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Via Overnight and Electronic Mail

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Re: Comments on the Draft Supplemental Environmental Impact Report for the Gateway Tower Mixed-Use Development Project (File No. H15-047, HP15-003 and T15-052)

Dear Ms. Le:

We write on behalf of **San Jose Residents for Responsible Development** to provide comments on the Draft Supplemental Environmental Impact Report (“DSEIR”) prepared by the City of San Jose (“City”), pursuant to the California Environmental Quality Act (“CEQA”),¹ for the Gateway Tower Mixed-Use Development Project (“Project”). The Project includes partial demolition of existing structures and construction of a 25-story building, with 308 residential apartment units and up to 8,000 square feet of ground floor commercial space. The proposed building tower would be up to approximately 262 feet in height including architectural elements, mechanical equipment screens, and elevator shafts. The project would include three levels of sub-grade parking and parking in the northern half of the building on the first through fifth floors.

The Project would be located from 455 to 493 South First Street in the Central/Downtown Planning Area of San Jose. The project site is bounded by commercial development on the north, South First Street on the east, William Street on the south, and Market Street on the west.

¹ Pub. Resources Code, §§ 21000 et seq.

The purpose of the DSEIR is to provide a project-level review supplementing the program-level Downtown Strategy 2000 Final Environmental Impact Report (Downtown Strategy 2000 FEIR) certified by the San Jose City Council in 2005.

As explained more fully below, the DSEIR fails to adequately evaluate the Project's air quality and public health impacts. As a result of its shortcomings, the DSEIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project's significant environmental impacts. The DSEIR's numerous defects in its air modeling and impact analysis render it inadequate as an informational document. In light of the DSEIR's fundamentally flawed nature, the comments contained in this letter should be viewed as illustrative of the problems with the document, rather than as a comprehensive catalogue of the document's deficiencies. Based on the findings of this comment letter, a revised DSEIR must be prepared and recirculated before the City may legally approve the Project.

We have reviewed the DSEIR and its technical appendices with assistance from Matt Hagemann and Jessie Jaeger from Soil / Water / Air Protection Enterprise ("SWAPE").² The City must respond to these consultants' comments separately and individually.

I. STATEMENT OF INTEREST

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 impacts of the Project. The association includes: City of San Jose residents Conrad Pierce and Jeffrey Funston; 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 that live and/or work in the City of San Jose and Santa Clara County.

Individual members of San Jose Residents and the affiliated unions live, work, recreate and raise their families in Santa Clara County, including the City of San Jose. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself.

² See Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Laura Horton re: Comments on the Gateway Tower Mixed-Use Development Project (hereinafter, "SWAPE Comments"), September 27, 2016, **Attachment A**.

Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. San Jose Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

II. THE DSEIR LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS REGARDING THE PROJECT'S AIR QUALITY AND PUBLIC HEALTH IMPACTS

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

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.⁹ The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly

³ CEQA Guidelines, § 15002, subd. (a)(1).

⁴ See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

⁵ *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* (2001) 91 Cal. App.4th 1344, 1367; *Schaeffer Land Trust v. San Jose City Council*, 215 Cal.App.3d 612, 620.

⁶ CEQA Guidelines § 15151; see also *Laurel Heights I* (1998) 47 Cal.3d 376, 406.

⁷ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁸ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

⁹ CEQA Guidelines § 15002(a)(2)-(3); *Berkeley Keep Jets Over the Bay Com.*, 91 Cal.App.4th at 1354.

reduced.”¹⁰ If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible,” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081.¹¹

In this case, the DSEIR fails to satisfy the basic purposes of CEQA. The DSEIR’s conclusions regarding impacts to air quality and public health are not supported by substantial evidence. An EIR may conclude that impacts are insignificant only after providing an adequate analysis of the magnitude of the impacts and the degree to which they will be mitigated. Thus, if the lead agency, here the City of San Jose, fails to fully investigate a potential impact, its finding of insignificance simply will not withstand legal scrutiny.¹² The City must address these shortcomings and recirculate a revised DSEIR for public review and comment.

A. The DSEIR Underestimates Construction Emissions

As explained by SWAPE, the DSEIR relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2013.2.2 (“CalEEMod”).¹³ CalEEMod provides recommended default values based on site specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project type. If more specific project information is known, the user can change the default values and input project-specific values, but the CEQA requires that such changes be justified by substantial evidence.¹⁴ Once all the values are inputted into the model, the Project’s construction and operational emissions are calculated, and “output files” are generated.

SWAPE explains that the CalEEMod output files for the Project, which can be found in Appendix A-1 of the DSEIR, disclose to the reader what parameters were utilized in calculating the Project’s air pollutant emissions, and make known which default values were changed as well as provide a justification for the values selected.¹⁵ SWAPE reviewed the Project’s CalEEMod output files and finds that

¹⁰ CEQA Guidelines § 15002, subd. (a)(2).

¹¹ CEQA Guidelines § 15092, subd. (b)(2)(A)-(B).

¹² Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15126.4(a)(2).

¹³ CalEEMod website, available at: <http://www.caleemod.com/>

¹⁴ CalEEMod User Guide, pp. 2, 9, available at: <http://www.caleemod.com/>

¹⁵ CalEEMod User Guide, pp. 7, 13, available at: <http://www.caleemod.com/> (According to SWAPE, a key feature of the CalEEMod program is the “remarks” feature, where the user explains why a default setting was replaced by a “user defined” value. These remarks are included in the report.)

several of the values inputted into the model are inconsistent with information disclosed in the DSEIR for several reasons.

First, SWAPE finds that the DSEIR fails to account for all material exported during the grading phase. According to the DSEIR, the Project proposes to construct three levels of subgrade parking.¹⁶ In order to construct the subterranean parking structure, the Project will require “excavation to approximately 33 feet below grade” and “approximately 28,200 cubic yards of soil will be excavated and hauled from the site.”¹⁷ SWAPE notes that these proposed material export activities “will produce substantial pollutant emissions” and were not properly included in the Project’s CalEEMod model.¹⁸

Indeed, SWAPE notes that only 26,900 cubic yards of soil was inputted into the CalEEMod model.¹⁹ The DSEIR therefore underestimated the total amount of material that will be hauled off site during the grading phase by approximately 1,300 cubic yards. SWAPE finds that this underestimation “presents a significant issue, as the inclusion of the entire amount of material export within the model is necessary to calculate emissions produced from material movement, including truck loading and unloading, and additional hauling truck trips.”²⁰

Second, SWAPE finds that the DSEIR applies an incorrect building square footage in its air quality analysis. According to the DSEIR, the Project includes up to 8,000 square feet of ground floor commercial space.²¹ However, the CalEEMod files use a commercial square footage of 5,135 square feet to model emissions,²² therefore underestimating the total size of the Project by 2,865 square feet.

Third, SWAPE finds that the DSEIR applies an incorrect number of parking spaces in its air quality analysis. According to the DSEIR, the Project proposes to construct a subterranean parking structure with approximately 285 vehicular parking spaces.²³ However, the CalEEMod files show that the model assumes only 256 parking spaces will be constructed,²⁴ underestimating the total number of

¹⁶ DSEIR, p. 13.

¹⁷ *Id.*, at 14.

¹⁸ SWAPE Comments, p. 2.

¹⁹ DSEIR, Appendix A-1, p. 6.

²⁰ SWAPE Comments, p. 2; CalEEMod User’s Guide, available at: <http://www.caleemod.com/>, p. 3, 26.

²¹ DSEIR, p. 5.

²² DSEIR, Appendix A-1, p. 32.

²³ DSEIR, p. 13.

²⁴ DSEIR, Appendix A-1, p. 32.

parking spaces by 29 spaces. SWAPE finds that by underestimating the number of parking spaces within the model, the emissions that would be produced during construction of the proposed parking lot are greatly underestimated.²⁵ SWAPE explains that “[p]aving for the parking spaces involves laying concrete or asphalt, which will result in air pollutant emissions during construction.”²⁶ SWAPE further explains that “emissions from architectural coating activities, electricity usage from outdoor lighting, ventilation, and elevators in the proposed parking structures are underestimated.”²⁷

Therefore, SWAPE concludes that given these various deficiencies in the DSEIR’s air quality analysis, the Project’s emissions are greatly underestimated.²⁸ SWAPE conducted an updated air quality analysis, and found that harmful emissions during construction significantly increase when those flaws are corrected.

Specifically, ROG emissions increase by approximately 23%, NO_x emissions increase by approximately 66%, PM₁₀ exhaust emissions increase by approximately 71%, and PM_{2.5} exhaust emissions increase by approximately 62%.²⁹ Therefore, SWAPE concludes that “the Project would result in substantially more severe effects than what was previously examined in the DSEIR.” As a result, the DSEIR should be revised and recirculated to include an updated model to adequately estimate the Project’s construction emissions, and additional mitigation measures should be incorporated where necessary, according to SWAPE.

B. The DSEIR Underestimates Potentially Significant Construction Health Risks

The DSEIR conducts a Health Risk Assessment (“HRA”) to determine the health risk impact from Project construction. SWAPE reviewed the Project’s HRA and finds that the DSEIR relies upon incorrect emission estimates to determine the Project’s construction health risk.³⁰ As a result, SWAPE concludes that the Project’s health risk impact is underestimated and should not be relied upon to determine Project significance.

²⁵ SWAPE Comments, p. 4.

²⁶ CalEEMod User Guide, pp. 25, available at: <http://www.caleemod.com/>

²⁷ CalEEMod User’s Guide, p. 3, available at: <http://www.caleemod.com/>

²⁸ See SWAPE Comments.

²⁹ *Id.*, at 4.

³⁰ *Id.*, at 5.

SWAPE explains that the DSEIR evaluates the cancer risk associated with diesel particulate matter (“DPM”) emissions generated by off-road construction equipment and on-road vehicles used during Project construction.³¹ However, as described above, the CalEEMod model used to estimate this risk relies upon incorrect input parameters that underestimate the Project’s construction emissions. Therefore, SWAPE notes that by relying upon an incorrect CalEEMod model, the Project’s health risk impact from construction is underestimated.

SWAPE provides a comparative analysis of several similarly sized mixed-use projects in the Bay Area in which they found highly significant health risk impacts during construction.³² Based on this comparative analysis, SWAPE concludes that “the proposed Project could potentially result in a significant health risk impact,” which was not adequately disclosed or analyzed in the DSEIR. Therefore, SWAPE further concludes that the DSEIR “must be revised and recirculated to include an updated health risk assessment that accurately evaluates the Project’s construction health risk using correct assumptions, and additional mitigation measures should be implemented, where necessary.”³³

III. CONCLUSION

As demonstrated above, the DSEIR fails to adequately disclose and evaluate the full extent of the Project’s air quality and public health impacts during construction, resulting in a legally deficient CEQA document. The City must prepare a revised DSEIR that addresses these inadequacies and recirculate the revised DSEIR for public review.

Sincerely,



Rachael E. Koss

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³¹ DSEIR, Appendix A-1, p. 21

³² SWAPE Comments, p. 6.

³³ *Id.*