

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

etrescott@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660
FAX: (650) 589-5062

DANIEL L. CARDOZO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
ELIZABETH KLEBANER
RACHAEL E. KOSS
JAMIE L. MAULDIN
ELLEN L. TRESCOTT

December 16, 2013

VIA E-MAIL

Santa Clara City Council
1500 Warburton Avenue
Santa Clara, CA 95050
Email: MayorAndCouncil@santaclaraca.gov

Re: 45 Buckingham Project (December 17th Agenda Item No. 8A)

Dear Mayor Matthews and City Council Members:

These comments are submitted on behalf of **Santa Clara Residents for Responsible Development** regarding the City of Santa Clara's ("City") Initial Study/Mitigated Negative Declaration ("MND") for the 45 Buckingham Drive project ("Project") proposed by Prometheus ("Applicant"). We submitted comments on the MND and presented testimony at the Planning Commission's November 20th hearing on the Project. We asked for more stringent mitigation measures to protect the public health and safety of construction workers, neighbors, and residents. We also asked the Planning Commission to give the public more time to review new information about contamination on the Project site (first disclosed at the Planning Commission hearing) and changes made to the MND only days before the hearing. The Planning Commission voted 3-2 to recommend your approval of the MND.

We continue to believe that more stringent mitigation is required to protect public health and safety, and at the very least a revised MND must be recirculated for public review. With an eye toward obtaining Project approval as quickly as possible, the Applicant and City staff have neglected to disclose important information, mischaracterized the environmental threats associated with the Project, and misinformed City decision-makers about the legal risks of approving the Project without further public review. We urge you to direct staff to revisit the proposed mitigation measures for hazardous materials and air quality, and recirculate a revised MND for public review, or an environmental impact report.

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I. STATEMENT OF INTEREST

Santa Clara Residents for Responsible Development (“Santa Clara Residents”) is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes David Clark, R.C. Crawford, Phillip Francisco, Victor Galvez, Matt Hanco, Ricci Herro, Gregory Small, Robert Stuhr, Corey Quevedo, Scott Thomas, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, and their members and their families and other individuals who live and work in the City of Santa Clara and Santa Clara County.

Individual members of Santa Clara Residents and the affiliated labor organizations live, work, and raise their families in Santa Clara. They would be directly affected by the Project’s environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to the health and safety hazards that exist onsite. Santa Clara Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members.

Attached to these comments as **Attachments A** and **B** are supporting analyses from hazardous materials expert Matthew Hagemann and air quality expert Petra Pless.

II. THE CITY HAS REFUSED TO INCORPORATE MITIGATION MEASURES TO REDUCE PUBLIC HEALTH IMPACTS FROM CONTAMINATED SOIL AND DIESEL ENGINE EMISSIONS

A. The Applicant and City staff have downplayed and mischaracterized evidence of serious soil contamination problems at the Project site

The MND acknowledged the potential presence of hydraulic fluid from hydraulic lifts, and pesticides from historical agricultural use, in soils on the Project site. To mitigate the risk of exposure for construction workers, a soil sampling plan would be approved by the City Fire Chief to determine if contamination exceeded construction worker screening thresholds. If so, a Site Management Plan with soil

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handling and removal protocols would be approved by the Fire Chief and the Planning Director.¹

Public commenters requested more stringent mitigation. Santa Clara Residents, with hazardous materials expert Matthew Hagemann, commented that: (1) the Fire Chief and Planning Director are not appropriate to oversee the handling and cleanup of hazardous materials; (2) the reason for comparing soil tests to “construction worker thresholds” was not adequately explained; and (3) the mitigation did not address potential risks to neighboring residents, including children, from inhaling airborne dust. Santa Clara Residents requested that the mitigation be revised to state that if contamination is found, a health risk assessment will be required, as well as strict dust control measures, and mandatory implementation of an investigation and cleanup plan approved by the County Department of Environment Health or the State Department of Toxic Substances Control (“DTSC”).

DTSC commented that construction worker screening thresholds are easier to meet than residential use thresholds, and therefore measures are needed to ensure that contaminated soils exceeding residential use thresholds will be capped and perpetually restricted in future use.

City staff rejected the request for a health risk assessment and stricter dust control measures, and wrote that if contamination does not exceed construction worker thresholds, “then no further action is required.”² Staff added new mitigation language to “clarify potential options for regulatory oversight.” That language is vague, as further discussed below, because it only requires potential “initiation” of “regulatory oversight” in the future, as needed, based on the Applicant’s soil testing.

The Applicant did conduct soil tests on the site, although there is no indication that the Fire Chief approved the soil sampling plan as required by the MND. The Applicant wrote to City staff that the tests showed “**low to non-detectable**” contamination at the site. The Applicant’s consultant even drafted a soils report concluding that the soil is “**suitable for unrestricted residential**

¹ MND, pp. 56-59.

² City Staff Report for Planning Commission meeting on November 20, 2013, Attachment 8, p. 20.

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use,” and the Applicant asked staff to communicate this verbally to the Planning Commission.³

The Applicant’s first draft soils report contained errors and failed to acknowledge numerous exceedances of health screening thresholds for pesticides.⁴ When these errors and omissions were pointed out by City staff, the Applicant revised the soils report to disclose that almost half of the soil samples contained high levels of dieldrin and other pesticides, such as endrin, ranging from 1.5 to 44 times the acceptable thresholds (50% to over 4,000% above the thresholds).⁵ The report also disclosed high levels of lead and arsenic in one sample where debris in the soil was observed, and speculated that this area “might have been a burn pit” or a “dump area for incinerator ash.”⁶ Despite these results, the report concluded that the site “**meets accepted criteria for unrestricted use.**”⁷

Besides providing an initial report with numerous errors, and maintaining that the site was suitable for construction, the Applicant’s soil consultant also purposefully omitted recommendations for protective health measures. The consultant wrote in an e-mail to City staff that “I don’t say it anywhere” in the report, but high levels of pesticides may require additional soil testing, remediation to eliminate “**soil that poses a potential unacceptable human health risk,**” or “**having to prepare a health risk assessment.**”⁸

City staff also publicly mischaracterized the extent of the contamination threat on the Project site. The City’s CEQA consultant included a cover letter to the soils report, provided to the public only at the Planning Commission hearing. The cover letter stated that only a small number of the soil samples were “**one percent or less above the respective [environmental screening levels].**”⁹ Moreover, at the Planning Commission hearing, City staff stated that “[f]or the most part all the chemicals that were analyzed are below the environmental screening levels,” except for one, “**an anomaly, that was higher, in one location.**”¹⁰

³ E-mails among Nathan Tuttle (Prometheus), David DeMent (PII Environmental), Shannon George (City CEQA consultant), and Debby Fernandez (City Staff) dated November 13-19, 2013 (**Attachment C**).

⁴ *Ibid.*

⁵ *Ibid.*; Shallow Soils Characterization Report dated November 19, 2013 (**Attachment D**).

⁶ *Ibid.* p. 5 (**Attachment D**).

⁷ *Ibid.*, cover letter from David DeMent, and p. 6 (**Attachment D**).

⁸ E-mail from David Dement dated November 19, 2013 (**Attachment C**).

⁹ Shallow Soils Characterization Report dated November 19, 2013, p. 5 (**Attachment D**).

¹⁰ Audio Recording of Planning Commission hearing on November 20, 2012, at 2:42:26.

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Finally, staff received a letter from a concerned neighbor on December 3, 2013. The neighbor has lived near the Project site for 45 years, and stated that prior uses of the buildings on the Project site included a machine shop and a radiator shop, which used tanks of toxic chemicals to wash engines.¹¹ The letter stated that recent plumbing work beneath the patio at the current bar on the Project site required plumbing staff to wear hazardous-materials handling suits and face masks to protect against chemicals discovered in the soil. The letter stated that the hazardous materials report prepared by the Applicant's soil consultant should have included an investigation of this potential contamination, and it "would be a grievous omission on the part of the City of Santa Clara should this area not be investigated."¹² The City's Staff Report for the December 13th City Council meeting, however, makes absolutely **no mention of the December 3rd letter from a concerned neighbor**, and simply included it among hundreds of pages of correspondence and documents received by the City.

There has been a gross failure by both the Applicant and City staff to disclose information to the public and to City decision-makers about the severity and extent of contamination threats on the Project site.

C. Proposed revisions to mitigation measures for soil contamination and diesel engine emissions are vague, unenforceable, and insufficient to reduce impacts to less than significant levels

1. Problems with hazardous materials mitigation

Mitigation measures HAZ 1-2 through HAZ 2-4 state that soil samples for contamination associated with hydraulic lifts and historical pesticide use shall be taken pursuant to a soil sampling plan approved by the City Fire Chief. City staff will review the results, and if contamination is above thresholds, regulatory oversight shall be initiated and a site management plan shall be prepared. Regulatory oversight "may be provided" by the County, the Regional Water Board, or DTSC. Pesticide contamination will be "reduced to acceptable levels, as required by a regulatory oversight agency," and on-site controls "may" be included to prevent future disturbance of any remaining contamination. The problems with this mitigation are numerous:

¹¹ Letter from concerned neighbor dated December 3, 2013 (**Attachment E**).

¹² *Ibid.*

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- Measures HAZ 1-2 through HAZ 1-4 address potential contamination from hydraulic lifts on site. They do not require comparison of soil samples with health screening thresholds for residential use, only with thresholds for construction workers, which are easier to meet. Regulatory oversight would only be initiated, and soil removal and remediation would only be undertaken, if construction worker thresholds are exceeded. There is no provision for on-site controls to protect against future soil disturbance and to protect residents, as recommended by DTSC.
- Measure HAZ 2-1 only requires that initial soil samples be compared to construction worker thresholds, not residential use thresholds. Later, measure HAZ 2-3 refers to residential use thresholds only as an example, using the term “e.g.,” instead of a hard threshold that must be included in the soil sampling plan, let alone a trigger for specific remediation activities.
- Under measures HAZ 2-2 and 2-3, results of soil tests will only be reviewed by City staff. Regulatory oversight will only be “initiated” based on those results, and further testing and remediation will only be undertaken if regulatory oversight is initiated and if measures are “required” by a regulatory agency.
- Measure 2-3 only requires that construction-related dust control and soil handling measures in a site management plan be approved by the Fire Chief and City Planning Staff, not a regulatory agency.

Given the known contamination threats on the Project site, and the mischaracterization and minimization of those threats by the Applicant and City staff, the City’s revised mitigation measures are insufficient. First, the mitigation leaves too much discretion to the Applicant and City staff to determine what future remediation actions are appropriate. Under the proposed mitigation, the Applicant will be free to present reports like those previously submitted, which contain errors, fail to acknowledge contamination in excess of thresholds, and make the unsupported recommendation that no mitigation is required. City staff, in turn, will be free to accept those conclusions, and will be solely responsible for overseeing how soil is handled on the Project site under a soil management plan.

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Under CEQA, a measure that commits a lead agency to pursuing mitigation in the future, based on the results of an applicant's study, is only sufficient if there is a reasonable expectation, based on meaningful information, that compliance with the measure will result in the effect being mitigated.¹³ Here, the Applicant and the City have downplayed significant contamination threats at the Project site, and have refused to incorporate straightforward mitigation measures requested by public commenters and agencies. This behavior does not support the adoption of mitigation that depends on future studies by the Applicant and future decisions by City staff.

Second, contrary to staff's assertion in response to public comments, the Fire Chief and City staff are not "required by law" to refer a case of contamination to a regulatory agency, or to ensure that a project receives a "case closure for the property."¹⁴ Even if City staff refers the matter to a regulatory agency, there are no mandatory investigations, risk assessments, or performance measures for the cleanup of the Project site. Both the County Department of Environmental Health and DTSC have "voluntary cleanup programs," which involve voluntary agreements negotiated by the Applicant, considering the Applicant's scheduling objectives and budget.¹⁵

In the case of *City of Maywood v. Los Angeles Unified School District*, the applicant had conducted a preliminary endangerment assessment under the guidance of DTSC, and was required to prepare a supplemental site investigation, a removal action workplan, and a site cleanup approved by DTSC. Prior to construction, the lead agency was also required to obtain "DTSC's review and approval" that "the site's condition will not significantly threaten the health and safety of workers, students, and adults."¹⁶ The court held that this was sufficient, because the applicant had conducted an extensive preliminary investigation, concluded that additional investigation and remediation would be necessary, and these further investigatory steps would be subject to numerous environmental rules and regulations described in the CEQA document, and would be overseen by DTSC. Also, construction would not start until DTSC determined that no further action was necessary.¹⁷

¹³ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308.

¹⁴ City Staff Report for November 20, 2013 Planning Commission meeting, Attachment 8, Responses to Comments, p. 20.

¹⁵ <http://www.sccgov.org/sites/deh/HMCD/Site%20Mitigation%20Program/Pages/Site-Mitigation-Program.aspx>; http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/BF_FS_VCP.pdf

¹⁶ *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 374.

¹⁷ *Id.* at 412.

The proposed mitigation here is much different. The Applicant's preliminary investigation was flawed, and even though it revealed the need for further investigation and remediation, the City has not required specific next steps, the Applicant will not necessarily be subject to any particular standards or be overseen by DTSC, and there is no requirement for an agency such as DTSC to confirm to the City that no further action is required. The mitigation should be revised to:

- (1) require a soil testing, investigation, and reporting plan that is pre-approved by the County or DTSC;
- (2) require testing for industrial chemicals close to the buildings on the north side of the Project site, and for dioxins and other burn-ash related compounds in the area of the burn pit/ash dump site;¹⁸
- (3) require that soil tests be compared to residential use thresholds in addition to construction worker thresholds;
- (4) require a health risk assessment for construction workers and neighboring residents, which shall require strict dust control measures;
- (5) require the Applicant to enter into and complete a voluntary cleanup agreement, preferably with DTSC, which addresses any and all of the following compounds, if present on the site: pesticides, hydraulic fluid, industrial chemicals, and toxins in the burn pit; and
- (6) require the Applicant to provide the City with a "no further action" letter from DTSC, or its equivalent from the County.

2. Problems with mitigation for diesel engine emissions

As explained by air quality expert Petra Pless, mitigation measure MM AIR-10 does not adequately mitigate the child cancer risk for diesel particulate matter ("DPM") emissions during construction.¹⁹ The significance threshold for child cancer risk is 10 in one million. The MND found that unmitigated construction emissions from diesel equipment would exceed this threshold. Measure MM AIR-10

¹⁸ As described by Mr. Hagemann, burn pits and incinerator ash are commonly linked with dioxin, a very potent toxin (**Attachment A**).

¹⁹ Letter from Petra Pless dated December 16, 2013 (**Attachment B**.)

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requires the Applicant to reduce emissions by 25% below the “equipment assumed in the initial construction health risk modeling.”

As discussed by Ms. Pless, there are four major problems with this mitigation. First, it fails to set forth any calculation procedure for reducing emissions by 25%, and leaves the calculation to an unidentified entity who may not be familiar with the assumptions in the initial construction health risk modeling. Moreover, the Applicant never provided the assumptions used in the initial construction health risk modeling (the “CalEEMod” model), or the data modeling to support the assessment. Thus, there is no reference point for reducing emissions by 25%.²⁰

Second, the mitigation measure only applies to off-road equipment that is greater than 50 horsepower and on site for more than two consecutive days. Thus, not all construction equipment would be subject to mitigation, including heavy grading equipment, which is typically on site for short periods and is often quite old and contributes the highest amounts of construction emissions.²¹

Third, the mitigation allows for the use of “Tier 2” diesel engines alone to meet the 25% reduction requirement. However, the CalEEMod data provided by the Applicant assumed that both Tier 2 engines *and* diesel particulate filters (“DPF”) would be used as part of the mitigation.²² Tier 2 engines are not automatically equipped with diesel particulate filters, which can reduce DPM emissions by 50% to 85% percent. Diesel particulate filters and Tier 2 engines are separate mitigation measures that can be assumed in the CalEEMod program.²³ Unless diesel particulate filters are required on all diesel-powered construction equipment, as assumed in the modeling, then the risk of child cancer has been greatly underestimated, and significant impacts are not adequately mitigated.²⁴

Fourth, the list of construction equipment used in the CalEEMod model runs did not include the haul trucks required to remove demolished building materials

²⁰ Pless Comments, p. 2.

²¹ *Ibid.*, p. 2.

²² *Ibid.*, pp. 2-3; citing City’s Response to Comments, Attachment 8, CalEEMod run, pp. 2 and 4 (model assumed both Tier 2 engines and diesel particulate filters as part of mitigation).

²³ CalEEMod User’s Guide, p. 39 (showing that “Engine Tier” and “DPF Level” are separate mitigation inputs in the model); *ibid.*, Appendix A, “Calculation Details,” pp. 49-50 (same), available at: <http://www.caleemod.com/> (**Attachment F**).

²⁴ Pless Comments, p. 3.

and import fill to the site.²⁵ Moreover, although the equipment list assumes that no fill will be exported from the site, the preliminary geotechnical report for the Project states that up to two feet of undocumented fill will need to be removed from the building site and replaced with compacted engineered fill.²⁶ As discussed above, recent soils characterization report for the Project also shows evidence of contamination that will require soil to be removed and hauled from the site. The DPM emissions associated with these activities were not included in the health risk assessment, and therefore cancer risks were underestimated and will very likely exceed the threshold of 10 in one million.²⁷ Revised mitigation measure MM AIR-10 is not sufficient to reduce impacts to a less than significant level.

III. MULTIPLE TRIGGERS FOR RECIRCULATION OF THE MND HAVE OCCURED

The California Environmental Quality Act ("CEQA") serves both an environmental protection purpose and an informational purpose. A CEQA document is supposed to inform decision-makers and the public about the potentially significant environmental effects of a project *before* the project is approved, and CEQA's public review process "protects not only the environment, but also informed self-government."²⁸

At the Planning Commission hearing, Santa Clara Residents requested recirculation of the MND because: (1) the City provided only three business days to review 42 pages of responses to public comments, 30 pages of new modeling data, and revisions to the text and mitigation measures in the MND; and (2) the City provided a soils report at the Planning Commission hearing that identified high levels of pesticides in the soil and a burn pit or dump site containing ash with high levels of lead and arsenic. In response, the Assistant City Attorney told the Planning Commission that a request for more time to review the new information was unreasonable, and CEQA allowed the City to revise its mitigation measures without recirculating the MND:

"They say that they need recirculation of this document based on the revisions that we've made. To do that, they cite to a section of the CEQA Guidelines, they say you have to recirculate any time there's

²⁵ *Ibid.*

²⁶ MND, Appendix C, Preliminary Geotechnical Investigation, p. 7.

²⁷ *Ibid.*

²⁸ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.

new impacts identified. We have not identified any new significant environmental impacts . . . so that doesn't trigger recirculation. Second point: [if] project revisions are added to reduce impacts, or mitigation measures are revised to reduce impacts. Well, we have beefed up some of the mitigation measures, we haven't made project revisions, but the problem I have is, saying that we can't revise mitigation measures is simply not what the law says.

They cite to [CEQA Guidelines section] 15073.5(b), which says when you have to recirculate a negative declaration. If you go to 15073.5(c), it says recirculation is *not* required when mitigation measures are replaced with equal or more effective measures. So in other words, if you make your mitigation better, you are not required to recirculate.”²⁹

A. Substitute mitigation measures that are not noticed for public hearing and supported by lead agency findings require recirculation

If a lead agency chooses to prepare an MND for a project instead of an environmental impact report (“EIR”), CEQA requires that the project plans must incorporate all necessary mitigation measures “before the proposed negative declaration and initial study are released for public review.”³⁰ Courts have interpreted this to mean that “any necessary mitigation measures must be *specifically* set forth at the time of publication of a mitigated negative declaration.”³¹ A leading CEQA treatise agrees: “To qualify for a mitigated negative declaration, the lead agency must add mitigation measures needed to render environmental impacts less than significant *before* the agency circulates the document.”³²

²⁹ Audio Recording of Planning Commission hearing on November 20, 2012, at 3:32:56; *see also* City Staff Report for City Council meeting on December 13, 2013, Attachment 7, Draft Minutes of November 20th Planning Commission hearing, p. 2 (“City Attorney Alexander Abbe noted that there is no requirement to recirculate an MND if revisions made to the mitigation measures will strengthen the mitigation”).

³⁰ Pub. Resources Code §§ 21064.5, 21080(c)(2); CEQA “Guidelines,” 14 Cal. Code Regs. § 15070(b)(1).

³¹ *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1605, fn. 4 (emphasis added).

³² Remy Thomas Moose & Manley, *Guide to the California Environmental Quality Act*, p. 320 (Solano Press, 11th ed. 2007).

If the agency changes mitigation measures to address potentially significant impacts, it must revise and recirculate the MND.³³ The only way to avoid recirculation is to hold a specific hearing on the substitute mitigation measures, and adopt the following written findings: (1) the substitute measures are equivalent or more effective than the original mitigation, and (2) they will not themselves cause potentially significant environmental effects.³⁴ The reason for requiring this procedure is that an MND, unlike an EIR, is not released in “draft” and “final” form, the lead agency is not obligated to respond to public comments, and there is only one opportunity for public review and input. A negative declaration has a “terminal effect on the environmental review process,” and therefore “opportunities to protest it, and to be heard before its finality, are consequently important” to fulfill CEQA’s purposes.³⁵ As one court noted, the “procedure by which the decision is reached cannot occur by incremental modifications of the proposal which cumulatively preempt the function of public input.”³⁶

The Assistant City Attorney’s reliance on CEQA Guidelines section 15073.5(c) is incorrect. That section states that recirculation of an MND is not required if mitigation measures “are replaced with equal or more effective measures pursuant to Section 15074.1” (emphasis added). Section 15074.1 requires that the replacement mitigation measures be noticed and heard at a public hearing, and that the lead agency adopt findings that the mitigation measures are equivalent or more effective than the original mitigation, and will not themselves cause significant impacts.³⁷ The City failed to notice the new mitigation measures for public hearing.

Moreover, the City has not made the required findings, nor is it clear that it can. First, Mitigation Measure AIR 1-10, as revised, is *less* protective than originally written. The original language required a reduction of diesel particulate matter from construction equipment that “would achieve an additional 25 percent reduction in exhaust particulate matter emissions, compared to similar equipment that meets U.S. EPA Tier 2 standards.”³⁸ The revised measure states that reductions “would achieve an additional 25 percent reduction in exhaust particulate matter emissions, compared to equipment assumed in the initial construction health risk modeling.”³⁹ The equipment assumed in the health risk modeling met

³³ CEQA Guidelines § 15073.5(b).

³⁴ *Id.* §§ 15073.5(b), 15074.1.

³⁵ *Plaggmier v. City of San Jose* (1980) 101 Cal.App.3d 842, 853.

³⁶ *Perley v. County of Calaveras* (1982) 137 Cal.App.3d 424, 431, fn. 3.

³⁷ CEQA Guidelines § 1507.1; Pub. Resources Code § 21080(f).

³⁸ MND, p. 27.

³⁹ MMRP, Measure MM AIR 1-10.

Tier 1 or lower standards, not the more stringent Tier 2 standards. As discussed above, even the revised mitigation measure is flawed, but nonetheless, the revisions do not meet the requirement of being equal to or more effective than the original measure.

Second, there is substantial evidence that Mitigation Measures HAZ 1.4 and HAZ 2.3 themselves will cause potentially significant effects on the environment.⁴⁰ The requirement to transport known hazardous materials offsite will add diesel excavators and haul trucks to the list of equipment required during construction, tipping Project emissions of diesel particulate matter over the thresholds of significance for child cancer risk, as explained above. Even if the City had followed the proper procedure for changing the mitigation measures in its MND, it could not make the required findings to avoid recirculation.

B. Newly identified impacts require recirculation

Recirculation of an MND is required if a new, avoidable significant effect is identified after publication of the MND but before project approval.⁴¹ Since the publication of the MND, the following significant effects have been identified.

1. Soil pesticide contamination is confirmed, and contamination may also include industrial chemicals associated with former machine shop and radiator shop activities, and contaminants related to a burn pit on the site

The MND only reflects a potentially significant impact to construction workers from hydraulic fluid and residual pesticides. Since the publication of the MND, soil testing confirms that residual pesticides are very high in some places, and that there is a burn pit or incinerator ash dump site on the property. A letter received from a concerned neighbor raises a credible argument that industrial contamination is present beneath buildings on the site. DTSC has commented that there may be impacts not only for construction workers, but also for residents. Santa Clara residents identified an unmitigated risk to neighboring residents that should require a health risk assessment, mandatory cleanup and approval from DTSC or the County, and more stringent dust control measures, such as those listed in the Bay Area Air Quality Management District's ("BAAQMD") "Table 8-2."

⁴⁰ CEQA Guidelines § 15074.1(b)(2).

⁴¹ CEQA Guidelines § 15073.5.

The scope and severity of potential contamination, potentially affected receptors, and necessary mitigation has been greatly enlarged since the publication of the IS/MND, and these impacts require disclosure in a recirculated CEQA document.

2. The need for soil excavation and haul and delivery trucks will push the Project's diesel particulate matter emissions over the threshold of significance for child cancer risk

Based on the confirmed presence of high levels of pesticides in the soil, plus other contamination threats on site, soil removal and soil hauling will be necessary. The preliminary geotechnical investigation prepared for the Project also states that undocumented fill on the Project site will need to be removed and replaced with suitable fill material beneath Project buildings.⁴² The diesel excavators and haul trucks required to deliver and remove fill and other materials from the site were not included in the modeling of diesel-emissions related child cancer risks.⁴³ Ms. Pless concludes that the addition of this equipment will result in Project construction emissions that exceed the threshold of 10 in one million for child cancer risks.⁴⁴ This is a newly identified significant and avoidable impact that triggers recirculation of the MND or the preparation of an EIR.

3. The City has failed to demonstrate that construction emissions of criteria air pollutants would not exceed thresholds of significance

Ms. Pless criticizes the City's failure to adopt recommended construction air quality mitigation measures from the BAAQMD CEQA Guidance. The City refuses to do so because it chose not to quantify the Project's emissions of "criteria" air pollutants, based on a screening threshold from BAAQMD's 2011 CEQA Guidance, which predicted that apartment projects under 240 units would not contribute significant criteria pollutant emissions. However, Ms. Pless explains that the BAAQMD updated its CEQA Guidance in 2012, and that the 2012 Guidance no longer includes this screening threshold.⁴⁵ Instead, the BAAQMD recommends modeling project construction emissions of criteria pollutants using the CalEEMod model, and comparing those emissions to adopted criteria.

⁴² MND Appendix C, p. 7.

⁴³ Pless Comments, p. 3 (**Attachment B**).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, pp. 3-4.

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In Ms. Pless's experience, projects that will result in significant cancer risks from unmitigated DPM emissions, such as this one, also commonly exceed the significance thresholds for criteria air pollutants.⁴⁶ This is a significant new impact that must be addressed in a recirculated CEQA document.

We urge the City Council not to overlook the serious unmitigated public health threats associated with the Project, and to closely consider whether the City has complied with the required procedures for public review and comment on the MND. The law requires the City not only to investigate and disclose known environmental conditions to the public, but to adopt clear and enforceable mitigation measures that are sure to reduce or eliminate those conditions, and to recirculate any new mitigation or information about additional significant impacts in a revised MND or an EIR.

Sincerely,



Ellen L. Trescott

ELT:ljl

cc: Debby Fernandez (via e-mail to dfernandez@santaclaraca.gov)

⁴⁶ *Ibid.* p. 4.