Development Permit, as approved, is consistent with applicable City Council policies, or counterbalancing considerations justify the inconsistency; and

4. The interrelationship between the orientation, location, and elevations of proposed buildings and structures and other uses on-site are mutually compatible and aesthetically harmonious.

5. The orientation, location, and elevation of the proposed buildings and structures and other uses on the site are compatible with and are aesthetically harmonious with adjacent development or the character of the neighborhood.

6. The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative effect on adjacent property or properties.

Here, as discussed in the analysis for the Project's Special Use Permits, the Project lacks affordable housing and has potentially significant environmental and public health impacts.

Further, the City lacks substantial evidence to claim that the Project's design is harmonious with the character of the neighborhood. The Historic Landmarks Committee concluded that, due to the Project's features, size, scale, proportion, and massing, the Project does not conform with Saint James Square Historic District Design Guidelines. The Historic Landmarks Commission also recommended that there was insufficient evidence to grant a hardship under Section 13.48.260, which would exempt the Project from certain design requirements.

As a result, the City cannot make the requisite findings to approve the Site Development Permit.

C. The City Cannot Make the Findings to Approve the Vesting Tentative Map

Pursuant to Section 66474 of the California Government Code, the City shall deny approval of a Vesting Tentative Map, if it makes any of the following findings:

1. That the proposed map is not consistent with applicable General and Specific Plans as specified in Section 65451.
2. That the design or improvement of the proposed subdivision is not consistent with applicable General and Specific Plans.
3. That the site is not physically suitable for the type of development.
4. That the site is not physically suitable for the proposed density of development.
5. That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
6. That the design of the subdivision or type of improvements is likely to cause serious public health problems.

Here, the Project is inconsistent with General Plan Policies requiring production of affordable housing. The Project's construction and operation generate potentially significant noise and health risk impacts. Further, the site is physically suitable for this type of development, as due to the Project's features, size, scale, proportion, and massing, the Project does not conform with Saint James Square Historic District Design Guidelines. Thus, the City lacks substantial evidence to make the findings requisite to approve a Vesting Tentative Map.

IV. CONCLUSION

For these reasons, and others discussed herein, the City lacks substantial evidence to make the requisite findings to make the Project's Approvals. Silicon Valley Residents urges the Planning Commission to recommend that the City revise and recirculate the FSEIR before any further action is taken on the Project, and to require the Applicant to bring the Project into compliance with all State and local land use policies before the Project can be considered for approval. We thank you for the opportunity to provide these comments.

Sincerely,

[redacted]

Aidan P. Marshall

APM:acp

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