



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Rosalynn Hughey

**SUBJECT:** SEE BELOW

**DATE:** February 21, 2019

Approved

*D. D. S. L.*

Date

*2/21/19*

COUNCIL DISTRICT: 1

## SUPPLEMENTAL

**SUBJECT: FILE NOS. PDC16-036, PD17-014, and PT17-023. PLANNED DEVELOPMENT ZONING FROM THE CG COMMERCIAL GENERAL ZONING DISTRICT TO A CP(PD) COMMERCIAL PEDESTRIAN PLANNED DEVELOPMENT ZONING DISTRICT. VESTING TENTATIVE MAP TO ALLOW THE SUBDIVISION OF THREE EXISTING PARCELS INTO FOUR PARCELS AND SEVEN COMMON PARCELS. PLANNED DEVELOPMENT PERMIT TO ALLOW THE DEMOLITION OF FIVE EXISTING BUILDINGS TOTALING APPROXIMATELY 105,980 SQUARE FEET, THE REMOVAL OF 68 ORDINANCE SIZED TREES, AND TO DEVELOP A SIX-STORY APPROXIMATELY 233,000-SQUARE FOOT OFFICE BUILDING, A SIX-STORY PARKING GARAGE, AN EIGHT-STORY MIXED-USE BUILDING CONTAINING APPROXIMATELY 10,000 SQUARE FEET OF GROUND FLOOR COMMERCIAL AND UP TO 289 RESIDENTIAL UNITS, AND AN EIGHT-STORY RESIDENTIAL BUILDING CONTAINING UP TO 293 RESIDENTIAL UNITS, APPROXIMATELY 88 AFFORDABLE RESIDENTIAL UNITS WILL BE DISPERSED THROUGHOUT THE MIXED-USE AND RESIDENTIAL BUILDING LOCATED ON THE SOUTHERLY SIDE OF STEVENS CREEK AND LOPINA WAY INTERSECTION, ALSO REFERRED TO AS THE 4300 STEVENS CREEK BOULEVARD MIXED-USE PROJECT (4300-4360 STEVENS CREEK BOULEVARD).**

## REASON FOR THE SUPPLEMENTAL

This supplemental memorandum includes Errata to the 4300 Stevens Creek Boulevard Mixed-Use Project Environmental Impact Report, and the City's responses to comments received in a letter dated January 16, 2019. The Errata include text edits to the Draft Environmental Impact Report (Draft EIR) to correct and clarify inconsistencies between the Draft Environmental Impact Report and the supporting Transportation Impact Analysis (TIA) prepared by Hexagon Transportation Consultants, Inc., dated August 17, 2018.

This supplemental memorandum also includes City responses to a letter from Adams, Broadwell, Joseph, and Cardozo, representing San José Residents for Responsible Development, dated January 16, 2019, received prior to the Planning Commission Hearing for the project. Although this letter was submitted after the 45-day public comment period for the Draft EIR from August 31, 2018 to October 15, 2018, the City is providing a response to these comments for informational purposes.

## ANALYSIS

The Errata includes text edits to the Draft EIR to correct and clarify inconsistencies between the Draft EIR and the supporting TIA prepared by Hexagon Transportation Consultants, Inc., dated August 17, 2018. Specifically, the Errata clarifies the conclusion of Impact TRAN-1, which the Draft EIR identifies as a significant impact to the intersection of Saratoga Avenue and San Tomas Expressway under background plus project conditions, as a significant and unavoidable impact as identified in the TIA.

The clarification in the Errata does not constitute significant new information requiring recirculation of the Draft EIR, as it is merely clarification of information already included in the Draft EIR and the TIA in Appendix F of the DEIR. CEQA allows such clarification pursuant to Section 15088.5(b) of the CEQA Guidelines. The TIA, which identified the impact to San Tomas Expressway and Saratoga Avenue as significant and unavoidable, is part of the circulated Draft EIR. Furthermore, the Draft EIR circulated in August 2018 and the draft Resolution certifying and adopting the EIR which was posted prior to the January 16, 2019 Planning Commission hearing identified significant and unavoidable impacts resulting from the project. These impacts already require adoption of a Statement of Overriding Considerations by City Council if the project is approved as proposed. The Errata, combined with the First Amendment to the Draft EIR dated January 2019 and the Draft EIR dated August 2018 constitutes the Final EIR for the project.

In addition to the Errata, this Supplemental Memorandum includes City responses to a letter from Adams, Broadwell, Joseph, and Cardozo dated January 16, 2019. The City received this letter immediately prior to the Planning Commission Hearing for the project. The letter responds to the City's responses in the First Amendment to the comment letter from Adams, Broadwell, Joseph, and Cardozo submitted during the public circulation period on the Draft EIR. Comments in the January 16, 2019 letter continue to assert inadequacies in the analysis in the Draft EIR and First Amendment related to transportation, greenhouse gas emissions, operational air quality, construction vibration, and hazardous materials.

As explained in the City's responses (Attachment 2), none of the comments present new information. The comment letter did not raise any issues which would require revisions to the analysis presented in the Draft EIR and First Amendment, and therefore, the Draft EIR does not require recirculation to disclose "new information" as defined by CEQA Guidelines Section 15162.

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The attached responses and responses provided in the First Amendment only serve to clarify information already disclosed in the Draft EIR.

/s/  
ROSALYNN HUGHEY, DIRECTOR  
Planning, Building and Code Enforcement

For questions please contact David Keyon, Planner IV, (408) 535-7898

**Attachments:**

Attachment 1: Errata to the 4300 Stevens Creek Boulevard Final Environmental Impact Report, dated February 19, 2019.

Attachment 2: Response to comments in letter from Adams, Broadwell, Joseph, and Cardozo dated January 16, 2019

Attachment 3: Letter from Adams, Broadwell, Joseph, and Cardozo dated January 16, 2019.

## **ATTACHMENT 1**

### **Errata to the 4300 Stevens Creek Boulevard Mixed-Use Project Environmental Impact Report**

## **ERRATA**

February 19, 2019

**Subject:** 4300 Stevens Creek Boulevard Mixed-Use Project  
Environmental Impact Report

**File Nos.:** PDC16-036, PD17-014, and PT17-023

**Address/Location:** 4300 Stevens Creek Boulevard

**Council District:** 1

### **TEXT REVISIONS**

The following section contains revisions/additions to the text of the *Draft Environmental Impact Report, 4300 Stevens Creek Boulevard Mixed Use Project*, dated August 2018. Revised or new language is underlined. All deletions are shown ~~with a line through the text~~.

Page ix Mitigation Measure TRAN-1.1; the mitigation measure has been **REVISED** as follows:

Prior to issuance of ~~any building permits~~ Department of Public Works Clearance, the project applicant shall pay fair share fees to the County of Santa Clara based on the August 2015 update of the County Expressway Plan 2040, which identifies the widening of San Tomas Expressway to eight lanes (by adding a fourth through lane in each direction) between Homestead Road and Stevens Creek Boulevard as a Tier 1 project. ~~Payment of the fee would reduce the impact to a less than significant level. Because the City of San José does not control implementation of these improvements, the impacts would be significant and unavoidable.~~

#### **Less Than Significant Unavoidable Impact With Mitigation**

Page 154 Section 3.13.3.1, Consistency with Plans and Policies; the paragraph has been **REVISED** as follows:

As discussed below, the proposed project would have a significant impact on the San Tomas Expressway/Saratoga Avenue intersection and four HOV freeway segments on I-280. Mitigation has been identified for San Tomas Expressway/Saratoga Avenue intersection ~~to~~ but would not reduce the impact to a less than significant level. The freeway impacts would be significant and unavoidable. Nevertheless, the project proposes a mixed-use development within a designated Urban Village and would place jobs, housing, and retail in proximity to existing transit, jobs, housing, and services, consistent with the General Plan. Therefore, the project is generally consistent with Plan Bay Area, the CMP, and General Plan Policies Policy TR-1.1, Policy TR-1.2, Policy TR-1.4, Policy TR-5.3, Policy TR-8.4, Policy TR-8.6, Policy TR-8.9, Policy TR-9.1, Policy CD-2.3,

Policy CD-3.4, and Policy CD-3.6. In addition, the project is consistent with Urban Village Policies CS-2.2, CS-3.5, CS-4.2, UD-5.2, and UD-5.3.

Page 159 MM TRAN-1.1 has been **REVISED** as follows:

Prior to issuance of any building permits Department of Public Works Clearance, the project applicant shall pay fair share fees to the County of Santa Clara based on the August 2015 update of the County Expressway Plan 2040, which identifies the widening of San Tomas Expressway to eight lanes (by adding a fourth through lane in each direction) between Homestead Road and Stevens Creek Boulevard as a Tier 1 project. Payment of the fee would reduce the impact to a less than significant level. Because the City of San José does not control implementation of these improvements, the impacts would be significant and unavoidable.

With implementation of the proposed mitigation, the project would ~~have a less than~~ still have a significant LOS impact under background plus project conditions. **(Less Than Significant Unavoidable Impact with Mitigation)**

Page 162 Section 3.13.5, Conclusion; the first paragraph has been **REVISED** as follows:

With implementation of the proposed mitigation, the LOS impact on the San Tomas Expressway/Saratoga Avenue intersection would ~~be reduced to a less than remain~~ significant level. **(Less Than Significant Unavoidable Impact with Mitigation)**

Page 181 Section 8.2, Significant Impacts From The Project; the third bullet point has been **REVISED** as follows:

- Impact TRAN-1: Implementation of the proposed project would have a significant impact on the San Tomas Expressway and Saratoga Avenue intersection under background plus project conditions (~~Less Than Significant and Unavoidable~~ with MM TRAN-1.1).

Page 179 Section 7.0, Significant and Unavoidable Impacts; the following has been added after statement No. 3:

4. Implementation of the proposed project would have a significant unavoidable impact on the San Tomas Expressway/Saratoga Avenue intersection under background plus project conditions.

Rosalynn Hughey, Director  
 Planning, Building and Code Enforcement



Deputy

Date: February 19, 2019

## **ATTACHMENT 2**

**Response to comments in letter from Adams, Broadwell,  
Joseph, and Cardozo dated January 16, 2019**

## ATTACHMENT 2

### RESPONSES TO COMMENTS RECEIVED PRIOR TO THE JANUARY 16, 2019 PLANNING COMMISSION HEARING

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The City of San José received a comment letter from Adams Broadwell Joseph & Cordozo prior to the Planning Commission hearing for the proposed project. The following includes responses to that comment letter. A copy of the comment letter in its entirety is also provided.

#### A. RESPONSE TO COMMENTS FROM ADAMS BROADWELL JOSEPH & CARDOZO, January 16, 2019:

**Comment A1:** We are writing on behalf of San Jose Residents for Responsible Development regarding the City of San Jose's ("City") January 2019 Final Environmental Impact Report ("FEIR") prepared for the 4300 Stevens Creek Boulevard Mixed-Use Project ("Project") proposed by Fortbay, LLC ("Applicant").

San Jose Residents for Responsible Development ("San Jose Residents") is an unincorporated association of individuals and labor unions that may be adversely affected by the potential public and worker health and safety hazards, and environmental and public service impacts of the Project. The association includes local resident Nancy Colleen Ferguson, as well as International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104 and Sprinkler Fitters Local 483, their member, their families and other individuals that live and/or work in the City of San Jose and Santa Clara County.

On October 15, 2018, we submitted comments on the Project's Draft EIR ("DEIR Comments"). The FEIR contains the City's response to our DEIR Comments. However, the City's responses and the FEIR fail to resolve all the issues we raised, as described below, and our comments still stand.

In short, the FEIR's conclusions regarding impacts on greenhouse gas ("GHG") emissions, transportation, vibration, hazards and public health are not supported by substantial evidence and fail to comply with the law. The City must revise the EIR to include legally appropriate analyses, supported by substantial evidence, and feasible mitigation for these impacts.

We prepared these comments with the assistance of air quality experts Matt Hagemann, P.G., C.Hg. and Kaitlyn Heck of Soil/Water/Air Protection Enterprise ("SWAPE") and of hazards expert James J.J. Clark of Clark & Associates. Their technical comments are attached hereto as Exhibit A and B respectively and are fully incorporated herein. We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.

**Comment A1:** The commenter submitted the letter and attachments responding to the City's response in the First Amendment to the Draft EIR less than one-and-a-half hours prior to the start of the January 16, 2019 Planning Commission hearing and after the public comment period for the Draft EIR. At the Planning Commission, staff responded, orally, to these comments. The City is not legally required to respond to the letter under CEQA, but, as a courtesy and for informational purposes, staff responded, orally, to these comments at the Planning Commission hearing and prepared this written response.



**Comment A2:** A. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Traffic Impacts

As explained in our DEIR Comments, the DEIR identifies a significant impact related to an increase in traffic caused by the Project, including a significant impact on the San Tomas Expressway and Saratoga Avenue intersection during the AM Peak Hour (TRAN-1).

To mitigate the impacts, the DEIR proposes MM-TRAN-1.1, which requires the applicant to pay fair share fees to the County of Santa Clara for the widening of San Tomas Expressway to eight lanes between Homestead Road and Stevens Creek Boulevard. The DEIR concludes that payment of the fee would reduce the impact to a less than significant level.

As explained in our comments, this mitigation violates CEQA, as it fails to comply with the CEQA requirement that mitigation must be fully enforceable, and with the California courts consistent finding that "...a commitment to pay fees without any evidence that mitigation will actually occur is inadequate." The DEIR provided no evidence that the County of Santa Clara's plan to widen the San Tomas Expressway, as discussed in MM TRAN-1.1, has been sufficiently analyzed and funded, and is certain to occur.

Moreover, as was shown in our DEIR Comments, the Traffic Impact Analysis ("TIA") for the Project clearly states "payment of a fair-share toward improvement costs alone would not guarantee the timely construction of the identified improvement to mitigate the project impact." Therefore, the TIA concludes that "in the event that the developer makes a fair-share contribution rather than constructing the improvement, this impact would be considered significant and unavoidable.

In its response, the City merely states the following:

Response J7: As discussed in the DEIR and the TIA, the 2008 update of the Comprehensive County Expressway Planning Study identifies 1) the widening of San Tomas Expressway to eight lanes (by adding a fourth through lane in each direction) between El Camino Real and Williams Road, and 2) regional Expressway Category projects in Measure B which identifies the widening of San Tomas Expressway to eight lanes between Homestead Road and Stevens Creek Boulevard as a Tier 1 project. This includes the impacted intersection of San Tomas Expressway and Saratoga Avenue.

Resolution No. 2016.06.17 adopted by the Board of Directors of the Santa Clara Valley Transportation Authority in June 2016 established improvements to be funded by Measure B, which was approved by the voters in November 2016. This resolution included the San Tomas Widening from Cupertino to San Jose as a Tier 1 transportation project.

This response fails to rectify the flaws described in our DEIR Comments, as again it includes no evidence that the widening Project is actually going to be fully executed, when it is going to be built, and if there are approved plans and funding for it. The only additional piece of information provided in the City's response is the (already known) fact that the Board of Directors of the Santa Clara Valley Transportation Authority resolution regarding Measure B included the San Tomas Widening from Cupertino to San Jose as a Tier 1 transportation project. This fact, however, does not say anything about the Project's actual prospects, timeline and funding.

Resolution No. 2016.06.17 is a resolution to proposed to the voters a new tax measure for transportation improvements that was approved by the voters in 2016. The resolution includes four attachments with “candidate project lists.” Attachment C is called “Santa Clara County Expressway Improvements (Tier 1)” and includes, among 19 other projects, the “San Tomas Expressway Widening and Trail between Homestead Road and Stevens Creek”. The fact that the Project is included in a list of candidate projects for an approved tax measure does not provide any guarantee that the project is actually going to be executed, or when.

Measure B is a tax measure that will be collected over the next 30 years. The VTA Board of Directors will allocate the funds collected based on guidelines the Board adopted. The Guidelines for the County Expressway program, which includes the San Tomas widening project, explain that VTA Board of Directors will allocate funding on a 2-year cycle and that as candidate projects move forward in readiness the County of Santa Clara will submit request for funding. It also authorizes the County Expressway Policy Advisory Board (PAB) to recommend the prioritization of projects and sets criteria for project’s prioritization. It is obviously a long and complicated process which involves a lot of discretion until a project that is included in attachment C of the resolution will be constructed. The City failed to provide *any* evidence that the widening project is making any such progress, let alone is guaranteed to be constructed.

Moreover, a lawsuit challenging the validity of Measure B was filed and, as a result, the Measure funds are being held back. The lawsuit is currently waiting Supreme Court review, and should the Supreme Court decide to hear the case, the implementation of Measure B may be delayed even further.

As explained in our DEIR comments, the CEQA Guidelines generally allow the payment of fees to mitigate impacts such as cumulative impacts, but the courts have consistently required evidence that the mitigation based on those fees will actually occur. Furthermore, courts have held that in order for a project to rely on a fee program for mitigation of impacts, the fee program itself also had to be analyzed in an EIR.

The City failed to explain in the DEIR and in the FEIR why it ignored the TIA conclusion that payment of fees will not mitigate the impacts. The City also failed to explain why it ignored the TIA’s recommendation for an alternative mitigation measure: a TDM program to reduce vehicle trips by 20 percent. By ignoring the TIA proposed alternative mitigation measure, the City again violated CEQA. Under CEQA, “[w]here several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. The City completely ignored the alternative mitigation proposed by its transportation expert in its transportation analysis, despite the fact the expert concluded this measure can mitigate the impact.

The City must therefore discuss both mitigation measures proposed in the TIA and provide substantial evidence to show that the San Tomas widening Project is a guaranteed and feasible alternative. Only after doing so can the City reach a conclusion, supported by substantial evidence, regarding the mitigation of the significant transportation impact caused by the Project.

**Response A2:** The DEIR properly discloses a significant impact to the intersection of San Tomas Expressway and Saratoga Avenue during the morning peak hour under background plus project conditions (Impact TRAN-1). The identified mitigation, payment of fair share

fees to the County of Santa Clara (MM TRA-1.1), will contribute to the completion of a fourth through lane in each direction on San Tomas Expressway at Saratoga Avenue, an improvement identified in the County's Comprehensive County Expressway Planning Study from 2008 and August 2015 update. The DEIR is correct that construction of the improvement will reduce the project's impact to a less than significant level.

There is no reasonable certainty on the timely construction of the mitigation improvements. As explained in the TIA, neither the applicant nor the City can ensure the improvements will be completed by a certain date, therefore the project could have a short-term, unmitigated impact until the County completes the improvements. Therefore, the City is clarifying the discrepancy in the impact conclusion of the DEIR to align it with the conclusion of a significant and unavoidable impact in the TIA. This clarification is memorialized in the attached Errata dated February 19, 2019.

The clarification in the Errata does not constitute significant new information requiring recirculation of the DEIR, as it is merely clarification of information already included in the TIA and DEIR allowed pursuant to Section 21083 of the California Public Resources Code. The TIA, which identified the impact to San Tomas Expressway and Saratoga Avenue as significant and unavoidable, is part of the circulated DEIR. Furthermore, the DEIR circulated in August 2018 and Draft EIR Resolution posted prior to the January 16, 2019 Planning Commission hearing identified significant and unavoidable impacts resulting from the project. These impacts already require adoption of a Statement of Overriding Consideration by City Council if the project is approved as proposed. The Errata will not change this requirement.

**Comment A3:** B. The EIR Fails to Adequately Mitigate Significant Greenhouse Gas Emissions

The City's analysis of the GHG impacts in the DEIR concluded that the Project will result in a significant impact from operational GHG emissions. It should be noted that the City also argues that if the Project is fully constructed and operational by January 1, 2021, it would have a less than significant impact. As explained in our DEIR Comments, this conclusion is not supported by substantial evidence. The City admits that it is likely the Project will not be operational by January 2021, and its analysis relies on the 2030 substantial progress threshold.

**Response A3:** The Bay Area Air Quality Management District (BAAQMD) CEQA Guidelines, May 2017, state "If a project is located in a community with an adopted GHG Reduction Strategy, the project may be considered less than significant if it is consistent with the GHG Reduction Strategy." Response J20 in the FEIR explained that not only would the project generate GHG emissions below the BAAQMD 2020 threshold, a discussion of the project's consistency with the City's GHG Reduction Strategy was provided. The City's GHG Reduction Strategy was re-adopted by the San José City Council in December 2015, and the environmental impacts of the GHG Reduction Strategy were analyzed in the General Plan FEIR and a 2015 Supplement to the General Plan FEIR. The City's projected emissions and the GHG Reduction Strategy are consistent with the measures necessary to meet state-wide 2020 goals established by AB 32 and addressed in the Climate Change Scoping Plan. For all these reasons, the DEIR conclusion regarding GHG emissions under the 2020 threshold are correct and supported by substantial evidence.

**Comment A4:** Under the substantial progress threshold analysis, the City concluded that the Project will result in a significant unavoidable impact from operational emissions. In our DEIR Comments, we explained that this conclusion is not supported by the evidence; to make such a finding, an EIR must include all feasible mitigation. The City failed to include all mitigation. SWAPE also proposed a list of feasible mitigation measures the City can implement to reduce the Project’s impact from GHGs, including limited parking supply, pricing parking, providing bike lanes and more.

In response, the City argued:

The project already accounts for these measures to the extent feasible with implementation of the TDM program for residents and employers outlined in mitigation measure MM GHG-1.1 of the DEIR. The ultimate measures included in the Office/Retail TDM Plan would be dependent on the end users as the buildings are not be constructed for a specific user, but the plan must include three or more of the measures outlined in the mitigation. The residential component would also have its own TDM plan specifically tailored to residential development.

This response is not supported by the evidence and violates CEQA. The City argues that because “end users” of the Project are still unknown it is impossible to require more robust mitigation measure [sic] in the form of a TDM program. But the end users’ specific identity has nothing to do with the reduction goals of the TDM program. The City may, as it does, leave the specific means by which the reduction goals will be achieved to the discretion of the end users. It must, however, set the performance standards (i.e., reduction goals) and the monitoring and enforcement mechanism to ensure that mitigation is effective and enforceable. Only then can the City argue the project accounts for all potential mitigation “to the extent feasible.” What the city does is improperly defer the formulation of its mitigation to a later time, in violation of CEQA.

Moreover, as SWAPE explains, the various measures suggested in the EIR for the TDM program may have very different reduction outcomes. Providing unbundled parking may achieve significantly more GHG reduction than providing free Wi-Fi (assuming this measure will even have any reduction effect). The City, however, fails to calculate the potential reduction emissions of each proposed measure, or require that the most effective ones will be implemented. In addition, SWAPE shows that the City fails to require that each measure *on its own* will achieve GHG reductions “to the extent feasible.” For example, SWAPE points out that the reduction impact of providing electric vehicle charging stations may vary greatly depending on the number of charging stations provided, but no quantitative requirements are attached to this measures or to other measures. Thus, the City fails to require mitigating the impact “to the extent feasible.”

The City must set performance standards (i.e., reduction targets) for its TDM program and analyze the potential reductions from such a program. Only if the City finds that implementation of such a plan cannot reduce the impact below the threshold of significance may it find the impact is significant and unavoidable.

The same is true for measures related to building designs. The City argues that:

Because final plans for building permits are completed after approval of the Planning entitlements and would not be completed at the time the DEIR was prepared, the City based the analysis on the most conservative emission rate and did not assume what level of reduction would be possible with the mitigation and building code requirements.

According to the DEIR, the Project “would be required to build to the California Green Building Code (CALGreen) which includes design provisions intended to minimize wasteful energy consumption. In addition, the proposed development would be designed to achieve minimum LEED certification consistent with San Jose Council Policy 6-32 (...)” However, at the same time the City admits that “no specific building measures have been identified at this time”. As SWAPE explains, it is therefore unclear if the Project is actually implementing mitigation to the extent feasible or simply meeting the minimum requirements in order to be consistent with San Jose City Council Policy 6-32. The City cannot make a “significant and unavoidable” determination prior to showing the Project is required to employ the best available and feasible building design to mitigate its significant GHG impact.

**Response A4:** As discussed in the text amendments in the First Amendment to the DEIR and explained in the supplemental memo from Illingworth & Rodkin dated January 3, 2019, the original GHG analysis estimated the project’s emissions using CalEEMod modeling data for 2021. This was due to the original estimated timing for project completion. As it is now clear that any project on the site would not be constructed and operational prior to January 1, 2021, the CalEEMod model was run again using modeling data for 2030 and the conclusions were provided in the FEIR. As a result, GHG emissions are estimated to be 3.12 metric tons CO<sub>2e</sub> per service population per year assuming project completion in 2021, reducing to 2.64 metric tons CO<sub>2e</sub> per year in 2030, which is 0.04 metric tons above the 2030 substantial progress threshold of 2.6.

As explained in the DEIR, the project applicant will be required to implement a TDM program under mitigation MM TRA-1.1, comply with CALGreen, and comply with the City’s Green Building ordinance. The residential and commercial uses would each be required to implement their own TDM plans. The analysis in the DEIR did not account for reductions in GHG emissions from implementation of the TDM plans and green building measures because they cannot be quantified at this time because specific measures beyond physical project attributes (such as enclosed bike parking) will be developed when a tenant for the office component is known. Any combination of TDM measures and green building measures could be sufficient to reduce the project’s GHG emissions by 0.04 metric tons CO<sub>2e</sub> per year per service population in 2030. Because the measures will not be fully defined until an office tenant or tenants are selected, the effectiveness of the TDM plan cannot be quantified at this time. Therefore, the City conservatively concluded that the impact would be significant and unavoidable. This conclusion does not preclude implementation of the identified mitigation which is required as a condition of project approval. See Response A15.

**Comment A5:** Finally, it should be noted that, in its response, the City also mentions that “the project was found to have a significant and unavoidable GHG emissions impact for which the City has already adopted overriding considerations.” To the extent the City argues that an overriding consideration previously adopted means the City is not required to fully mitigate the GHG impact of the Project, this argument is entirely wrong and violates CEQA. The City adopted overriding

considerations for its General Plan EIR, where it found that full buildout of the General Plan would result in a significant impact from GHG emissions. The General Plan EIR was a program-level EIR, and this is a project-level EIR, and the City must analyze the Project's impacts separately and mitigate them to the extent feasible.

**Response A5:** The General Plan EIR and Supplemental EIR evaluated greenhouse gas (GHG) emissions expected to occur from buildout of the General Plan, including an increase of 4,500 jobs and 3,860 dwelling units within the Stevens Creek Urban Village. As stated in the 2015 Supplement to the General Plan FEIR, these impacts were disclosed as significant and unavoidable because the substantial citywide GHG emissions reductions needed beyond 2020 cannot be done alone with the policies in the Envision San José 2040 General Plan (2040 General Plan); and these reductions will require an aggressive, multiple-pronged approach that includes policy decisions and additional emission controls at the federal and state level, and new and substantially advanced technologies that could not be anticipated or predicted with any accuracy at the time the General Plan FEIR and Supplemental EIR were prepared. Future policy and regulatory decisions by other agencies (such as the California Air Resources Board, California Public Utilities Commission, California Energy Commission, Metropolitan Transportation Commission, and BAAQMD) and technological advances are outside the City's control, and, therefore, could not be relied upon as feasible mitigation strategies. Given the uncertainties about the feasibility of achieving the post-2020 emissions reductions, the City's contribution to GHG emissions and climate change resulting from buildout of the Envision San José 2040 General Plan post-2020 was conservatively determined to be cumulatively considerable.

The residential and commercial development proposed by the project is a subset of the total development anticipated in the 2040 General Plan and specifically within the Stevens Creek Urban Village growth area. The project's EIR tiers off the analysis in the General Plan EIR and Supplemental EIR for GHG emissions. As described in the First Amendment to the project's DEIR, project operations would generate GHG emissions below the 2020 threshold, would be consistent with the General Plan, and would be consistent with the GHG Reduction Strategy. However, the City assessed the project-level GHG emissions using the 2030 substantial progress threshold to provide the most conservative estimate of potential project GHG impacts. The project-level analysis determined that the project would not meet the substantial progress threshold, and identified a project-level mitigation measure, MM TRA-1.1, discussed in Response A4, above.

**Comment A6:** Finally, the General Plan EIR itself states that “[a]dditional strategies, policies and programs, to supplement those currently identified, will ultimately be required to meet the 2035 reduction target”. The Project EIR must therefore identify all potential mitigation for the Project's specific GHG impacts.

**Response A6:** Please refer to Response A5, above.

The partial quotation provided in Comment A6 (that “[a]dditional strategies, policies and programs, to supplement those currently identified, will ultimately be required to meet the 2035 reduction target” is from the Envision San José 2040 General Plan Supplemental EIR

and is not in reference to individual projects. The paragraph, in its entirety, discusses the need for additional strategies, policies and programs by the City, beyond the current GHG Reduction Strategy (which is only applicable through the end of 2020), to meet the required 2035 reduction target of 3.04 MT of CO<sub>2</sub>e/SP as well as the 2050 target.<sup>1</sup>

**Comment A7:** C. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Vibration Impacts

The DEIR identifies significant impacts related to vibrations cause during Project construction. Specifically, the DEIR identifies a significant impact to the adjacent automotive dealership from vibration levels in excess of City standards. To mitigate the impact, the DEIR proposes to mitigation measures: first, a “Construction Vibration Monitoring Plan” that “shall be implemented to document condition prior to, during, and after vibration generating construction activities.” This plan will include a list of all heavy construction equipment to be used for the Project and the “avoidance methodology.”

The second measure requires the Applicant to include four measures as part of the approved construction plans prior to the issuance of any demolition or grading permits; ensure that construction crews shall avoid dropping heavy objects or equipment within 30 feet of any adjacent structure, ensure that all contractors follow the “prescribed vibration mitigation measures,” designate a specific person in charge of excess vibration claims and a requirement to make necessary repairs should vibration cause damages.

As explained in of DEIR Comments, these measures are in fact an impermissible deferral of mitigation, in which an agency “simply requires a project applicant to obtain a ...report and then comply with any recommendations that may be made in the report.” Mitigation is deferred to future “Construction Vibration Monitoring Plan,” “approved construction plans” and “avoidance methodology.” In fact, the only actual measure is the prohibition on dropping heavy objects or equipment within 30 feet of any adjacent structure. However, the Noise and Vibration Assessment prepared by the City’s consultants recommend a more specific measure: that the City “[p]rohibit the use of heavy vibration-generating construction equipment, such as vibratory rollers or excavation using clam shell or chisel drops, within 30 feet of any adjacent building.” The DEIR provides no explanation as to why it did not include these specific limitations or, at the very least, performance standards to include in a mitigation plan, as required under CEQA.

In its response, the City argues that “[p]rior to completion and approval of full building plans by the City, it would be speculative to assume the specific type of equipment that would be used on-site, the duration, and the location. Without this information, only broad-based restrictions can be applied to the project.” This explanation, however, fails to explain why the City did not include more specific mitigation measures, as recommended by its consultant, and performance standards.

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<sup>1</sup> Please refer to page 20 of the Draft Supplemental Program Environmental Impact Report for the Envision San Jose 2040 General Plan, September 2015 for a full discussion

The City moves on to argue that:

The commercial building in question is approximately 25 feet from the property line of the project site (...) vibration levels due to construction activities would be up to 0.21 in/sec Peak Particle Velocity (PPV) at the nearest off-site commercial building, which is just over the threshold of 0.20 PPV for structures of conventional construction established as a threshold in General Plan Policy EC-2.3. The mitigation recommendations from the noise consultant is based on assumed construction equipment that could be utilized on-site. As shown on the site plan (Figure 2.2-4 of the DEIR) the nearest hardscape to the shared property line is set back 11 feet. The nearest building, including the below-grade parking level, is approximately 14 feet from the shared property line. As a result, the City concluded that the prohibition of construction equipment outlined in Mitigation Measure 2 of the Noise and Vibration Study was not warranted.

These statements do not explain why the City chose to depart from its own consultant recommendation. Obviously, the consultant is aware of the distance of the nearest building and hardscape as they are reflected in the site plan. The City fails to explain why it did not include the expert's recommendation on how to avoid vibration damage. The City therefore impermissibly deferred its mitigation in violation of CEQA.

**Response A7:** The commenter's assertion that the vibration mitigation measures in the DEIR are a deferral of mitigation is incorrect and fails to acknowledge the nature of the impact, the full requirements of the mitigation, and the necessary reporting as stated in Response J8 of the First Amendment to the Draft EIR.

The commenter correctly states that the measures included in the Noise and Vibration Assessment are *recommended* by the noise consultant, but are not specifically required to reduce the vibration impact to less than significant. In addition to the mitigation recommendations by the noise consultant, the City included additional measures to ensure compliance with General Plan Policy EC-2.3 and ensure that the project would have a less than significant impact.

As stated in Response J8 of the First Amendment to the Draft EIR and partially reiterated by the commenter in Comment A7 above, the City concluded that the prohibition of heavy vibration-generating equipment within 30 feet of any adjacent building was not a necessary restriction due to the distance between the on-site commercial building and the property line, as well as the areas of significant ground disturbance on the project site. The noise consultant for the project has confirmed that the prohibition of heavy vibration-generating construction equipment, such as vibratory rollers or excavation using clam shell or chisel drops, within 30 feet of any adjacent building is not required to ensure a less than significant impact given the mitigation included in the DEIR, as well as the layout of the project design and the distance of the off-site building from the property line.<sup>2</sup>

The City, as the Lead Agency, has authority to make the final determination on the best and most effective mitigation based on all available data. The fact that the City chose not to

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<sup>2</sup> Personal Communication – Michael Thill, Illingworth & Rodkin, January 31, 2019.



include one mitigation measure recommended by the noise consultant for the reasons previous stated does not constitute deferral and is not in violation of CEQA.

**Comment A8:** D. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Air Quality and Health Risks

The DEIR includes a Health Risk Assessment (“HRA”) to evaluate the Project’s health risk impact from diesel particulate matter (“DPM”) emissions from the Project’s construction. However, as explained by SWAPE in our DEIR Comments, the City failed to conduct an *operational* HRA to evaluate the health risk posed to existing sensitive receptors near the Project site from additional emissions generated during operation. This lack of operational HRA [sic] is inconsistent with the Guidelines published by The Office of Environmental Health Hazard Assessment (“OEHHA”), the organization responsible for providing recommendations for health risk assessments in California. SWAPE also conducted a screening-level HRA and found the infantile, child, and lifetime cancer risks created by Project’s operations [sic] all greatly exceed the BAAQMD’s threshold of 10 in one million.

In its response, the City argued that the OEHHA Guidelines are not applicable to this Project and that it has no duty to conduct an operational HRA. In addition, it argues that SWAPE overstated the number of car-trips generated by the Project. This response fails to remedy the flaws in the City’s analysis.

**Response A8:** The project is a mixed-use residential and office project with ground floor retail that will not be a significant source of toxic air contaminants (TACs). As stated in Response J17 of the First Amendment to the Draft EIR, OEHHA’s Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments is specifically referred to as the Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments. The guidance manual was developed by OEHHA, in conjunction with the Air Resources Board (ARB) for use in implementing the Air Toxics Hot Spots Program. The ARB states that the Air Toxics Hot Spots Information and Assessment Act requires stationary (non-mobile) sources to report the types and quantities of certain substances routinely released into the air.

The Air Toxics Hot Spots Information and Assessment Act specifically defines a facility as follows:

44304. "Facility" means every structure, appurtenance, installation, and improvement on land which is associated with a source of air releases or potential air releases of a hazardous material.

ARB specifically notes that an operational HRA is required for the following types of facilities.

- Facilities that emit >10 tons per year of Total Organic Gasses (TOG), Particulate Matter (PM), Nitrogen Oxides (NOx), or Sulfur Oxides (SOx)
- Facilities that emit >5 tons/year of any Federal Hazardous Air Pollutant (HAP)

- Facilities that emit <10 tons/year like gas stations, dry cleaners, hazardous waste incinerators, metal platers using cadmium or chromium, waste water treatment facilities, etc.

None of these criteria apply to the proposed project. The project is not a significant stationary source of TACs and per OEHHA and BAAQMD, therefore no operational HRA is required.

Please see Response A13 for a response to the SWAPE letter.

**Comment A9:** SWAPE maintains that the omission of an operational HRA is not consistent with OEHHA most recent guidelines (March 2015). Indeed, CEQA required that City to analyze potentially significant impacts from a Project’s operational emissions. SWAPE shows that the Project is expected to generate approximately 307 truck trips per day, generating exhaust emissions and continuing to expose nearby sensitive receptors to emissions.

**Response A9:** Please see Response A8, above, and Responses A13 and A14, below.

**Comment A10:** The OEHHA document recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project, and this Project will last longer than that. SWAPE explains that while their analysis is a screening-level HRA, which tends to be conservative, it nevertheless provides substantial evidence that the Project may result in a significant operational health risk. The City has a duty to perform an assessment of the Project’s operational emissions’ impacts and to mitigate any impacts that are found.

**Response A10:** Please see Response A8, above, and Responses A13 and A14, below.

**Comment A11:** E. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Impacts Related to Hazardous Site Conditions

The DEIR acknowledges that “possible historic pesticide use on-site could have resulted in the accumulation of residual pesticides (e.g., DDT compounds, arsenic, and lead) in the shallow soils on-site.” In addition, the DEIR states that there is likely asbestos containing materials and lead-based paint in the building materials of the buildings to be demolished.

In our DEIR Comments, we showed that the city failed to properly mitigate the potential impacts from the hazards on the site, because the mitigation measures proposed in the DEIR only require analytical testing of the soils to be performed after demolition of the buildings. We explained that this is an improper deferral of mitigation.

In its response, the City argue that [sic] “[g]iven the length of time since agricultural activities have occurred on-site and the development of the site since cessation of the agricultural use more than 45 years ago, the likelihood of surface soils having residual agricultural contamination is negligible. The City then argues that despite this, the Applicant would be required to implement standard dust control measures during all phases of construction “which would abate any dust generated during demolition.” The City also points out that it has been cautious in choosing to employ these mitigation measures despite the fact the Phase I Environmental Impact Assessment for the proposed

project found the presence of potential residual agricultural chemicals in the soil to be a “de minimis” condition.

As Dr. Clack [sic] explains, this response fails to address the flaws pointed out in our DEIR Comments. First, for DDT, the half-lives in slow degrading soils and sediments are known to be much higher than what is indicated by the City, which means the potential concentration of DDT remaining in soils could be more than twice higher than the City’s response indicates could be present.

Second, Dr. Clark explains that given the potential for persistent organic pollutants (POPs) to exist in the soil, the measures proposed by the City would not be enough to mitigate the impact. This is because mitigation measures that are generally proposed for demolition activities and earth moving activities on site are not 100% effective at preventing exposure: the U.S. EPA found the control efficiency for respirable particles generated during storage and handling activities (demolition and soil movements) is generally between 56 percent and 81 percent using water spray alone. Dr. Clark explains that between approximately 20 percent to 50 percent of the toxic materials in the construction debris that is generated as respirable dust could therefore be released to the community. This, he explains, is true for both Asbestos and uncharacterized POP impacted soils on the Project site that will be disturbed during the demolition process or the clean-up of the debris.

Dr. Clark therefore concludes that “[t]he approach to sample after materials have been disturbed lends itself to creating a larger potential problem for the community. The mitigation measure is equivalent to closing the barn door after the horse has escaped.” The City should require sampling of the soil prior to demolition in order to properly mitigate the potentially significant impacts from soil contamination.

**Response A11:** This comment summarizes detailed comments made in the letter from Clark & Associates dated January 14, 2019, Attachment B to the January 16, 2019 letter from Adams, Broadwell, Joseph, and Cardozo. Please refer to Response A16-A19 for detailed responses to this letter.

**Comment A12:** F. Conclusion

The FEIR is inadequate as an environmental document because the City fails to properly analyze and mitigate the Project’s impacts. The Project will result in significant impacts in a number of areas, including GHGs, public health, traffic, hazards and from vibration. However, the City fails to properly mitigate those impacts, and many of the mitigation measures relied upon by the DEIR are improperly deferred or their effectiveness is not supported by the evidence.

The City cannot approve the Project until it revises the EIR to comply with CEQA and recirculates the revised EIR for public review.

**Response A12:** As demonstrated in the First Amendment to the DEIR and in Responses A1-A11 and A13-A21, the commenter did not provide substantial evidence to support their conclusion that the FEIR is inadequate. Therefore, no revisions or recirculation of the EIR is required.

**Comment A13:** We have reviewed the January 2019 First Amendment to the Draft Environmental Impact Report (“First Amendment”), which addressed comments we made in an October 12, 2018 comment letter on the August 2018 Draft Environmental Impact Report (DEIR) prepared for the 4300 Stevens Creek Boulevard Mixed-Use Project (“Project”) located in the City of San Jose (“City”). Our October 12, 2018 comment letter specifically discussed the DEIR’s inadequate evaluation of the Project’s health risk impacts and failure to adequately assess the Project’s greenhouse gas (GHG) impacts. After our review, we find the Responses to Comments document contained within the First Amendment (“Responses”) and the First Amendment itself to be insufficient in addressing the Project’s air quality and GHG impacts. An updated DEIR must be prepared that adequately evaluates and mitigates these potentially significant impacts. Until an updated analysis is prepared, the Project should not be approved.

#### Air Quality – Diesel Particulate Matter Health Risk Emissions Inadequately Evaluated

In our October 12 letter, we found that the DEIR failed to conduct an operational health risk assessment (HRA), thereby failing to adequately evaluate the Project’s health risk impact to nearby, off-site sensitive receptors. We provided a supplemental analysis in order to demonstrate that the Project will create a significant health risk to nearby sensitive receptors. In our comment letter, we prepared a screening level HRA to evaluate the health risk posed to the residences near the Project site during operation. We concluded that a residential receptor exposed to the Project’s operational emissions over a 30-year period, starting at the 3<sup>rd</sup> trimester stage of life would have an excess cancer risk of 177 in one million.

The risk significantly exceeds the Bay Area Air Quality Management District’s (BAAQMD) significance threshold of 10 in one million. In response to our letter, the Project Applicant states the following:

“The project does not propose significant operational sources of TACs, such as freeways and high traffic roads, commerce distribution centers, rail yards, ports, refineries, chrome platers, dry cleaners, or gasoline stations. The project would generate passenger vehicle traffic, which is not a substantial TAC source. Only diesel delivery or landscape service trucks would be considered an operational source of TACs, of which the project would generate a small amount. Furthermore, the loading areas serving both the ground floor commercial and office building will be located toward the front half of the site, away from existing residences (the nearest sensitive receptors) south of Albany Drive. Because passenger vehicles are not a significant source of TACs, a quantitative operational TAC impact assessment was not completed for the Draft EIR, consistent with City practice in its environmental documents” (Responses, p. 46).

The Responses go onto say [sic],

“Given the lack of TAC emission sources included in the project, the commenters assessment has been inappropriately applied to the project and inaccurately stated that the project would result in significant operational health risk impacts” (Responses, p. 46).

We maintain that the omission of a proper HRA for existing, off-site sensitive receptors is inconsistent with recommendations set forth by the Office of Environmental Health Hazard Assessment (OEHHA), the organization responsible for providing recommendations for HRAs in California. In February of 2015, OEHHA released its most recent *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments*, which was formally adopted in March of 2015. This guidance document describes the types of projects that warrant the preparation of a HRA. Once construction of the Project is complete, the Project will generate approximately 307 truck trips per day, which will generate additional exhaust emissions, thus continuing to expose nearby sensitive receptors to emissions. The OEHHA document recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project, and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (MEIR). Even though we are not provided with the expected lifetime of the Project, we can reasonably assume that the Project will operate for at least 30 years, if not more. Therefore, health risks from Project operation should have also been evaluated by the DEIR as well as the First Amendment, as a 30-year exposure duration vastly exceeds 6-month requirements set forth by OEHHA. These recommendations reflect the most recent risk policy, and as such, an assessment of health risks to nearby sensitive receptors from operation should be included in a revised California Environmental Quality Act (CEQA) evaluation for the Project.

**Response A13:** As stated in the First Amendment and in Response A8 above, the project is not considered to be a significant source of TACs for the following reasons:

- 1) SWAPE's screening level HRA is inaccurate and misleading. The AERSCREEN screening level analysis used is a high-level analysis that does not take into account site-specific meteorological data and assumes that all truck and other vehicle emissions would occur only on the project site for a prolonged period of time. Truck traffic generated by the project would not be limited to movement within the site and trucks would only be on site for a limited period of time to complete deliveries. Based on the CalEEMod model, typical trip lengths are seven to 12 miles.
- 2) The responses to comments provided in the First Amendment are from the City of San José as the Lead Agency for the project. The project applicant is not included in the CEQA analysis process.
- 3) The proposed project is a mixed-use development consisting of residential, retail, and office uses. The assertion by SWAPE that the project would generate approximately 307 truck trips per day is false. Per SWAPE's letter, the assumed 307 truck trips were derived from a review of the DEIR's CalEEMod modeling and it is stated that SWAPE multiplied each vehicle type of the listed fleet mix by the net operational daily trips. What SWAPE fails to acknowledge is that the fleet mix percentages shown in the CalEEMod model outputs are the default numbers in the model which are based on the countywide average mix of vehicle types for all land uses as provided by the State Emissions Factors (EMFAC) model (2014). This vehicle mix does not represent actual truck traffic generated by the project, which does not include uses that would predict high volumes of truck traffic (like distribution centers) and is primarily a residential, retail, and office project with some occasional deliveries to the non-residential uses. Consistent with standard practice, the modeling data was not modified to reflect the specific land

uses proposed by the project but relied on the default data. It is unreasonable to assume that a combined residential, office, and retail project of the proposed size would generate the volume of daily truck trips the commenter is asserting.

- 4) Lastly, as stated in the FEIR (Response J17), OEHHA's *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments* is specifically referred to as the *Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments*. The guidance manual was developed by OEHHA, in conjunction with the Air Resources Board (ARB) for use in implementing the Air Toxics Hot Spots Program. The ARB states that the Air Toxics Hot Spots Information and Assessment Act requires stationary sources to report the types and quantities of certain substances routinely released into the air.

The Air Toxics Hot Spots Information and Assessment Act specifically defines a facility as follows:

44304. "Facility" means every structure, appurtenance, installation, and improvement on land which is associated with a source of air releases or potential air releases of a hazardous material.

ARB specifically notes that applicability for the HRA assessment is based on the following types of facilities.

- Facilities that emit >10 tons per year of Total Organic Gasses (TOG), Particulate Matter (PM), Nitrogen Oxides (NO<sub>x</sub>), or Sulfur Oxides (SO<sub>x</sub>)
- Facilities that emit >5 tons/year of any Federal Hazardous Air Pollutant (HAP)
- Facilities that emit <10 tons/year like gas stations, dry cleaners, hazardous waste incinerators, metal platers using cadmium or chromium, waste water treatment facilities, etc.

The commenter does not provide substantial evidence indicating the project will have a potential significant operational air quality impact that would require preparation of an HRA. As a residential and office project with limited retail, the proposed project is not a significant stationary source of TACs. Therefore, as previously stated in the First Amendment to the Draft EIR, pursuant to OEHHA and BAAQMD guidelines, no operational HRA is required.

**Comment A14:** Furthermore, we maintain that the HRA provided in our October 12 comment letter provides evidence that the Project may result in a significant operational health risk. The AERSCREEN modeling we conducted is recommended by both OEHHA and the California Air Pollution Control Officers Associated (CAPCOA) guidance as the appropriate air dispersion model for Level 2 health risk screening assessments ("HRSAs"). A Level 2 HRSA utilizes a limited amount of site-specific information to generate maximum reasonable downwind concentrations of air contaminants to which nearby sensitive receptors may be exposed. As stated in our October 12 comment letter, we understand that our analysis provides a conservative health risk estimate. SWAPE provided a *screening-level* HRA in order to demonstrate that a health risk may occur as a result of Project operation. Since a screening-level HRA found a potential significant risk, a more refined operational HRA should be conducted in an updated EIR in order to more precisely

determine the actual health risk posed to the nearby sensitive receptors as a result of Project operation.

**Response A14:** The CAPCOA guidance noted above is also part of the OEHHA Air Toxic “Hot Spots” Program and is not applicable to residential, retail, and office land uses. The October 12<sup>th</sup> SWAPE comment letter specifically states that their analysis was based on the following project assumptions:

“Operational activity was simulated as a 10.0-acre rectangular area source in AERSCREEN, with dimensions of 235 meters by 173 meters. A release height of three meters was selected to represent the height of exhaust stacks on operational equipment and other heavy-duty vehicles, and an initial vertical dimension of one and a half meters was used to simulate instantaneous plume dispersion upon release.”

Based on this information the commenter is assuming a fixed source of emissions with equipment exhaust stacks and the regular, continued use of heavy-duty vehicles on-site. Clearly, this assumption is inconsistent with the proposed residential and office project. The SWAPE letter then argues that the project would generate 307 daily truck trips, which is also an erroneous assumption as discussed in Response A13. As outlined in the First Amendment to the Draft EIR and in Response A13 above, the assumptions used by SWAPE to prepare the screening level HRA are incorrect. As such, the screening level analysis prepared provides no evidence that an operational HRA is required nor does it demonstrate the project’s need to comply with the OEHHA and CAPCOA Hot Spots Project analysis requirements.

**Comment A15:** Greenhouse Gas – Failure to Adequately Implement Mitigation Measures

In our October 12 letter, we found that the DEIR failed to implement all available, feasible mitigation before concluding that the Project’s GHG impact was “significant and unavoidable”. We listed several other mitigation measures that the Project could incorporate in order to further reduce the GHG impact. In response, the Project Applicant states,

“The Project already accounts for these measures to the extent feasible with implementation of the TDM program for residents and employers outlined in mitigation measure MM GHG-1.1 of the DEIR. The ultimate measures included in the Office/Retail TDM Plan would be dependent on the end users as the buildings are not be constructed for a specific user, but the plan must include three or more of the measures outlined in the mitigation. The residential component would also have its own TDM plan specifically tailored to residential development. Regarding the measures related to building design, the project would be required to build the California Green Building Code (CALGreen) and the project would be designed to achieve minimum LEED certification as required by San Jose Council Policy 6-32 as discussed on page 84 of the DEIR. The DEIR also notes that no specific reduction in emissions was taken as part of the analysis because the specific building measures have not yet been identified” (p.51).

However, review of the DEIR and First Amendment demonstrates that the Project actually fails to implement all available mitigation to the “extent feasible” in order to reduce GHG emissions to the maximum extent possible. As a result, the Project Applicant incorrectly determines that the Project’s

GHG emissions will be significant and unavoidable without implementing all available, feasible mitigation, as is required to CEQA. [sic]

Specifically, review of Mitigation Measures (MM) GHG-1.1 demonstrates that the DEIR simply lists potential measures to be implemented as part of the Transportation Demand Management (TDM) program (DEIR, p. vi-vii). According to MM GHG-1.1 and the Responses, the Project would have to implement at least three of these measures into a TDM program (DEIR, p. vi and p. 51). However, the Project Applicant fails to provide any evidence that the potential mission reduction measures would be implemented to the maximum extent feasible. This is because the TDM program lacks performance measures in the form of reduction goals. That is, the DEIR fails to require that the TDM program implementation will achieve a certain level of GHG emissions reductions.

Moreover, the different measures proposed in the DEIR for TDM programs can have very different reduction efforts. For example, the reductions achieved by providing electric vehicle charging stations may be very different from those achieved by providing free or discounted transit passes. The reductions achieved by unbundled parking may be very different from those achieved by providing free Wi-Fi to all for telecommuting. The DEIR fails to analyze the potential reduction impact of each proposed TDM element.

In addition, the DEIR fails to require that each measure in itself will be implemented to the extent feasible. For example, MM GHG-1.1 recommends “Electric vehicle charging stations (and pre-wiring for future stations)” (DEIR, p. vii) as a potential measure to be implemented in the TDM. However, MM GHG-1.1 is unclear how many electric vehicle charging stations would be provided, how many prewired stations would be provided, or if these stations would be available to the public. Thus, MM GHG-1.1 also recommends “Secure bicycle parking” as a potential measure to be implemented in the TDM (DEIR, p. vii). However, the DEIR goes onto [sic] say, “Bicycle parking would be provided consistent with San Jose requirements, though the final quantity would be determined at the development permit stage” (DEIR, p. 82). As a result, DEIR fails to demonstrate the extent that “secure bicycle parking” would be implemented. Therefore, the DEIR provides no evidence that the measures included in MM GHG-1.1 would actually be implemented to the extent feasible in order to reduce the Project’s GHG emissions from transportation.

Furthermore, the Project is required by the City to be consistent with the Green Building Code and achieve the minimum LEED certification (p. 51). We find this to be an inadequate reason for determining that building design mitigation has been implemented to the extent feasible. The DEIR specifically states that “no specific building measures have been identified at this time” (DEIR, p.8). Therefore, it is unclear if the Project is actually implementing mitigation to the extent feasible or simply meeting the minimum requirements in order to be consistent with the San Jose City Council Policy 6-32. Therefore, the Project Applicant fails to commit to implementation of all available, feasible mitigation measures to the extent possible in order to reduce Project emissions. Prior to Project Approval, an updated DEIR should be prepared that specifies how the GHG mitigation measures will be implemented to the extent feasible.

**Response A15:** As shown in the text amendments provided in the First Amendment to the Draft EIR and explained in the supplemental air quality memo from Illingworth & Rodkin dated January 3, 2019, and discussed above in Response A4, the original GHG analysis estimated the project’s emissions using CalEEMod modeling data for 2021. This was due to



the original estimated timing of completion for the project. As it is now clear that any project on the site would not be constructed and operational prior to January 1, 2021, the CalEEMod model was run again using modeling data for 2030 and the conclusions were provided in the First Amendment to the Draft EIR. As a result, GHG emissions are estimated to be 3.12 metric tons CO<sub>2</sub>e per service population per year assuming project completion in 2021, reducing to 2.64 metric tons CO<sub>2</sub>e per service population per year, which is 0.04 metric tons above the 2030 substantial progress threshold of 2.6.

As previously explained in the First Amendment and Response A4, the project would be required to implement a TDM program under mitigation MM TRA-1.1, and comply with both the CALGreen Building Code and the City's Green Building Ordinance. The residential and commercial uses would each be required to implement their own TDM plans. The GHG analysis did not apply any reductions for the TDM plans and green building measures because they cannot be quantified at this time. Specifically, several measures would be dependent on the end user/property owner/property manager as they are monetarily based. In addition, other measures (such as EV parking and other parking incentives) would be based on final building plans and City requirements. Nevertheless, any combination of TDM measures and green building measures would be sufficient to reduce the project's GHG emissions by 0.04 metric tons per year. Because the measures are not fully defined and cannot be quantified at this time, the City has conservatively concluded that the impact would be significant and unavoidable. This conclusion does not preclude implementation of the identified mitigation which is required as a condition of project approval.

ATTACHMENT B – CLARK AND ASSOCIATES LETTER, dated January 14, 2019.

**Comment A16:** At the request of San Jose Residents for Responsible Development (San Jose Residents), Clark and Associates (Clark) has reviewed materials related to the First Amendment to the Draft EIR for 4300 Stevens Creek Boulevard Mixed-Use Project ("Project") dated January, 2019. Clark has previously commented on the need to revise the DEIR due to discrepancies in the DEIR's approach to dealing with potential hazardous waste sites (either areas impacted by the historical use of pesticides or the potential for lead or asbestos to be present in existing buildings that will be demolished during the construction of the project) that could impact the surrounding community, including previously unidentified sensitive receptors.

The City has presented responses to the original comments and to supplemental comments in the form of a First Amendment to the DEIR. The responses still do not address the primary concerns raised in the previously submitted comments and makes erroneous arguments related to the potential for pesticides and other hazardous materials to exist in the environment, essentially stating that if anything is discovered it can be dealt with at a later date. This argument effectively kicks the can down the alley, forcing the community to deal with the contamination issues that could have been eliminated with reasonable forethought.

#### RESPONSES TO COMMENTS:

In the First Amendment to the DEIR the City has addressed four specific point [sic] related to comments previously submitted. Responses to each of the points is provided below.

**Comment 1: failure to Consider the Potentially Significant Impacts From Residual Pesticides, Asbestos, And Lead That May Have Been Used At The Site**

As stated in the comments to the City, the Proponents of the Project have failed to adequately analyze and mitigate the considerable impact on nearby residences and businesses from the entrainment of pesticide impacted, lead impacted or asbestos impacted dust that will be generated during construction activities. The extent of the contamination and the concentrations of chemicals that may be present in the soils of the Site are unknown. The mitigation measures outlined by the City are improper because they defer sampling to until [sic] after demolition, and pesticides-polluted [sic] dust from demolition can impact workers and sensitive receptors nearby.

The City responses in the First Amendment can be summarized as:

- Since the environmental site assessment (ESA) did not classify the pesticides on the site as a recognized environmental concern (REC). The ESA classified the potential as “de minimis”.
- The DTSC definitions in the guidance cited in the comment letter to the City refer to are [sic] only applicable to non-disturbed land.
- The City is taking the extra precautions by requiring sampling after demolition and conditioning the development on reaching levels acceptable by the SCCDEH.
- As for dust impacts during demolition, it will be handled using dust control measures.

**Response:**

The guidance related to the performance of an ESA relies on the adequacy of historical records to determine the potential for hazardous wastes to exist at a site. Visual inspections of site and review of records are not substitutes for analytical measurements of soils at the site to determine the presence or absence of pesticides or other hazardous materials. The 1992 ESA prepared by TRC for the subject property (included in ESA submitted by ERM in 2018), indicated that asbestos bearing materials (ABMs) were present on site and that site had a long history of use as an orchard and pasture land (at least from 1954 through 1974). Many of the pesticides and herbicides used in California prior to the development of the site contained toxic metals and toxic organic compounds.

**Response A16:** The 1992 ESA prepared by TRC did identify the potential for asbestos containing materials within the buildings and did identify the historic agricultural uses of the site, just as the ERM report did. The 1992 ESA summary of findings states that TRC “did not identify potential environmental concerns associated with the past use of the subject property” consistent with the findings of the ERM report and the DEIR.

**Comment A17:** Chemicals that are considered persistent organic pollutants (POPs) due to their long half-lives in the environment include DDT and its degradation product, DDE. The values of half-lives cited in the City’s response are debatable. For DDT the half-lives in slow degrading soils and sediments are known to range from a low of 15 years to a high of 31 years, not necessarily the 2 to 15 years cited by the City. The potential concentration of DDT remaining in soils could be more than 2 times higher than the City’s response indicates could be present. Metals in the environment do not degrade but may be transported through the soil column via the infiltration of water from rains. This information alone warrants the classification of pesticides as a potential Historic REC (HREC).

**Response A17:** The City’s statement regarding the half-life of DDT is based on the U.S. Department of Health and Human Services. Public Health Service Agency for Toxic Substances and Disease Registry ToxGuide for DDT/DDD/DDE.  
(<https://www.atsdr.cdc.gov/toxguides/toxguide-35.pdf>)

The commenter cited two references in their determination that the half-life of DDT is 15 to 31 years. The City reviewed the Leatherbarrow reference, which is specific to a study of San Francisco Bay. The City could not review the Howard reference as it is not readily available and neither the report or excerpts from the report were provided by the commenter to allow the City to assess the applicability of the reference findings. Furthermore, the commenter provides no evidence that the site contains slow degrading soils or sediments. As such, the commenter’s assertion that the City’s response is debatable is not supported by the evidence provided.

As specified in mitigation measure MM HAZ-1.1 of the Draft EIR, the soil will be sampled and tested to provide actual concentrations of pesticides and pesticide-based metals, such as arsenic and lead. These concentrations will be compared to the environmental screening levels established by the Santa Clara County Department of Environmental Health.

Finally, the commenter misrepresents the definition of a Historic REC. An historic REC is defined by the ASTM Standard Practice E1527-13 as a “past release or any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting the property to any required controls.” Documentation pertaining to the project site does not indicate the presence of any past releases addressed by any regulatory agency, and therefore the site cannot be considered a Historic REC.

**Comment A18:** Given the potential for POPs and toxic metals to exist in the soils on site, it is prudent to define the extent of the impacts prior to disturbing any soils. Once the source of the POPs and toxic agents (soils in the case of POPs and toxic metals, construction materials in the case of toxic agents such as asbestos) are disturbed they will migrate off-site, impacting the community.

Mitigation measures that are generally proposed for demolition activities and earth moving activities on site are not 100% effective at preventing exposure to the agents since they will be entrained in winds and will migrate beyond the confines of the subject property. According to the U.S. EPA3, the control efficiency for respirable particles (less than 3.5 microns) generated during storage and handling activities (demolition or soil movements) is generally between 56 percent and 81 percent using water spray alone. Utilizing this approach along with Mitigation Measure HAZ 1-1 (sampling of debris and soils after demolition has occurred) only ensures that between approximately 20 percent to 50 percent of the toxic materials in the construction debris that is generated as respirable dust could be released to the community. For uncharacterized POP impacted soils on site that will be disturbed during the demolition process or the clean-up of the debris, the same argument is evident. The approach to sample after materials have been disturbed lends itself to creating a larger potential problem for the community. The mitigation measure is equivalent to closing the barn door after the horse has escaped.

The City's response relies on the Santa Clara County Department of Environmental Health (SCCDEH) to derive acceptable levels for POPs and metals in soils. SCCDEH does not promulgate its own standards but instead relies on guidance from the California Environmental Protection Agency's Department of Toxic Substance Control (DTSC), Office of Health and Hazard Assessment (OEHHA) and Human and Ecological Risk Office (HERO), the Santa Clara Regional Water Quality Control Board (SC-RWQCB), and the U.S. EPA to derive appropriate standards. The Amendments must address what the proposed screening thresholds would be prior to moving forward with any work.

**Response A18:** First, the commenter suggests that a Phase I Environmental Site Assessment is not sufficient to determine the potential for contamination on a project site and that on-site soil testing is required. This is incorrect as Phase I Environmental Site Assessments are the standard documentation used under CEQA to determine the potential for on-site contamination. Phase II Soil Testing is required in cases where the Phase I determines a high likelihood of contamination. The City's expert concluded that the information provided in the Phase I Environmental Site Assessment and the DEIR was sufficient to make a determination of potential impact. While the commenter may not agree with the City's determination, it does not negate the City's conclusion. Furthermore, the commenter has provided no site-specific data to refute the City's determination.

Second, the commenter notes the presence of asbestos bearing materials. As previously noted in the DEIR and First Amendment to the Draft EIR, asbestos and lead within the buildings would be remediated per OSHA requirements.

Third, the mitigation measure does not rely on the SCCDEH to derive acceptable levels of soil contaminants. The mitigation measure states that if concentrations are found above established DTSC regulatory environmental screening levels, then the SCCDEH would act as the oversight agency for remediation of the site.

Lastly, as stated in Response J13 of the First Amendment to the Draft EIR, the Phase I Environmental Impact Assessment for the proposed project (Appendix E to the DEIR) found the presence of potential residual agricultural chemicals in the soil to be a *de minimis* condition and did not consider it as a recognized environmental condition (REC). While the technical expert made this finding, the City choose to take a more conservative estimate of the potential contamination on-site by finding a significant impact.

The commenter states that dust from soil disturbance during demolition could be contaminated. This is unlikely as the site has been developed and the soils disturbed, and it is reasonable to assume that fill was used during construction of the existing buildings and hardscape. Given the length of time since agricultural activities have occurred on-site and the development of the site since cessation of the agricultural use more than 45 years ago, the likelihood of surface soils having residual agricultural contamination is negligible. Nevertheless, the project applicant would be required to implement standard dust control measures during all phases of construction which would abate any dust generated during demolition. Dust control measures are not limited to watering, but also include implementing practices such as limiting vehicle speed on-site and track-out prevention practices. The

mitigation proposed as part of the project is acceptable practice for addressing subsurface residual contamination.

Mitigation measure MM HAZ-1.1 in the DEIR requires the project applicant to collect and test soils using established construction/trench worker and residential thresholds. Furthermore, regulatory oversight would be provided by SCCDEH. As stated in the DEIR, the mitigation must be completed prior to issuance of grading permits. Therefore, there is no deferral of mitigation as the project cannot proceed until the mitigation is completed to the satisfaction of the City and the regulatory agency. Furthermore, as the potential for agricultural contaminants on-site is not an REC, there is no specific need or requirement to complete soil sampling prior to demolition.

With regard to the building materials, pages 92-93 of the DEIR list the specific OSHA requirements that are mandatory by law that the project would implement to address potential asbestos containing materials and lead based paint. This comment does not raise any issues that would require recirculation of the DEIR or inclusion of additional mitigation measures.

**Comment A19:** Comment 2: FAILURE TO IDENTIFY SENSITIVE RECEPTORS THAT COULD BE IMPACTED BY RELEASES OF HAZARDOUS WASTE FROM THE PROJECT SITE

As stated in the comments to the City, the Proponents of the Project have failed to identify a relevant sensitive receptor (the Starbright School) near the project site. The City responded that the need to evaluate operational emissions from the Project was only applicable to hazardous material emitting sites and that construction impacts were normally only evaluated for sites within 1,000 feet of a project.

**Response A19:** The commenter has misinterpreted the City's response. Response J14 of the FEIR states:

“The threshold noted by the commenter is in reference to facilities that would emit or utilize hazardous emissions/substances/waste during operation to ensure compatibility of land uses. As noted on page 91 of the DEIR, operation of the proposed project would include the use and storage of cleaning supplies and maintenance chemicals in small quantities, similar to the operations of the existing buildings, as well as nearby businesses and residences. Therefore, the impact to any nearby school would be less than significant.

Regarding construction impacts to the Starbright School, construction impacts are typically addressed for properties within 1,000 feet of a project site pursuant to the BAAQMD CEQA Guidelines. As the school is more than 1,200 feet from the project site, construction impacts would be the same or less than the nearby residential impacts and would not require additional mitigation.”

**Comment A20:** The Starbright School resides approximately 1,200 feet west of the Project Site. The BAAQMD CEQA guidance states “BAAQMD recommends that a Lead Agency identify all TAC and PM2.5 sources located within a 1,000 foot radius of the proposed project site. A lead agency should enlarge the 1,000-foot radius on a case-by-case basis if an unusually large

source or sources of risk or hazard emissions that may affect a proposed project is beyond the recommended radius. Permitted sources of TAC and PM2.5 should be identified and located as should freeways and major roadways, and other potential sources. To conduct a thorough search, a Lead Agency shall gather all facility data within 1,000 feet of the project site (and beyond where appropriate).”<sup>4</sup> Asbestos and lead are classified by the State of California under *Title 17, CCR, § 93000* as toxic air contaminants (TACs) which do not have an identifiable threshold for exposure (i.e., sufficient evidence to support the identification of a level at which no significant health effects are anticipated from exposure to the substance). DDE, a degradation product of DDT, is also listed under *Title 17, CCR, § 93000* as TAC.

Given the nature of HRECs that may be present on site and the potential for their migration from the site to the Starbright School it is well within the City’s purview to have the Proponent evaluate the impacts from construction activities on the school. As is evident in the Response to Comment 1 (above), the mitigation measures proposed for preparation of the site (demolition of buildings followed by sampling of shallow soils for the presence of POPs and toxic agents) fails to consider the clear exposure pathway between the subject property and the Starbright School. During the demolition of the buildings and the clean-up of the debris respirable particulate matter (PM) will be generated on site. A significant portion (20% to 50%) of the PM generated on site can migrate off-site even with mitigation measures in place and be deposited at the School. PM composed of asbestos is considered by the State of California to be a toxic and is listed on Proposition 65.

**Response A20:** The commenter states that the BAAQMD recommends enlarging the standard 1,000-foot radius if “an unusually large source or sources of risk or hazard emissions that may affect a proposed project is beyond the recommended radius.” This refers specifically to impact *on* the project, not impacts *from* the project. In which case, the radius of potential impacts from the project relative to the Starbright School is not relevant.

The commenter also states that asbestos and lead are classified by the State as TACs. As expressly stated on pages 92-93 of the DEIR and reiterated in the First Amendment to the Draft EIR, asbestos and lead abatement on the project site is required consistent with OSHA and BAAQMD standards. The commenter provides no substantial evidence that compliance with OSHA standards for asbestos and lead remediation, as required by law, is insufficient to protect the community surrounding the project site.

For the City’s responses to the comment regarding DDT, please refer to Response A18, above.

**Comment A21:** Conclusion

The facts identified and referenced in this comment letter lead me to reasonably conclude that the Project could result in significant unmitigated impacts that are not addressed in the First Amendment to the DEIR. To protect public health the City must prepare a revised EIR for the Project to address the deficiencies identified above, and recirculate it for public review.

**Response A21:** Please refer to Responses A16-A20 above.

## **ATTACHMENT 3**

**Copy of comment letter from Adams, Broadwell, Joseph,  
and Cardozo dated January 16, 2019**

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*Of Counsel*

January 16, 2019

*Via Hand Delivery*

*Agenda Item 5.a*

City of San Jose Planning Commission  
City Hall  
200 E. Santa Clara St.  
San José, CA 95111

**Re: Comments on the Final Environmental Impact Report for  
the 4300 Stevens Creek Boulevard Mixed-Use Project by  
Fortbay, LLC (PDC#16-036 PD17-014, PT17-23)**

Dear Honorable Planning Commission Members:

We are writing on behalf of San Jose Residents for Responsible Development regarding the City of San Jose's ("City") January 2019 Final Environmental Impact Report ("FEIR") prepared for the 4300 Stevens Creek Boulevard Mixed-Use Project ("Project") proposed by Fortbay, LLC ("Applicant").<sup>1</sup>

San Jose Residents for Responsible Development ("San Jose Residents") is an unincorporated association of individuals and labor unions that may be adversely affected by the potential public and worker health and safety hazards, and environmental and public service impacts of the Project. The association includes local resident Nancy Colleen Ferguson, as well as International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104 and Sprinkler Fitters Local 483, their members, their families and other individuals that live and/or work in the City of San Jose and Santa Clara County.

On October 15, 2018, we submitted comments on the Project's Draft EIR ("DEIR Comments"). The FEIR contains the City's responses to our DEIR

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<sup>1</sup> First Amendment to the Draft Environmental Impact Report 4300 Stevens Creek Boulevard Mixed-Use Project, File No. PDC16-036, PD17-014, PT17-23  
4343-010acp



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Comments. However, the City's responses and the FEIR fail to resolve all the issues we raised, as detailed below, and our comments still stand.<sup>2</sup>

In short, the FEIR's conclusions regarding impacts on greenhouse gas ("GHG") emissions, transportation, vibration, hazards and public health are not supported by substantial evidence and fail to comply with the law. The City must revise the EIR to include legally appropriate analyses, supported by substantial evidence, and feasible mitigation for these impacts.

We prepared these comments with the assistance of air quality experts Matt Hagemann, P.G., C.Hg. and Kaitlyn Heck of Soil / Water / Air Protection Enterprise ("SWAPE") and of hazards expert James J.J. Clark of Clark & Associates. Their technical comments are attached hereto as Exhibit A and B respectively and are fully incorporated herein. We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.<sup>3</sup>

#### **A. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Traffic Impacts**

As explained in our DEIR Comments, the DEIR identifies significant impacts related to an increase in traffic caused by the Project, including a significant impact on the San Tomas Expressway and Saratoga Avenue intersection during the AM Peak Hour (TRAN-1).<sup>4</sup>

To mitigate the impacts, the DEIR proposes MM-TRAN-1.1, which requires the applicant to pay fair share fees to the County of Santa Clara for the widening of San Tomas Expressway to eight lanes between Homestead Road and Stevens Creek Boulevard. The DEIR concludes that payment of the fee would reduce the impact to a less than significant level.

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<sup>2</sup> We incorporate our October 15, 2018 comments, along with their attachments and exhibit, herein by reference. ("DEIR Comments")

<sup>3</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

<sup>4</sup> DEIR, p. 158.

As we explained in our comments, this mitigation violates CEQA, as it fails to comply with the CEQA requirement that mitigation must be fully enforceable,<sup>5</sup> and with the California courts consistent finding that "...a commitment to pay fees without any evidence that mitigation will actually occur is inadequate."<sup>6</sup> The DEIR provided no evidence that the County of Santa Clara's plan to widen the San Tomas Expressway, as discussed in MM TRAN-1.1, has been sufficiently analyzed and funded, and is certain to occur.

Moreover, as was shown in our DEIR Comments, the Traffic Impact Analysis ("TIA") for the Project clearly states "payment of a fair-share toward improvement costs alone would not guarantee the timely construction of the identified improvement to mitigate the project impact." Therefore, the TIA concludes that "in the event that the developer makes a fair-share contribution rather than constructing the improvement, this impact would be considered significant and unavoidable."<sup>7</sup>

In its response, the City merely states the following:

**Response J7:** As discussed in the DEIR and the TIA, the 2008 update of the Comprehensive County Expressway Planning Study identifies 1) the widening of San Tomas Expressway to eight lanes (by adding a fourth through lane in each direction) between El Camino Real and Williams Road, and 2) regional Expressway Category projects in Measure B which identifies the widening of San Tomas Expressway to eight lanes between Homestead Road and Stevens Creek Boulevard as a Tier 1 project. This includes the impacted intersection of San Tomas Expressway and Saratoga Avenue.

Resolution No. 2016.06.17 adopted by the Board of Directors of the Santa Clara Valley Transportation Authority in June 2016 established improvements to be funded by Measure B, which was approved by the voters in November 2016. This resolution included the San Tomas Widening from Cupertino to San Jose as a Tier 1 transportation project.<sup>8</sup>

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<sup>5</sup> 14 CCR §15126.4.

<sup>6</sup> *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140 (quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692).

<sup>7</sup> 4300 Stevens Creek Boulevard Mixed-Use Development, Traffic Impact Analysis, Hexagon Transportation Consultants, Inc., August 17, 2018 (hereinafter, "TIA"), p. 36.

<sup>8</sup> FEIR, p. 32.

This response fails to rectify the flaws described in our DEIR Comments, as again it includes no evidence that the widening Project is actually going to be fully executed, when it is going to be built, and if there are approved plans and funding for it. The only additional piece of information provided in the City's response is the (already known) fact that the Board of Directors of the Santa Clara Valley Transportation Authority resolution regarding Measure B included the San Tomas Widening from Cupertino to San Jose as a Tier 1 transportation project. This fact, however, does not say anything about the Project's actual prospects, timeline and funding.

Resolution No. 2016.06.17 is a resolution to propose to the voters a new tax measure for transportation improvement that was approved by the voters in 2016. The resolution includes four attachments with "candidate projects lists." Attachment C is called "Santa Clara County Expressway Improvements (Tier 1)" and includes, among 19 other projects, the "San Tomas Expressway Widening and Trail between Homestead and Stevens Creek".<sup>9</sup> The fact that the Project is included in a list of candidate projects for an approved tax measure does not provide any guarantee that the project is actually going to be executed, or when.

Measure B is a tax measure that will be collected over the next 30 years. The VTA Board of Directors will allocate the funds collected based on guidelines the Board adopted. The Guidelines for the County Expressway program, which includes the San Tomas widening project, explain that VTA Board of Directors will allocate funding on a 2-year cycle and that as candidate projects move forward in readiness the County of Santa Clara will submit request for funding. It also authorizes the County Expressway Policy Advisory Board (PAB) to recommend the prioritization of projects and sets criteria for project's prioritization.<sup>10</sup> It is obviously a long and complicated process which involves a lot of discretion until a project that is included in attachment C of the resolution will be constructed. The City failed to provide *any* evidence that the widening project is making any such progress, let alone is guaranteed to be constructed.

Moreover, a lawsuit challenging the validity of Measure B was filed and, as a result, the Measure funds are being held back. The lawsuit is currently waiting

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<sup>9</sup> <http://yesmeasureb.com/uploads/articles/VTA.pdf> (accesses January 11, 2019).

<sup>10</sup> <http://www.vta.org/measure-b-2016> (accesses January 11, 2019).

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Supreme Court review, and should the Supreme Court decide to hear the case, the implementation of Measure B may be delayed even further.<sup>11</sup>

As explained in our DEIR comments, the CEQA Guidelines generally allow the payment of fees to mitigate impacts such as cumulative impacts,<sup>12</sup> but the courts have consistently required evidence that the mitigation based on those fees will actually occur.<sup>13</sup> Furthermore, courts have held that in order for a project to rely on a fee program for mitigation of impacts, the fee program itself also had to be analyzed in an EIR.<sup>14</sup>

The City failed to explain in the DEIR and in the FEIR why it ignored the TIA conclusion that payment of fees will not mitigate the impacts. The City also failed to explain why it ignored the TIA's recommendation for an alternative mitigation measure: a TDM program to reduce the vehicle trips by 20 percent.<sup>15</sup> By ignoring the TIA proposed alternative mitigation measure, the City again violated CEQA. Under CEQA, "[w]here several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified."<sup>16</sup> The City completely ignored the alternative mitigation proposed by its transportation expert in its transportation analysis, despite the fact the expert concluded this measure can mitigate the impact.

The City must therefore discuss both mitigation measures proposed in the TIA and provide substantial evidence to show that the San Tomas widening Project is a guaranteed and feasible alternative. Only after doing so can the City reach a conclusion, supported by substantial evidence, regarding the mitigation of the significant transportation impact caused by the Project.

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<sup>11</sup> <http://www.vta.org/News-and-Media/Connect-with-VTA/Update-on-Measure-B-Lawsuit#.XDkVp1xKiUk> (accesses January 11, 2019).

<sup>12</sup> 14 CCR § 15130(a)(3).

<sup>13</sup> *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140 (quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692).

<sup>14</sup> *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026).

<sup>15</sup> 4300 Stevens Creek Boulevard Mixed-Use Development, Traffic Impact Analysis, Hexagon Transportation Consultants, Inc., August 17, 2018 (hereinafter, "TIA"), p.38.

<sup>16</sup> 14 CCR § 15126.4(a)(1)(B).

## **B. The EIR Fails to Adequately Mitigate Significant Greenhouse Gas Emissions**

The City's analysis of the GHG impacts in the DEIR concluded that the Project will result in a significant impact from operational GHG emissions. It should be noted that the City also argues that if the Project is fully constructed and operational by January 1, 2021, it would have a less than significant impact. As explained in our DEIR Comments, this conclusion is not supported by substantial evidence. The City admits that it is likely the Project will not be operational by January 2021, and its analysis relies on the 2030 substantial progress threshold.

Under the substantial progress threshold analysis, the City concluded that the Project will result in a significant unavoidable impact from operational emissions. In our DEIR Comments, we explained that this conclusion is not supported by the evidence: to make such a finding, an EIR must include all feasible mitigation. The City failed to include all feasible mitigation.<sup>17</sup> SWAPE also proposed a list of feasible mitigation measures the City can implement to reduce the Project's impact from GHGs, including limiting parking supply, pricing parking, providing bike lanes and more.

In response, the City argued:

The project already accounts for these measures to the extent feasible with implementation of the TDM program for residents and employers outlined in mitigation measure MM GHG-1.1 of the DEIR. The ultimate measures included in the Office/Retail TDM Plan would be dependent on the end users as the buildings are not be constructed for a specific user, but the plan must include three or more of the measures outlined in the mitigation. The residential component would also have its own TDM plan specifically tailored to residential development.<sup>18</sup>

This response is not supported by the evidence and violates CEQA. The City argues that because "end users" of the Project are still unknown it is impossible to require more robust mitigation measure in the form of a TDM program. But the end

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<sup>17</sup> 14 CCR § 15091.

<sup>18</sup> FEIR, p. 51.

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users' specific identity has nothing to do with the reduction goals of the TDM program. The City may, as it does, leave the specific means by which the reduction goals will be achieved to the discretion of the end users. It must, however, set the performance standards (i.e., reduction goals) and the monitoring and enforcement mechanism to ensure that mitigation is effective and enforceable. Only then can the City argue the project accounts for all potential mitigation "to the extent feasible." What the City does is improperly defer the formulation of its mitigation to a later time, in violation of CEQA.<sup>19</sup>

Moreover, as SWAPE explains, the various measures suggested in the EIR for the TDM program may have very different reduction outcomes.<sup>20</sup> Providing unbundled parking may achieve significantly more GHG reduction than providing free Wi-Fi (assuming this measure will even have any reduction effect). The City, however, fails to calculate the potential reduction emissions of each proposed measure, or require that the most effective ones will be implemented. In addition, SWAPE shows that the City fails to require that each measure *on its own* will achieve GHG reductions "to the extent feasible." For example, SWAPE points out that the reduction impact of providing electric vehicle charging stations may vary greatly depending on the number of charging stations provided, but no quantitative requirements are attached to this measure or to others measures.<sup>21</sup> Thus, the City fails to require mitigating the impact "to the extent feasible."

The City must set performance standards (i.e, reduction targets) for its TDM program and analyze the potential reductions from such a program. Only if the City finds that implementation of such a plan cannot reduce the impact below the threshold of significance may it find the impact is significant and unavoidable.

The same is true for measures related to building designs. The City argues that:

Because final plans for building permits are completed after approval of Planning entitlements and would not be complete at the time the DEIR was prepared, the City based the analysis on the most conservative emission rates

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<sup>19</sup> 14 CCR §15126.4(a)(1)(B).

<sup>20</sup> Exhibit A: SWAPE comments, p. 4.

<sup>21</sup> Exhibit A: SWAPE comments, p. 4.

and did not assume what level of reduction would be possible with the mitigation and building code requirements.<sup>22</sup>

According to the DEIR, the Project “would be required to build to the California Green Building Code (CALGreen) which includes design provisions intended to minimize wasteful energy consumption. In addition, the proposed development would be designed to achieve minimum LEED certification consistent with San José Council Policy 6-32 (...)”<sup>23</sup> However, at the same time the City admits that “no specific building measures have been identified at this time”.<sup>24</sup> As SWAPE explains, it is therefore unclear if the Project is actually implementing mitigation to the extent feasible or simply meeting the minimum requirements in order to be consistent with San Jose City Council Policy 6-32.<sup>25</sup> The City cannot make a “significant and unavoidable” determination prior to showing the Project is required to employ the best available and feasible building design to mitigate its significant GHG impact.

Finally, it should be noted that, in its response, the City also mentions that “the project was found to have a significant and unavoidable GHG emissions impact for which the City has already adopted overriding considerations.”<sup>26</sup> To the extent the City argues that an overriding consideration previously adopted means the City is not required to fully mitigate the GHG impact of the Project, this argument is entirely wrong and violates CEQA. The City adopted overriding considerations for its General Plan EIR, where it found that full buildout of the General Plan would result in a significant impact from GHG emissions. The General Plan EIR was a program-level EIR, and this is a project-level EIR, and the City must analyze the Project’s impacts separately and mitigate them to the extent feasible.<sup>27</sup>

Finally, the General Plan EIR itself states that “[a]dditional strategies, policies and programs, to supplement those currently identified, will ultimately be required to meet the 2035 reduction target”.<sup>28</sup> The Project EIR must therefore identify all potential mitigation for the Project’s specific GHG impacts.

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<sup>22</sup> FEIR, p. 51.

<sup>23</sup> DEIR, p. 84.

<sup>24</sup> DEIR, p. 8.

<sup>25</sup> Exhibit A: SWAPE comments, p. 4-5.

<sup>26</sup> FEIR, p. 51.

<sup>27</sup> 14 CCR § 15093(c).

<sup>28</sup> General Plan EIR, pp. 37, <http://www.sanjoseca.gov/DocumentCenter/View/46542.4343-010acp>

### **C. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Vibration Impacts**

The DEIR identifies significant impacts related to vibrations caused during Project construction. Specifically, the DEIR identifies a significant impact to the adjacent automotive dealership from vibration levels in excess of City standards.<sup>29</sup> To mitigate the impact, the DEIR proposes two mitigation measures: first, a “Construction Vibration Monitoring Plan” that “shall be implemented to document conditions prior to, during, and after vibration generating construction activities.”<sup>30</sup> This plan will include a list of all heavy construction equipment to be used for the Project and the “avoidance methodology.”

The Second measure requires the Applicant to include four measures as part of the approved construction plans prior to the issuance of any demolition or grading permits: ensure that construction crews shall avoid dropping heavy objects or equipment within 30 feet of any adjacent structure, ensure that all contractors follow the “prescribed vibration mitigation measures,” designate a specific person in charge of excessive vibration claims and a requirement to make necessary repairs should vibration cause damages.<sup>31</sup>

As explained in our DEIR comments, these measures are in fact an impermissible deferral of mitigation, in which an agency “simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report.”<sup>32</sup> Mitigation is deferred to future “Construction Vibration Monitoring Plan,” “approved construction plans” and “avoidance methodology.” In fact, the only actual measure is the prohibition on dropping heavy objects or equipment within 30 feet of any adjacent structure. However, the Noise and Vibration Assessment prepared by the City’s consultants recommended a more specific measure: that the City “[p]rohibit the use of heavy vibration-generating construction equipment, such as vibratory rollers or excavation using clam shell or chisel drops, within 30 feet of any adjacent building.”<sup>33</sup> The DEIR provides no explanation as to why it did not include these specific limitations or, at the very

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<sup>29</sup> Impact NOI-1, DEIR, p. 127.

<sup>30</sup> MM NOI-1.1, DEIR, p. 128.

<sup>31</sup> MM NOI-1.2, DEIR, p. 128.

<sup>32</sup> *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>33</sup> Noise and Vibration Assessment, p. 27.



least, performance standards to include in a mitigation plan, as required under CEQA.

In its response, the City argues that “[p]rior to completion and approval of full building plans by the City, it would be speculative to assume the specific type of equipment that would be used on-site, the duration, and the location. Without this information, only broad-based restrictions can be applied to the project.” This explanation, however, fails to explain why the City did not include more specific mitigation measures, as recommended by its consultant, and performance standards.

The City moves on to argue that:

The commercial building in question is approximately 25 feet from the property line of the project site (...) vibration levels due to construction activities would be up to 0.21 in/sec Peak Particle Velocity (PPV) at the nearest off-site commercial building, which is just over the threshold of 0.20 PPV for structures of conventional construction established as a threshold in General Plan Policy EC-2.3. The mitigation recommendations from the noise consultant is based on assumed construction equipment that could be utilized on-site. As shown on the site plan (Figure 2.2-4 of the DEIR) the nearest hardscape to the shared property line is set back 11 feet. The nearest building, including the below-grade parking level, is approximately 14 feet from the shared property line. As a result, the City concluded that the prohibition of construction equipment outlined in Mitigation Measure 2 of the Noise and Vibration Study was not warranted.<sup>34</sup>

These statements do not explain why the City chose to depart from its own consultant recommendation. Obviously, the consultant was aware of the distance of the nearest building and hardscape as they are reflected in the site plan. The City fails to explain why it did not include the expert’s recommendation on how to avoid vibration damage. The City therefore impermissibly deferred its mitigation in violation of CEQA.

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<sup>34</sup> FEIR, p. 34.  
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#### **D. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Air Quality and Health Risks**

The DEIR includes a Health Risk Assessment (“HRA”) to evaluate the Project’s health risk impact from diesel particulate matter (“DPM”) emissions from the Project’s construction. However, as explained by SWAPE in our DEIR Comments, the City failed to conduct an *operational* HRA to evaluate the health risk posed to existing sensitive receptors near the Project site from additional emissions generated during operation. This lack of operational HRA is inconsistent with the Guidelines published by The Office of Environmental Health Hazard Assessment (“OEHHA”), the organization responsible for providing recommendations for health risk assessments in California. SWAPE also conducted a screening-level HRA and found the infantile, child, and lifetime cancer risks created by Project’s operations all greatly exceed the BAAQMD’s threshold of 10 in one million.

In its response, the City argued that the OEHHA Guidelines are not applicable to this Project and that it has no duty to conduct an operational HRA. In addition, it argued that SWAPE overstated the number of car-trips generated by the Project.<sup>35</sup> This response fails to remedy the flaws in the City’s analysis.

SWAPE maintains that the omission of an operational HRA is not consistent with OEHHA most recent guidelines (March 2015). Indeed, CEQA requires the City to analyze potentially significant impacts from a Project’s operational emissions. SWAPE shows that the Project is expected to generate approximately 307 truck trips per day, generating exhaust emissions and continuing to expose nearby sensitive receptors to emissions. The OEHHA document recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project, and this Project will last longer than that.<sup>36</sup> SWAPE explains that while their analysis is a screening-level HRA, which tends to be more conservative, it nevertheless provides substantial evidence that the Project may result in a significant operational health risk. The City has a duty to perform an assessment of the Project’s operational emissions’ impacts and to mitigate any impacts that are found.

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<sup>35</sup> FEIR, p. 45.

<sup>36</sup> Exhibit A: SWAPE comments, p. 2-3.

### **E. The EIR Fails to Adequately Disclose, Analyze, and Mitigate Significant Impacts Related to Hazardous Site Conditions**

The DEIR acknowledges that “possible historic pesticide use on-site could have resulted in the accumulation of residual pesticides (e.g., DDT compounds, arsenic, and lead) in the shallow soil on-site.”<sup>37</sup> In addition, the DEIR states that there are likely asbestos containing materials and lead-based paint in the building materials of the buildings to be demolished.<sup>38</sup>

In our DEIR Comments, we showed that the City failed to properly mitigate the potential impacts from the hazards on the site, because the mitigation measures proposed in the DEIR only require analytical testing of soils to be performed after demolition of the buildings. We explained that this is an improper deferral of mitigation.

In its response, the City argue that “[g]iven the length of time since agricultural activities have occurred on-site and the development of the site since cessation of the agricultural use more than 45 years ago, the likelihood of surface soils having residual agricultural contamination is negligible.”<sup>39</sup> The City then argues that despite that, the Applicant would be required to implement standard dust control measures during all phases of construction “which would abate any dust generated during demolition.”<sup>40</sup> The City also points out that it has been cautious in choosing to employ these mitigation measures despite the fact the Phase I Environmental Impact Assessment for the proposed project found the presence of potential residual agricultural chemicals in the soil to be a “de minimis” condition.

As Dr. Clack explains, this response fails to address the flaws pointed out in our DEIR Comments. First, for DDT, the half-lives in slow degrading soils and sediments are known to be much higher than what is indicated by the City, which means the potential concentration of DDT remaining in soils could be more than twice higher than the City’s response indicates could be present.<sup>41</sup>

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<sup>37</sup> DEIR p. 88.

<sup>38</sup> *Id.*, at 89.

<sup>39</sup> FEIR, p. 39.

<sup>40</sup> FEIR, p. 39.

<sup>41</sup> Exhibit B: Clark Comments, p. 3.

Second, Dr. Clark explains that given the potential for persistent organic pollutants (POPs) to exist in the soil, the measures proposed by the City would not be enough to mitigate the impact. This is because mitigation measures that are generally proposed for demolition activities and earth moving activities on site are not 100% effective at preventing exposure: the U.S. EPA found the control efficiency for respirable particles generated during storage and handling activities (demolition or soil movements) is generally between 56 percent and 81 percent using water spray alone. Dr. Clark explains that between approximately 20 percent to 50 percent of the toxic materials in the construction debris that is generated as respirable dust could therefore be released to the community. This, he explains, is true for both Asbestos and uncharacterized POP impacted soils on the Project site that will be disturbed during the demolition process or the clean-up of the debris.<sup>42</sup>

Dr. Clark therefore concludes that “[t]he approach to sample after materials have been disturbed lends itself to creating a larger potential problem for the community. The mitigation measure is equivalent to closing the barn door after the horse has escaped.”<sup>43</sup> The City should require sampling of the soil prior to demolition in order to properly mitigate the potentially significant impacts from soil contamination.

## F. CONCLUSION

The FEIR is inadequate as an environmental document because the City fails to properly analyze and mitigate the Project's impacts. The Project will result in significant impacts in a number of areas, including GHGs, public health, traffic, hazards and from vibration. However, the City fails to properly mitigate those impacts, and many of the mitigation measures relied upon by the DEIR are improperly deferred or their effectiveness is not supported by the evidence.

The City cannot approve the Project until it revises the EIR to comply with CEQA and recirculates the revised EIR for public review.

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<sup>42</sup> Exhibit B: Clark Comments, p. 3-4.

<sup>43</sup> Exhibit B: Clark Comments, p. 4.

January 16, 2019  
Page 14

Thank you for your consideration of these comments.

Sincerely,



Nirit Lotan

cc: [tracy.tam@sanjoseca.gov](mailto:tracy.tam@sanjoseca.gov);  
[david.keyon@sanjoseca.gov](mailto:david.keyon@sanjoseca.gov);  
[danielle.buscher@sanjoseca.gov](mailto:danielle.buscher@sanjoseca.gov)

Attachments

NL:acp

4343-010acp

# **ATTACHMENT A**



Technical Consultation, Data Analysis and  
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January 14, 2019

Nirit Lotan  
Adams Broadwell Joseph & Cardozo  
601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080

**Subject: Response to Comments on the 4300 Stevens Creek Boulevard Mixed-Use Project**

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Dear Ms. Lotan,

We have reviewed the January 2019 First Amendment to the Draft Environmental Impact Report (“First Amendment”), which addressed comments we made in an October 12, 2018 comment letter on the August 2018 Draft Environmental Impact Report (DEIR) prepared for the 4300 Stevens Creek Boulevard Mixed-Use Project (“Project”) located in the City of San Jose (“City”). Our October 12, 2018 comment letter specifically discussed the DEIR’s inadequate evaluation of the Project’s health risk impacts and failure to adequately assess the Project’s greenhouse gas (GHG) impacts. After our review, we find the Responses to Comments document contained within the First Amendment (“Responses”) and the First Amendment itself to be insufficient in addressing the Project’s air quality and GHG impacts. An updated DEIR must be prepared that adequately evaluates and mitigates these potentially significant impacts. Until an updated analysis is prepared, the Project should not be approved.

## **Air Quality**

### **Diesel Particulate Matter Health Risk Emissions Inadequately Evaluated**

In our October 12 letter, we found that the DEIR failed to conduct an operational health risk assessment (HRA), thereby failing to adequately evaluate the Project’s health risk impact to nearby, off-site sensitive receptors. We provided a supplemental analysis in order to demonstrate that the Project will create a significant health risk to nearby sensitive receptors. In our comment letter, we prepared a screening level HRA to evaluate the health risk posed to the residences near the Project site during operation. We concluded that a residential receptor exposed to the Project’s operational emissions over a 30-year period, starting at the 3<sup>rd</sup> trimester stage of life would have an excess cancer risk of 177 in one million.<sup>1</sup>

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<sup>1</sup> See SWAPE’s October 12, 2018 comment letter on the 4300 Stevens Creek Boulevard Mixed-Use Project.

This risk significantly exceeds the Bay Area Air Quality Management District's (BAAQMD) significance threshold of 10 in one million. In response to our letter, the Project Applicant states the following:

"The project does not propose significant operational sources of TACs, such as freeways and high-traffic roads, commerce distribution centers, rail yards, ports, refineries, chrome platers, dry cleaners, or gasoline stations. The project would generate passenger vehicle traffic, which is not a substantial TAC source. Only diesel delivery or landscape service trucks would be considered an operational source of TACs, of which the project would generate a small amount. Furthermore, the loading areas serving both the ground floor commercial and office building will be located toward the front half of the site, away from existing residences (the nearest sensitive receptors) south of Albany Drive. Because passenger vehicles are not a significant source of TACs, a quantitative operational TAC impact assessment was not completed for the Draft EIR, consistent with City practice in its environmental documents" (Responses, p. 46).

The Responses go onto say,

"Given the lack of TAC emission sources included in the project, the commenters assessment has been inappropriately applied to the project and inaccurately stated that the project would result in significant operational health risk impacts" (Responses, p. 46).

We maintain that the omission of a proper HRA for existing, off-site sensitive receptors is inconsistent with recommendation set forth by the Office of Environmental Health Hazard Assessment (OEHHA), the organization responsible for providing recommendations for HRAs in California.<sup>2</sup> In February of 2015, OEHHA released its most recent *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments*, which was formally adopted in March of 2015.<sup>3</sup> This guidance document describes the types of projects that warrant the preparation of a HRA. Once construction of the Project is complete, the Project will generate approximately 307 truck trips per day,<sup>4</sup> which will generate additional exhaust emissions, thus continuing to expose nearby sensitive receptors to emissions. The OEHHA document recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project, and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (MEIR).<sup>5</sup> Even though we were not provided with the expected lifetime of the Project, we can reasonably assume that the Project will operate for at least 30 years, if not more. Therefore, health risks from Project operation

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<sup>2</sup> See SWAPE's September 24, 2018 comment letter on the AC by Marriot – West San Jose Project

<sup>3</sup> "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/hotspots2015.html](http://oehha.ca.gov/air/hot_spots/hotspots2015.html)

<sup>4</sup> Review of the DEIR's CalEEMod modeling demonstrates that the Project Applicant assumes the following fleet mix of light heavy-duty 1 (LHD1), light heavy-duty 2 (LHD2), medium heavy-duty (MHD) and heavy heavy-duty (HHD): 0.015; 0.005; 0.012; and 0.021, respectively (DEIR, Appendix A, pp. 51). Multiplying each of the fleet mixes by the net operational daily trip rate of 5,793 (Responses, p. 45), the Project will generate approximately 86 daily LHD1 trips, 29 daily LHD2 trips, 72 daily MHD trips, and 120 daily HHD trips for a total of approximately 307 truck trips per day.

<sup>5</sup> "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/2015/2015GuidanceManual.pdf](http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf), p. 8-6, 8-15



should have also been evaluated by the DEIR as well as the First Amendment, as a 30-year exposure duration vastly exceeds 6-month requirements set forth by OEHHA. These recommendations reflect the most recent health risk policy, and as such, an assessment of health risks to nearby sensitive receptors from operation should be included in a revised California Environmental Quality Act (CEQA) evaluation for the Project.

Furthermore, we maintain that the HRA provided in our October 12 comment letter provides evidence that the Project may result in a significant operational health risk. The AERSCREEN<sup>6</sup> modeling we conducted is recommended by both OEHHA<sup>7</sup> and the California Air Pollution Control Officers Associated (CAPCOA)<sup>8</sup> guidance as the appropriate air dispersion model for Level 2 health risk screening assessments (“HRSAs”). A Level 2 HRSA utilizes a limited amount of site-specific information to generate maximum reasonable downwind concentrations of air contaminants to which nearby sensitive receptors may be exposed. As stated in our October 12 comment letter, we understand that our analysis provides a conservative health risk estimate. SWAPE provided a *screening-level* HRA in order to demonstrate that a health risk may occur as a result of Project operation. Since a screening-level HRA found a potential significant risk, a more refined operational HRA should be conducted in an updated DEIR in order to more precisely determine the actual health risk posed to the nearby sensitive receptors as a result of Project operation.

## Greenhouse Gas

### Failure to Adequately Implement Mitigation Measures

In our October 12 letter, we found that the DEIR failed to implement all available, feasible mitigation before concluding that the Project’s GHG impact was “significant and unavoidable.” We listed several other mitigation measures that the Project could incorporate in order to further reduce the GHG impact. In response, the Project Applicant states,

“The Project already accounts for these measures to the extent feasible with implementation of the TDM program for residents and employers outlined in mitigation measure MM GHG-1.1 of the DEIR. The ultimate measures included in the Office/Retail TDM Plan would be dependent on the end users as the buildings are not be constructed for a specific user, but the plan must include three or more of the measures outlined in the mitigation. The residential component would also have its own TDM plan specifically tailored to residential development. Regarding the measures related to building design, the project would be required to build the California Green Building Code (CALGreen) and the project would be designed to achieve minimum LEED certification as required by San Jose Council Policy 6-32 as discussed on page 84 of the DEIR. The

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<sup>6</sup> “AERSCREEN Released as the EPA Recommended Screening Model,” USEPA, April 11, 2011, *available at*: [http://www.epa.gov/ttn/scram/guidance/clarification/20110411\\_AERSCREEN\\_Release\\_Memo.pdf](http://www.epa.gov/ttn/scram/guidance/clarification/20110411_AERSCREEN_Release_Memo.pdf)

<sup>7</sup> “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, *available at*: [http://oehha.ca.gov/air/hot\\_spots/2015/2015GuidanceManual.pdf](http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf)

<sup>8</sup> “Health Risk Assessments for Proposed Land Use Projects,” CAPCOA, July 2009, *available at*: [http://www.capcoa.org/wp-content/uploads/2012/03/CAPCOA\\_HRA\\_LU\\_Guidelines\\_8-6-09.pdf](http://www.capcoa.org/wp-content/uploads/2012/03/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf)

DEIR also notes that no specific reduction in emissions was taken as part of the analysis because the specific building measures have not yet been identified” (p. 51).

However, review of the DEIR and First Amendment demonstrates that the Project actually fails to implement all available mitigation to the “extent feasible” in order to reduce GHG emissions to the maximum extent possible. As a result, the Project Applicant incorrectly determines that the Project’s GHG emissions will be significant and unavoidable without implementing all available, feasible mitigation, as is required to CEQA.<sup>9</sup>

Specifically, review of Mitigation Measure (MM) GHG-1.1 demonstrates that the DEIR simply lists potential measures to be implemented as part of the Transportation Demand Management (TDM) program (DEIR, p. vi-vii). According to MM GHG-1.1 and the Responses, the Project would have to implement at least three of these measures into a TDM program (DEIR, p. vi and p. 51). However, the Project Applicant fails to provide any evidence that the potential emission reduction measures would be implemented to the maximum extent feasible. This is because the TDM program lacks performance measures in the form of reduction goals. That is, the DEIR fails to require that the TDM program implementation will achieve a certain level of GHG emissions reductions.

Moreover, the different measures proposed in the DEIR for TDM programs can have very different reduction effects. For example, the reductions achieved by providing electric vehicle charging stations may be very different from those achieved by providing free or discounted transit passes. The reductions achieved by unbundling parking may be very different from those achieved by providing free Wi-Fi to allow for telecommuting. The DEIR fails to analyze the potential reduction impact of each proposed TDM element

In addition, the DEIR fails to require that each measure in itself will be implemented to the extent feasible. For example, MM GHG-1.1 recommends “Electric vehicle charging stations (and pre-wiring for future stations)” (DEIR, p. vii) as a potential measure to be implemented in the TDM. However, MM GHG-1.1 is unclear how many electric vehicle charging stations would be provided, how many prewired stations would be provided, or if these stations would be available to the public. Thus, MM GHG-1.1 fails to demonstrate how it would implement this measure to the extent feasible. Moreover, MM GHG-1.1 also recommends “Secure bicycle parking” as a potential measure to be implemented in the TDM (DEIR, p. vii). However, the DEIR goes on to say, “Bicycle parking would be provided consistent with San Jose requirements, though the final quantity would be determined at the development permit stage” (DEIR, p. 82). As a result, the DEIR fails to demonstrate the extent that “secure bicycle parking” would be implemented. Therefore, the DEIR provides no evidence that the measures included in MM GHG-1.1 would actually be implemented to the extent feasible in order to reduce the Project’s GHG emissions from transportation.

Furthermore, the Project is required by the City to be consistent with the Green Building Code and achieve the minimum LEED certification (p. 51). We find this to be an inadequate reason for determining that building design mitigation has been implemented to the extent feasible. The DEIR specifically states

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<sup>9</sup> [http://www.valleyair.org/transportation/GAMAQI\\_3-19-15.pdf](http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf), p. 115 of 125

that “no specific building measures have been identified at this time” (DEIR, p. 8). Therefore, it is unclear if the Project is actually implementing mitigation to the extent feasible or simply meeting the minimum requirements in order to be consistent with San Jose City Council Policy 6-32. Therefore, the Project Applicant fails to commit to implementation of all available, feasible mitigation measures to the extent possible in order to reduce Project emissions. Prior to Project Approval, an updated DEIR should be prepared that specifies how the GHG mitigation measures will be implemented to the extent feasible.

Sincerely,

A handwritten signature in blue ink that reads "Matt Hagemann". The signature is fluid and cursive, with a long horizontal stroke at the end.

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

A handwritten signature in black ink that reads "Kaitlyn Heck". The signature is cursive and somewhat stylized.

Kaitlyn Heck

# KAITLYN MARIE HECK

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Technical Consultation, Data Analysis and  
Litigation Support for the Environment

## SOIL WATER AIR PROTECTION ENTERPRISE

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## EDUCATION

UNIVERSITY OF CALIFORNIA, LOS ANGELES B.S. ENVIRONMENTAL SCIENCES & ENVIRONMENTAL SYSTEMS AND SOCIETY JUNE 2017

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## PROJECT EXPERIENCE

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### SOIL WATER AIR PROTECTION ENTERPRISE

SANTA MONICA, CA

AIR QUALITY SPECIALIST

#### SENIOR PROJECT ANALYST: CEQA ANALYSIS & MODELING

- Calculated roadway, stationary source, and cumulative impacts for risk and hazard analyses at proposed land use projects.
- Quantified criteria air pollutant and greenhouse gas emissions (GHG) released during construction and operational activities of proposed land use projects using CalEEMod and EMFAC2014 emission factors.
- Utilized AERSCREEN, a screening dispersion model, to determine the ambient air concentrations at sensitive receptor locations.
- Organized reports containing figures and tables that compare the results of criteria air pollutant analyses to CEQA thresholds and that discuss results of the health risk analyses conducted for several land use redevelopment projects.

#### SENIOR PROJECT ANALYST: GREENHOUSE GAS MODELING AND DETERMINATION OF SIGNIFICANCE

- Quantified GHG emissions of a "business as usual" scenario for proposed land use projects using CalEEMod.
- Determined compliance of proposed projects with AB 32, Executive Order S-3-05, and SB 32 GHG reduction targets, with measures described in CARB's Scoping Plan for each land use sector, and with GHG significance thresholds recommended by various Air Quality Management Districts in California.
- Produced tables and figures that compare the results of the GHG analyses to applicable CEQA thresholds and reduction targets.

#### PROJECT ANALYST: HUMAN HEALTH EXPOSURE ASSESSMENT OF WORKER EXPOSED TO SILICA EMITTED DURING CEMENT SANDING

- Participated in interviews with subject to discuss working conditions and work history. Prepared Memorandum of subject's responses for client's use.
- Calculated the level of worker exposure to cement dust and silica in accordance with the U.S. EPA's Exposure Factor Handbook.
- Compiled and organized witness testimony and peer reviewed data on human health effects from exposure to cement dust and silica.
- Prepared a final analytical report and organized supporting data for use as Expert testimony in environmental litigation.

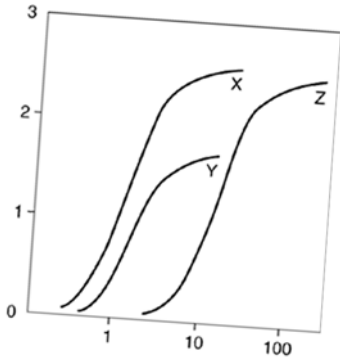
#### PROJECT MANAGER: EXPOSURE ASSESSMENT OF ACRYLAMID PRODUCTS FOR PROPOSITION 65 COMPLIANCE DETERMINATION

- Calculated the lifetime human exposure to acrylamide for approximately fifteen Proposition 65 cases.
- Analyzed laboratory testing data to determine the level of consumption required to meet the No Significant Risk Level (NSRL).
- Compared consumption levels to public dietary trends to determine if the average person's consumption would exceed the NSRL.
- Prepared final analytical exposure assessment and produced data tables for use in environmental enforcement statute of Proposition 65 cases.

#### PROJECT ANALYST: MODELING OF UNCOMBUSTED HYDROCARBONS AND PARTICULATE MATTER BY INDUSTRIAL FIRE

- Prepared AERSCREEN modeling of uncombusted hydrocarbons and particulate matter under different exposure scenarios. Produced tables and figures that compare the results of the AERSCREEN models.
- Organized Memorandums to discuss methodology and results for use as Expert testimony in environmental litigation.

# **ATTACHMENT B**



January 14, 2019

Adams Broadwell Joseph & Cardozo  
601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080

**Attn: Ms. Nirit Lotan**

Clark & Associates

**Subject: Comment Letter on First Amendment to Draft Environmental Impact Report (DEIR) For 4300 Stevens Creek Boulevard Mixed-Use Project**

---

**OFFICE**

12405 Venice Blvd  
Suite 331  
Los Angeles, CA 90066

**PHONE**

310-907-6165

**FAX**

310-398-7626

Dear Ms. Lotan:

At the request of San Jose Residents for Responsible Development (San Jose Residents), Clark and Associates (Clark) has reviewed materials related to the First Amendment to the Draft EIR For 4300 Stevens Creek Boulevard Mixed-Use Project (“Project”) dated January, 2019. Clark has previously commented on the need to revise the DEIR due to discrepancies in the DEIR’s approach to dealing with potential hazardous waste sites (either areas impacted by the historical use of pesticides or the potential for lead or asbestos to be present in existing buildings that will be demolished during the construction of the project) that could impact the surrounding community, including previously unidentified sensitive receptors.

The City has presented responses to the original comments and to supplemental comments in the form of a First Amendment to the DEIR. The responses still do not address the primary concerns raised in the previously submitted comments and makes erroneous arguments related to the potential for pesticides and other hazardous materials to exist in the environment, essentially stating that if anything is discovered it can be dealt with at a later date. This argument effectively kicks the can down the alley, forcing the community to deal with the contamination issues that could have been eliminated with reasonable forethought.

## RESPONSE TO COMMENTS:

In the First Amendment to the DEIR the City has addressed four specific point related to comments previously submitted. Responses to each of the points is provided below.

### **Comment 1: FAILURE TO CONSIDER THE POTENTIALLY SIGNIFICANT IMPACTS FROM RESIDUAL PESTICIDES, ASBESTOS, AND LEAD THAT MAY HAVE BEEN USED AT THE SITE**

As stated in the comments to the City, the Proponents of the Project have failed to adequately analyze and mitigate the considerable impact on nearby residences and businesses from the entrainment of pesticide impacted, lead impacted or asbestos impacted dust that will be generated during construction activities. The extent of the contamination and the concentrations of chemicals that may be present in the soils of the Site are unknown. The mitigation measures outlined by the City are improper because they defer sampling to until after demolition, and pesticides-polluted dust from demolition can impact workers and sensitive receptors nearby.

The City responses in the First Amendment can be summarized as:

- Since the environmental site assessment (ESA) did not classify the pesticides on the site as a recognized environmental concern (REC). The ESA classified the potential as “de minimis”.
- The DTSC definitions in the guidance cited in the comment letter to the City refer to are only applicable to non-disturbed land.
- The City is taking the extra precautions by requiring sampling after demolition and conditioning the development on reaching levels acceptable by the SCCDEH.
- As for dust impacts during demolition, it will be handled using dust control measures.

### **Response:**

The guidance related to the performance of an ESA relies on the adequacy of historical records to determine the potential for hazardous wastes to exist at a site. Visual inspections of site and review of records are not substitutes for analytical measurements of soils at the site to determine the presence or absence of pesticides or other hazardous materials. The 1992 ESA prepared by TRC for the subject property (included in ESA submitted by ERM in 2018),

indicated that asbestos bearing materials (ABMs) were present on site and that site had a long history of use as an orchard and pasture land (at least from 1954 through 1974). Many of the pesticides and herbicides used in California prior to the development of the site contained toxic metals and toxic organic compounds.

Chemicals that are considered persistent organic pollutants (POPs) due to their long half-lives in the environment include DDT and its degradation product, DDE. The values of half-lives cited in the City's response are debatable. For DDT the half-lives in slow degrading soils and sediments are known to range from a low of 15 years<sup>1</sup> to a high of 31 years<sup>2</sup>, not necessarily the 2 to 15 years cited by the City. The potential concentration of DDT remaining in soils could be more than 2 times higher than the City's response indicates could be present. Metals in the environment do not degrade but may be transported through the soil column via the infiltration of water from rains. This information alone warrants the classification of pesticides as a potential Historic REC (HREC).

Given the potential for POPs and toxic metals to exist in the soils on site, it is prudent to define the extent of the impacts prior to disturbing any soils. Once the source of the POPs and toxic agents (soils in the case of POPs and toxic metals, construction materials in the case of toxic agents such as asbestos) are disturbed they will migrate off-site, impacting the community. Mitigation measures that are generally proposed for demolition activities and earth moving activities on site are not 100% effective at preventing exposure to the agents since they will be entrained in winds and will migrate beyond the confines of the subject property. According to the U.S. EPA<sup>3</sup>, the control efficiency for respirable particles (less than 3.5 microns) generated during storage and handling activities (demolition or soil movements) is generally between 56 percent and 81 percent using water spray alone. Utilizing this approach along with Mitigation Measure HAZ 1-1 (sampling of debris and soils after demolition has occurred) only ensures that between approximately 20 percent to 50 percent of the toxic materials in the construction

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<sup>1</sup> Leatherbarrow, JE et al. 2006. Organochlorine Pesticide Fate in San Francisco Bay.

<sup>2</sup> Howard, Philip, et al. 1991. *Handbook of Environmental Degradation Rates*. Lewis Publishers for CRC Press, Inc. Boca Raton, FL.

<sup>3</sup> U.S. EPA. 1988. *Control of Open Fugitive Dust Sources*. EPA-450/3-88-008. September, 1988. Pg 5-18



debris that is generated as respirable dust could be released to the community. For uncharacterized POP impacted soils on site that will be disturbed during the demolition process or the clean-up of the debris, the same argument is evident. The approach to sample after materials have been disturbed lends itself to creating a larger potential problem for the community. The mitigation measure is equivalent to closing the barn door after the horse has escaped.

The City's response relies on the Santa Clara County Department of Environmental Health (SCCDEH) to derive acceptable levels for POPs and metals in soils. SCCDEH does not promulgate its own standards but instead relies on guidance from the California Environmental Protection Agency's Department of Toxic Substance Control (DTSC), Office of Health and Hazard Assessment (OEHHA) and Human and Ecological Risk Office (HERO), the Santa Clara Regional Water Quality Control Board (SC-RWQCB), and the U.S. EPA to derive appropriate standards. The Amendments must address what the proposed screening thresholds would be prior to moving forward with any work.

**Comment 2: FAILURE TO IDENTIFY SENSITIVE RECEPTORS THAT COULD BE IMPACTED BY RELEASES OF HAZARDOUS WASTE FROM THE PROJECT SITE**

As stated in the comments to the City, the Proponents of the Project have failed to identify a relevant sensitive receptor (the Starbright School) near the project site. The City responded that the need to evaluate operational emissions from the Project was only applicable to hazardous material emitting sites and that construction impacts were normally only evaluated for sites within 1,000 feet of a project.

The Starbright School resides approximately 1,200 feet west of the Project Site. The BAAQMD CEQA guidance states "BAAQMD recommends that a Lead Agency identify all TAC and PM2.5 sources located within a 1,000 foot radius of the proposed project site. A lead agency should enlarge the 1,000-foot radius on a case-by-case basis if an unusually large source or sources of risk or hazard emissions that may affect a proposed project is beyond the recommended radius. Permitted sources of TAC and PM2.5 should be identified and located

as should freeways and major roadways, and other potential sources. To conduct a thorough search, a Lead Agency shall gather all facility data within 1,000 feet of the project site (and beyond where appropriate).”<sup>4</sup> Asbestos and lead are classified by the State of California under *Title 17, CCR*, § 93000 as toxic air contaminants (TACs) which do not have an identifiable threshold for exposure (i.e., sufficient evidence to support the identification of a level at which no significant health effects are anticipated from exposure to the substance). DDE, a degradation product of DDT, is also listed under *Title 17, CCR*, § 93000 as TAC.

Given the nature of HRECs that may be present on site and the potential for their migration from the site to the Starbright School it is well within the City’s purview to have the Proponent evaluate the impacts from construction activities on the school. As is evident in the Response to Comment 1 (above), the mitigation measures proposed for preparation of the site (demolition of buildings followed by sampling of shallow soils for the presence of POPs and toxic agents) fails to consider the clear exposure pathway between the subject property and the Starbright School. During the demolition of the buildings and the clean-up of the debris respirable particulate matter (PM) will be generated on site. A significant portion (20% to 50%) of the PM generated on site can migrate off-site even with mitigation measures in place and be deposited at the School. PM composed of asbestos is considered by the State of California to be a toxic and is listed on Proposition 65.


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<sup>4</sup> BAAQMD. 2010. Bay Area Quality Management District CEQA Guidelines, June, 2010. Pg 5-8.

## **Conclusion**

The facts identified and referenced in this comment letter lead me to reasonably conclude that the Project could result in significant unmitigated impacts that are not addressed in the First Amendment to the DEIR. To protect public health the City must prepare a revised EIR for the Project to address the deficiencies identified above, and recirculate it for public review.

Sincerely,



JAMES J. J. CLARK, Ph.D.