

# 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

[nkuffel@adamsbroadwell.com](mailto:nkuffel@adamsbroadwell.com)

SO. SAN FRANCISCO OFFICE

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

TEL: (650) 589-1660

FAX: (650) 589-5062

MILA A. BUCKNER  
DANIEL L. CARDOZO  
CHRISTINA M. CARO  
THOMAS A. ENSLOW  
TANYA A. GULESSERIAN  
MARC D. JOSEPH  
RACHAEL E. KOSS  
NATALIE B. KUFFEL  
LINDA T. SOB CZYNSKI  
NED C. THIMMAYYA

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### Via Overnight and Electronic Mail

Reema Mahamood  
Environmental Project Manager, City of San Jose  
Department of Planning, Building, and Code Enforcement  
200 East Santa Clara St., 3rd Floor  
San Jose, CA 95113  
**Email:** [reema.mahamood@sanjoseca.gov](mailto:reema.mahamood@sanjoseca.gov)

**Re: Comments on the Draft Environmental Impact Report for the 350 S. Winchester Mixed-Use Project (Volar) (File No. PDC15-065, PDC15-059, and PT15-069)**

Dear Ms. Mahamood:

We write on behalf of **San Jose Residents for Responsible Development** to provide comments on the Draft Environmental Impact Report (“DEIR”) prepared by the City of San Jose (“City”), pursuant to the California Environmental Quality Act (“CEQA”),<sup>1</sup> for the 350 S. Winchester Mixed-Use Project (“Project”). This project consists of a Planned Development Zoning to rezone the property from the CG Commercial General Zoning District to the CP(PD) Planned Development Zoning District, a Planned Development Permit, and a Tentative Map to allow the demolition of 26,000 square foot commercial building and construction of a maximum 18-story (200 feet tall) mixed-use building with up to 307 residential units, approximately 52,200 square feet of commercial (retail/restaurant) and office uses, and four levels of below grade parking on a 0.89 gross acre site. The Project would be located at 350 S. Winchester Boulevard, approximately 550 feet south of Stevens Creek Boulevard (APN 277-33-003).

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<sup>1</sup> Pub. Resources Code, §§ 21000 et seq.

The purpose of the DEIR is to provide a project-level review, supplementing the program-level Envision San Jose 2040 General Plan Final Program Environmental Impact Report (“FPEIR”) certified by the San Jose City Council in 2011.

As explained more fully below, the DEIR fails to adequately evaluate the Project’s impacts. As a result of its shortcomings, the DEIR lacks substantial evidence to support its conclusions and fails to properly mitigate the Project’s significant environmental impacts. The DEIR’s numerous defects render it inadequate as an informational document. In light of the DEIR’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 DEIR must be prepared and recirculated before the City may legally approve the Project.

We have reviewed the DEIR and its technical appendices with assistance from Matt Hagemann and Jessie Jaeger from Soil / Water / Air Protection Enterprise (“SWAPE”).<sup>2</sup> 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 organizations 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 Jeff Dreyer, Gabriel Montes, and Eric Comstock; the International Brotherhood of Electrical Workers Union, Local 332, Plumbers & Steamfitters Union, Local 393, Sheet Metal Workers Union, Local 104, Sprinkler Fitters Union, Local 483, and their members and their families; and other individuals that live and/or work in the City of San Jose and Santa Clara County.

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<sup>2</sup> See Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Natalie Kuffel re: Comments on the 350 S. Winchester Mixed-Use Project (hereinafter, “SWAPE Comments”), February 20, 2017, **Attachment A**.

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. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. The organizational members of San Jose Residents also have 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 in the area.

## II. THE DEIR IS NOT IN COMPLIANCE WITH CEQA

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.<sup>3</sup> CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.<sup>4</sup> 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.<sup>5</sup> To be adequate, the EIR should evidence the lead agency's good faith effort at full disclosure.<sup>6</sup> 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."<sup>7</sup> "Thus, the EIR protects not only the environment but also informed self-government."<sup>8</sup>

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.<sup>9</sup> The EIR

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<sup>3</sup> 14 Cal. Code Regs. ("CEQA Guidelines") § 15002, subd. (a)(1).

<sup>4</sup> See Pub. Resources Code, § 21000; CEQA Guidelines, § 15002.

<sup>5</sup> *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1367 (*Berkeley Jets*); *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 620.

<sup>6</sup> CEQA Guidelines, § 15151; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 406 (*Laurel Heights I*).

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

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

<sup>9</sup> CEQA Guidelines, § 15002, subd. (a)(2)-(3); *Berkeley Jets, supra*, 91 Cal.App.4th at 1354.

serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.”<sup>10</sup> 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.<sup>11</sup>

As these comments will demonstrate, the DEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It fails in significant aspects to perform its function as an informational document that is meant “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment” and “to list ways in which the significant effects of such a project might be minimized.”<sup>12</sup>

The DEIR must be withdrawn and revised to address these errors and deficiencies. Because of the substantial omissions in the information disclosed in the DEIR, revisions necessary to comply with CEQA will be, by definition, significant. In addition, substantial revision will be required to address impacts that were not disclosed in the DEIR. Because these revisions are significant, the revised DEIR will need to be recirculated for additional public comment.<sup>13</sup>

### **1. The DEIR Fails to Accurately Describe the Project.**

An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.<sup>14</sup> Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project’s impacts and undercutting public review.<sup>15</sup> The courts have repeatedly held that “an accurate, stable and finite project description

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<sup>10</sup> CEQA Guidelines, § 15002, subd. (a)(2).

<sup>11</sup> CEQA Guidelines, § 15092, subd. (b)(2)(A)-(B).

<sup>12</sup> *Laurel Heights I, supra*, 47 Cal.3d at p. 391.

<sup>13</sup> Pub. Resources Code, § 21091.1; CEQA Guidelines, § 15088.5.

<sup>14</sup> See, e.g., *Laurel Heights I, supra*, 47 Cal.3d 376.

<sup>15</sup> See *ibid.*

is the *sine qua non* of an informative and legally sufficient [CEQA document].”<sup>16</sup> Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal’s benefit against its environmental costs.<sup>17</sup>

The Project site currently contains a 26,000 square foot, two-story commercial building.<sup>18</sup> That building would be demolished and the material would need to be hauled to a waste facility. Soil excavated for the four levels of underground parking would also need to be hauled away.<sup>19</sup> The DEIR fails to describe the haul route that will export this large amount of potentially hazardous<sup>20</sup> material.

The haul route may create a disturbance to adjacent residents and schools. Therefore, the route Project haul trucks will follow is a key determination required to inform the City’s analysis of potentially significant impacts from noise, safety, traffic, and toxic air contaminant exposure to the sensitive receptors that will be affected by trucks travelling along the haul route. Depending on which haul route is selected, different homes and schools would be affected. Residents and school patrons may be required to modify their own schedules and practices in order to accommodate, or avoid the adverse effects of, the haul trucks in their neighborhood. The City must also analyze the impacts that each potential haul route will cause to the differently affected neighborhoods, and must identify appropriate mitigation measures that will mitigate significant impacts to each neighborhood.

## **2. The DEIR Relies on an Improper Mitigation Measures to Reduce Significant Impacts.**

If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>21</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by

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<sup>16</sup> *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

<sup>17</sup> *Id.* at pp. 192-193.

<sup>18</sup> DEIR, p. 6.

<sup>19</sup> DEIR, p. 76.

<sup>20</sup> See DEIR, pp. 138-139 (discussing the potential for contaminated soil, lead paint, and friable asbestos).

<sup>21</sup> Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

adopting feasible mitigation measures.<sup>22</sup> Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that the measures are fully enforceable through permit conditions, agreements, or other legally binding instruments.<sup>23</sup> A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>24</sup> This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”<sup>25</sup>

a. The DEIR relies on an infeasible mitigation measure to reduce public health impacts to a less than significant level.

The DEIR found that there could be a significant public health impact from the construction emissions caused by diesel exhaust, specifically diesel particulate matter.<sup>26</sup> The DEIR found that child cancer risk at the nearby residences would exceed the threshold of 10 cases per million.<sup>27</sup> In order to reduce this impact to a less than significant level, the DEIR relies on Mitigation Measure AIR 1-1, which states:

All diesel-powered off-road equipment larger than 50 horsepower and operating at the site for more than two days continuously shall meet U.S. EPA particulate matter emissions standards for Tier 4 engines or equivalent. The project applicant shall submit to the Department of Planning, Building, and Code Enforcement a construction operations plan that includes specifications of the equipment to be used during

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<sup>22</sup> *Id.*, §§ 21002-21002.1.

<sup>23</sup> CEQA Guidelines, § 15126.4(a)(2).

<sup>24</sup> *Kings County Farm Bureau v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

<sup>25</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

<sup>26</sup> DEIR, p. 78.

<sup>27</sup> *Ibid.*

construction. The plan shall be accompanied by a letter signed by an air quality specialist, verifying that the equipment included in the plan meets the standards set forth in these mitigation measures. The plan shall be submitted for review and approval to the Supervising Planner of the Department of Planning, Building and Code Enforcement's Environmental Review Division prior to issuance of a grading, demolition, and/or building permit (whichever occurs earliest).<sup>28</sup>

The DEIR fails to evaluate the feasibility of actually obtaining a construction fleet of Tier 4 equipment. As discussed by SWAPE, Tier 4 equipment is still uncommon and may be difficult to acquire for such a large project.<sup>29</sup> The United States Environmental Protection Agency's ("EPA") 1998 nonroad engine emission standards were structured as a three-tiered progression. Tier 1 standards were phased-in from 1996 to 2000 and Tier 2 emission standards were phased in from 2001 to 2006. Tier 3 standards, which applied to engines from 37-560 kilowatts only, were phased in from 2006 to 2008. The Tier 4 emission standards were introduced in 2004, and were phased in from 2008 to 2015.<sup>30</sup>

Although Tier 4 engines are currently being produced and installed in new off-road construction equipment, the majority of existing diesel off-road construction equipment in California is not equipped with Tier 4 Final engines.<sup>31</sup> According to recent studies, Tier 4 Final equipment only accounts for 4% of all off-road equipment currently available in the state of California. Therefore, SWAPE concludes that it is highly unrealistic to assume that the Applicant will be able to assemble a fleet of construction machinery equipped exclusively with Tier 4 Final engines.<sup>32</sup>

The DEIR does not acknowledge the difficulties in obtaining an all Tier 4 fleet and does not suggest any alternative mitigation measures if the Applicant is

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<sup>28</sup> DEIR, p. 80.

<sup>29</sup> See SWAPE Comments, **Attachment A**.

<sup>30</sup> Emission Standards, Nonroad Diesel Engines, *available at*: <https://www.dieselnet.com/standards/us/nonroad.php#tier3>

<sup>31</sup> California Industry Air Quality Coalition White Paper, p. 3, *available at*: [http://www.agc-ca.org/uploadedFiles/Member\\_Services/Regulatory-Advocacy-Page-PDFs/White\\_Paper\\_CARB\\_OffRoad.pdf](http://www.agc-ca.org/uploadedFiles/Member_Services/Regulatory-Advocacy-Page-PDFs/White_Paper_CARB_OffRoad.pdf)

<sup>32</sup> SWAPE Comments, p. 3.

unable to acquire the necessary construction equipment. Because the DEIR relies on a potentially infeasible mitigation measure, there could still be significant health impacts on the community.

b. The DEIR relies on a vague and unenforceable mitigation measure to reduce construction vibration impacts.

The DEIR acknowledges that construction of the Project could expose nearby buildings to vibration levels that exceed the significance threshold.<sup>33</sup> In order to reduce construction vibration impacts to a less than significant level, the DEIR proposes the implementation of Mitigation Measure NOI-2.1, which states:

During construction, the project shall avoid impact pile driving unless alternatives to pile driving are not feasible. Drilled piers or rammed aggregate piers shall be used to lower vibration levels where geologic conditions permit their use. If pile driving cannot be avoided, the project applicant shall submit a construction operations plan that explains reasons why alternatives to pile driving cannot be utilized.<sup>34</sup>

This mitigation measure is inadequate because it does not contain any criteria for determining when pile driving alternatives are “not feasible.”<sup>35</sup> Nor does the measure state who will be reviewing the “construction operations plan” and what standards the reviewer will be using to determine if the Applicant is correct and pile driving “cannot be avoided.” Accordingly, this mitigation measure is not sufficient to ensure that construction vibration impacts will be less than significant.<sup>36</sup>

c. The DEIR fails to propose any mitigation to address the significant noise impacts.

The DEIR acknowledges that there will be significant impacts related to construction noise, both project-specific and cumulative impacts. Yet, no mitigation

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<sup>33</sup> DEIR, p. 100.

<sup>34</sup> DEIR, p. 102.

<sup>35</sup> See *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (EHL).

<sup>36</sup> *Ibid.* (finding a mitigation measure that allowed “approval by a county department without setting any standards” to be inadequate).



is proposed to address either impact. In regard to the project-specific impact, the DEIR states that changing construction phasing to reduce the overall length of construction may reduce the impacts, but the DEIR provides no explanation as to why that option was not evaluated.<sup>37</sup> This violates CEQA's requirements. If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>38</sup> "A gloomy forecast of environmental degradation is of little value without pragmatic, concrete means to minimize the impacts and restore ecological equilibrium."<sup>39</sup>

The analysis of cumulative construction noise impacts is similarly problematic. The DEIR anticipates that construction of the Project will overlap with the construction of the large Santana West development, which is located only 350 feet southwest of the Project site.<sup>40</sup> Both projects would have significant construction noise impacts and would combine to have even more significant impacts on the nearby residences.<sup>41</sup> Yet, once again, no mitigation is considered. For example, the DEIR could evaluate the feasibility of staggering construction of the two large projects so that the cumulative impact on the nearby residents would be decreased.

d. The DEIR improperly defers mitigation for impacted roadway intersections.

The DEIR acknowledges that the Project will cause significant traffic impacts at two intersections: Winchester Boulevard and Stevens Creek Boulevard, and Monroe Street and Stevens Creek Boulevard.<sup>42</sup> Rather than make physical improvements onsite, the DEIR proposes constructing "offsetting improvements to other parts of the citywide transportation system in the vicinity of the project site" under the City's Transportation Impact Policy for "protected intersections."<sup>43</sup> It is not clear that these offsetting improvements will reduce impacts to a less than

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<sup>37</sup> See DEIR, p. 102 ("Unless the construction phasing was changed to reduce the overall length of construction, this impact would be significant and unavoidable.").

<sup>38</sup> Pub. Resources Code, §§ 21002.1(a), 21100(b)(3); CEQA Guidelines, §§ 15121, subd. (a), 15126.4, subd. (a).

<sup>39</sup> *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1039.

<sup>40</sup> DEIR, p. 173.

<sup>41</sup> *Ibid.*

<sup>42</sup> DEIR, pp. 54-55.

<sup>43</sup> DEIR, p. 55.

significant level. The DEIR states only that “the implementation of offsetting improvements would provide project benefits that outweigh the project’s significant impact.”<sup>44</sup> Providing benefits is not necessarily the equivalent of reducing impacts to a less than significant level.<sup>45</sup>

Nevertheless, the DEIR must have concluded that these offsite improvements would reduce the impacts at these intersections to a less than significant level because these impacts are not listed as significant and unavoidable at the conclusion of the DEIR.<sup>46</sup> Based on the information provided in the DEIR, there is no way to verify that this conclusion is correct because there is no indication of what the offsetting improvements will be. According to the DEIR, “[t]he specific offsetting improvements shall be identified in the subsequent planning permits.”<sup>47</sup> Not only does this violate CEQA, as discussed below, but it also violates the City’s own guidance, which states that “[t]he specific improvements proposed should generally be identified prior to project approval.”<sup>48</sup>

The improvements that will supposedly offset the significant impacts to these “protected intersections” must be disclosed in the DEIR and not deferred to a later date.<sup>49</sup> The DEIR does not explain why the mitigation is being deferred. There are no additional studies that must be conducted. The measures will be selected “based on the peak hour trips generated by the project,”<sup>50</sup> figures that were already determined by the DEIR’s supporting traffic study. No new information will be acquired later in the permitting process. The measures must be implemented “prior to issuance of occupancy permits,” so the City is not planning to wait until the

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<sup>44</sup> DEIR, p. 55.

<sup>45</sup> See also *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 302-303 (finding a significant traffic impact even when the City’s General Plan allowed more traffic delays in the central core).

<sup>46</sup> DEIR, p. 180.

<sup>47</sup> DEIR, p. 55.

<sup>48</sup> See Protected Intersections FAQ’s, available at <http://sjdistrict1.com/wp-content/uploads/2016/03/Protected-Intersections-FAQ.pdf> (“The value, location and specific type of improvements, may be some of the information that could be available to the public during the community outreach process that takes place prior to project approval.”).

<sup>49</sup> *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906 (*Oakland Heritage*) (“[I]t is improper to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur before the project is approved.”).

<sup>50</sup> DEIR, p. 55.

Project is operational to determine the number of trips actually generated by the Project.<sup>51</sup> Accordingly, there are no “practical considerations [which] prohibit devising such measures early in the planning process.”<sup>52</sup> The DEIR improperly defers the mitigation for these significant impacts and does not provide sufficient information to determine that the impacts will in fact be reduced to a less than significant level.

### **3. The Project Conflicts with the General Plan.**

An EIR must evaluate the project’s consistency with relevant adopted plans and policies, including the general plan.<sup>53</sup> “A project is inconsistent [with a general plan] if it conflicts with a general plan policy that is fundamental, mandatory, and clear.”<sup>54</sup> Here, the Project is not in conformance with the General Plan’s land use designation and conflicts with a policy to preserve urban trees.

- a. The DEIR improperly concludes that the Project qualifies as a Signature Project under General Plan Policy IP-5.10.

The DEIR acknowledges that the Project, as proposed, is not consistent with the existing zoning or general plan designation because of its residential nature, height, and setbacks.<sup>55</sup> However, the DEIR claims that the Project can overcome these inconsistencies if it qualifies as a “Signature Project” in a designated Urban Village.<sup>56</sup> The Santana Row/Valley Fair Urban Village, where the Project is proposed, was designated in the City’s General Plan but the City has yet to adopt an Urban Village Plan. Under the General Plan, the City cannot issue residential entitlements until the Urban Village Plan is prepared, unless the project is a Signature Project.<sup>57</sup> According to Policy IP-5.10, a Signature Project must meet the following requirements:

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Oakland Heritage, supra*, 195 Cal.App.4th at p. 906.

<sup>53</sup> CEQA Guidelines, § 15125, subd. (d).

<sup>54</sup> *EHL, supra*, 131 Cal.App.4th at p. 782.

<sup>55</sup> DEIR, p. 11.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Envision San Jose 2040*, Ch. 1, p. 71.

1. Conforms to the Land Use / Transportation Diagram. Within the Urban Village areas, Signature projects are appropriate on sites with an Urban Village, residential, or commercial Land Use / Transportation Diagram designation.
2. Incorporates job growth capacity above the average density of jobs/acre planned for the developable portions of the entire Village Planning area and, for portions of a Signature project that include housing, those portions incorporate housing density at or above the average density of dwelling units per acre planned for the entire Village Planning area.
3. Is located at a visible, prominent location within the Village so that it can be an example for, but not impose obstacles to, subsequent other development within the Village area.

Additionally, a proposed Signature project will be reviewed for substantial conformance with the following objectives:

4. Includes public parklands and/or privately maintained, publicly-accessible plazas or open space areas.
5. Achieves the pedestrian friendly design guideline objectives identified within this General Plan.
6. Is planned and designed through a process that provided a substantive opportunity for input by interested community members.
7. Demonstrates high-quality architectural, landscape and site design features.
8. Is consistent with the recommendations of the City's Architectural Review Committee or equivalent recommending body if the project is subject to review by such body.<sup>58</sup>

The Project should not qualify as a Signature Project under General Plan Policy IP-5.10 because it does not incorporate sufficient job growth capacity. The Project is mainly a residential project. Once operational, the Project will provide only 160 jobs.<sup>59</sup> The DEIR does not demonstrate that this low number is “above the average density of jobs/acre planned for the developable portions of the entire Village Planning area.” The density of the residential portion of the Project is not enough to overcome this deficiency since *both* requirements must be met for a

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<sup>58</sup> *Envision San Jose 2040*, Ch. 7, pp. 18-19.

<sup>59</sup> DEIR, p. 154.

mixed-use project.<sup>60</sup> This emphasis on job growth is tied to the General Plan's goal "to promote job growth and to improve the City's Jobs/Employed Resident ratio."<sup>61</sup>

Additionally, the Project's "public open space" is a rooftop deck, which is unlikely to be utilized by the public. San Francisco has found that rooftop public plazas are underutilized because they are difficult for the public to find and, even if found, can be difficult to access.<sup>62</sup> At the very least, the Project should be required to include signage that makes it clear to the public at the exterior ground level that this resource is available for public use.

Finally, it is not clear that the Project was designed with community input. Already, numerous nearby residents have spoken out about the height of the Project.<sup>63</sup> When community meetings were held on the proposed Santana Row/Valley Fair Urban Village Plan, the consensus from the community was that "buildings along Winchester should be no higher than four stories."<sup>64</sup> The Project, as proposed, would be 18 stories tall.

Accordingly, the DEIR inaccurately states that the Project complies with the General Plan because it qualifies as a Signature Project. The Project should not qualify as a Signature Project.

b. The DEIR fails to demonstrate compliance with General Plan policies meant to preserve urban trees.

The Project is required to pursue "all reasonable measures to preserve" the mature trees onsite by General Plan Policies MS-21.4 and MS-21.5. Despite assurances that "[e]xisting trees will be retained on parcels slated for development

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<sup>60</sup> See bullet point (2), *supra* ("Incorporates job growth capacity above the average density of jobs/acre planned for the developable portions of the entire Village Planning area *and*, for portions of a Signature project that include housing, those portions incorporate housing density at or above the average density of dwelling units per acre planned for the entire Village Planning area.")

<sup>61</sup> *Envision San Jose 2040*, Ch. 1, p. 71.

<sup>62</sup> See John King, Hidden Treasures: Finding San Francisco's rooftop public spaces, *S.F. Chronicle*, available at <http://www.sfchronicle.com/bayarea/place/article/San-Francisco-has-wealth-of-rooftop-public-9321535.php>.

<sup>63</sup> See <http://www.sanjoseca.gov/DocumentCenter/View/65946>

<sup>64</sup> See Winchester and Santana Row/Valley Fair Urban Villages, Community Workshop #2 Summary, p. 10, available at <http://www.sanjoseca.gov/DocumentCenter/View/61431>

to the extent feasible,”<sup>65</sup> all of the trees onsite will be removed.<sup>66</sup> No explanation is given as to why retaining the trees would be unfeasible. Additionally, the DEIR provides conflicting information about whether any of the trees are ordinance size.<sup>67</sup> It is also unclear whether any replacement trees will be planted onsite or whether in lieu payments will be made for offsite trees.<sup>68</sup> On this issue, the DEIR does not serve its informational purpose and has not provided the public with sufficient information to determine if the Project complies with the General Plan and what the full impact on the urban tree canopy will be.

#### **4. The DEIR’s Transportation/Traffic Impacts Analysis Relies on Use of Private Roadway.**

Tatum Lane is identified in the DEIR as the Project’s “vehicular access road.”<sup>69</sup> But Tatum Lane is also identified as a “one-lane east-west private roadway that currently provides direct access to the project site via a full access driveway.”<sup>70</sup> The DEIR fails to provide information clarifying whether Tatum Lane, as a private roadway, can be used by the public to access the Project site, and what the traffic impacts would be if Project traffic was not able to use this private roadway.

#### **5. The DEIR Fails to Provide Substantial Evidence the Project will not Result in Dangerous Conditions for Cyclists and Pedestrians.**

The DEIR acknowledges that the Project will generate new demand for pedestrian and bicycle facilities and that there are no current bicycle links between the Project site and other bicycle or transit facilities in the area.<sup>71</sup> Despite that fact, the DEIR finds that there will not be a significant impact because there are “planned improvements” to the bicycle network will take place sometime in the

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<sup>65</sup> DEIR, p. 24.

<sup>66</sup> DEIR, p. 130 (“development of the proposed project would result in the loss of all the on-site trees”).

<sup>67</sup> Compare DEIR, p. 24 (“There are ordinance trees or designated heritage trees onsite”) with p. 127 (“None of these trees are ordinance-sized”).

<sup>68</sup> See DEIR, p. 74 (“the project will plant new trees on-site and, if necessary, plant new trees off-site as well”) and p. 130 (suggesting that the Applicant may pay in-lieu fees).

<sup>69</sup> See DEIR, p. 108.

<sup>70</sup> DEIR, p. 38.

<sup>71</sup> DEIR, p. 55.

future and the Project will not conflict with those planned bicycle facilities.<sup>72</sup> For additional support, the DEIR states that the Project “*may* construct off-setting improvements for bicycle facilities” as mitigation for impacts to the protected intersections.<sup>73</sup> These future improvements and uncertain mitigation measures are not sufficient to demonstrate that cyclists generated by the Project will be not be placed in a dangerous situation when the Project becomes operational.

Furthermore, there is no discussion in the DEIR as to whether existing pedestrians and cyclists in the area will be safe during the Project’s construction. This includes senior residents from Belmont Village Senior Living, which is located near the Project site at 500 S. Winchester Boulevard.<sup>74</sup> Mitigation measures should be imposed to prevent any impacts to cyclists and pedestrians during construction. For example, the DEIR could impose the following mitigation measures:

- The Applicant shall install appropriate traffic signs around the construction site to ensure pedestrian, bicycle, and vehicle safety.
- The Applicant shall plan construction and construction staging as to maintain pedestrian access on adjacent sidewalks throughout all construction phases. This requires the Applicant to maintain adequate and safe pedestrian protection, including physical separation (including utilization of barriers such as K-Rails or scaffolding, etc.) from work space and vehicular traffic and overhead protection, due to sidewalk closure or blockage, at all times.
- Temporary pedestrian facilities should be adjacent to the project site and provide safe, accessible routes that replicate as nearly as practical the most desirable characteristics of the existing facility.
- Covered walkways shall be provided where pedestrians are exposed to potential injury from falling objects.
- Applicant shall keep the sidewalk open during construction until it is absolutely required to close or block the sidewalk for construction staging. The sidewalk shall be reopened as soon as reasonably feasible taking construction and construction staging into account.

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.* (emphasis added).

<sup>74</sup> <http://www.belmontvillage.com/locations/san-jose-california/>

## 6. The DEIR Underestimates the Project's Air Quality Impacts.

The DEIR relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2013.2.2 ("CalEEMod"). SWAPE has reviewed the CalEEMod output files and found that several of the values inputted into the model were not consistent with Project information disclosed in the DEIR. As a result, SWAPE concludes that the DEIR underestimates that Project's construction and operational emissions.<sup>75</sup>

### a. The DEIR uses inconsistent land types and sizes.

The CalEEMod output files show that the "Land Use Type" and "Sizes" inputted into the CalEEMod model are inconsistent with the information disclosed in the DEIR.<sup>76</sup> First, the DEIR states that the Project will have 16,516 square feet of retail space, but only 14,309 square feet was inputted into CalEEMod for this land use.<sup>77</sup> Second, the DEIR states that the Project will have 8,652 square feet of restaurant space, but only 6,715 square feet was inputted into CalEEMod for this land use.<sup>78</sup> As SWAPE discusses, these discrepancies present serious issues to the entire land use analysis because the land use type and size features are used throughout CalEEMod to determine default variables and emission factors that go into the model's calculations.<sup>79</sup>

### b. The DEIR underestimates the number of daily vehicle trips.

In addition to the discrepancies noted above, the DEIR's air quality analysis also underestimated the number of daily vehicle trips.<sup>80</sup> First, SWAPE discovered that the number of daily trips estimated in the Traffic Impact Analysis ("TIA") and the number of vehicle trips inputted into CalEEMod were not consistent.<sup>81</sup> The TIA estimated that the Project would generate 3,475 daily trips.<sup>82</sup> But only 3,179 daily

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<sup>75</sup> SWAPE Comments, p. 3.

<sup>76</sup> SWAPE Comments, pp. 5-6.

<sup>77</sup> SWAPE Comments, p. 6 (comparing DEIR p. 6, Table 2.2-1 and Appendix B, p. 27 of PDF).

<sup>78</sup> *Ibid.*

<sup>79</sup> See SWAPE Comments, pp. 6-7.

<sup>80</sup> SWAPE Comments, pp. 7-9.

<sup>81</sup> SWAPE Comments, p. 7.

<sup>82</sup> See DEIR, Appendix A, Table 3, pp. 16-17.



vehicle trips were entered into the CalEEMod.<sup>83</sup> This is a discrepancy of 296 trips per day, or 108,040 trips per year.

Moreover, the 3,475 daily trips figure from the TIA is underestimated as well because it relies on an inapplicable transit reduction. The TIA reduces trips related to the residential and office components of the Project by two percent due to the “housing near a major bus stop reduction” and the “employment near a major bus stop reduction.”<sup>84</sup> These reductions are contained in the Valley Transportation Authority (“VTA”) Guidelines. The VTA’s Transportation Impact Analysis Guidelines states that the development must be within 2,000 feet of a transit facility in order to qualify for the two percent reduction.<sup>85</sup> According to the DEIR, however, the nearest “major bus stop” to the Project is located 3,960 feet away at the Valley Fair shopping mall.<sup>86</sup> Therefore, the Project would not qualify for this reduction. By applying this inapplicable reduction, the DEIR underestimates daily vehicle trips by approximately 35 trips per day, or 12,775 trips per year.<sup>87</sup> This error calls into question not only the air quality analysis but also the traffic analysis contained in the DEIR.

## **7. The DEIR Contains an Inadequate Analysis of Impacts from Greenhouse Gas Emissions.**

The DEIR concludes that the Project will have less than significant greenhouse gas (“GHG”) emissions impacts due to its compliance with the City’s GHG Reduction Strategy, which was approved by the City Council in December 2015. First, the GHG Reduction Plan was based on the land use designations in the General Plan and the Project is not in compliance with those designations. According to the GHG Reduction Strategy, “[t]he primary test for consistency with the Greenhouse Gas Reduction Strategy is conformance to the General Plan Land Use / Transportation Diagram and supporting policies.”<sup>88</sup> The DEIR claims that the Project is consistent with the *Regional Commercial* General Plan land use designation for the site in its GHG analysis, but that statement is directly

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<sup>83</sup> See DEIR, Appendix B, p. 42 of PDF.

<sup>84</sup> See DEIR, Appendix A, Table 3, pp. 16-17.

<sup>85</sup> See SWAPE Comments, p. 9 (citing VTA’s Transportation Impact Analysis Guidelines at p. 36).

<sup>86</sup> DEIR, Appendix A, p. 9.

<sup>87</sup> SWAPE Comments, p. 9.

<sup>88</sup> See <http://www.sanjoseca.gov/documentcenter/view/9388>

contradicted by the Project Description, which acknowledges that the Project is not consistent with the *Regional Commercial* General Plan designation.<sup>89</sup>

Second, even if the Project could rely on the GHG Reduction Plan, the DEIR must do more to demonstrate consistency. Specifically, the City “should explain how implementing the particular requirements in the plan, regulation, or program ensure that the project’s incremental contribution to the cumulative effect is not cumulatively considerable.”<sup>90</sup> The analysis must account for all of the GHG emissions generated by the Project.<sup>91</sup> Furthermore, if any of the requirements relied on are “not otherwise binding and enforceable,” the lead agency must “incorporate those requirements as mitigation measures applicable to the project.”<sup>92</sup>

The required level of analysis was not conducted here. The DEIR lists numerous mandatory criteria from the GHG Reduction Strategy without ever demonstrating how the Project is consistent with these criteria.<sup>93</sup> The DEIR notes that the GHG Reduction Strategy includes voluntary measures as well, but does not state why those voluntary measures were not imposed as mitigation.<sup>94</sup> As previously stated, this Project conflicts with the General Plan by proposing an 18-story, mainly residential project in a commercial land use designation. Additionally, the Project’s total annual VMT will be 5,220,789 miles<sup>95</sup> and even this large number is underestimated.<sup>96</sup> Given these two facts, reliance on the mandatory criteria of the GHG Reduction Plan may not be enough to reduce GHG emissions impacts to a less than significant level. Enforcement of the voluntary criteria as binding mitigation may be required and should be considered by the City.

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<sup>89</sup> DEIR, p. 11.

<sup>90</sup> CEQA Guidelines, § 15064, subd. (h)(3); see also CEQA Guidelines, § 15183.5, subd. (b)(2).

<sup>91</sup> See California Natural Resources Agency, Final Statement of Reasons for Regulatory Action, *Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97*, p. 27, available at [http://resources.ca.gov/ceqa/docs/Final\\_Statement\\_of\\_Reasons.pdf](http://resources.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf) (“to demonstrate consistency with an existing GHG reduction plan, a lead agency would have to show that the plan actually addresses the emissions that would result from the project”).

<sup>92</sup> CEQA Guidelines, § 15183.5, subd. (b)(2).

<sup>93</sup> See DEIR, pp. 86-87.

<sup>94</sup> DEIR, p. 86.

<sup>95</sup> DEIR, p. 150.

<sup>96</sup> See SWAPE Comments, pp. 7-9.

## 8. The DEIR Improperly Defers Its Analysis of Hazards Impacts.

The DEIR implies that a discussion of existing hazards onsite is no longer required by CEQA after the California Supreme Court's decision in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369.<sup>97</sup> This is inaccurate and misleading. Because the Project will exacerbate the existing onsite hazards by disturbing the potentially contaminated soil to a depth of approximately 49 feet and demolishing the existing building, which likely contains asbestos and lead,<sup>98</sup> the DEIR is still required to analyze the impacts of exposing residents and construction workers to these hazards.<sup>99</sup>

The DEIR acknowledges that implementation of the Project could expose construction workers and disposal sites to residual agricultural soil contamination.<sup>100</sup> According to the DEIR and the supporting Phase I ESA, this contamination could include organochlorine, lead arsenate, and copper sulfate.<sup>101</sup> Despite being banned in the 1970s, organochlorine pesticides such as DDT, DDE, and Chlordane can still pose a risk to workers and community members as these compounds persist in soil for hundreds of years.<sup>102</sup> The U.S. EPA identifies DDT and DDE as probable human carcinogens.<sup>103</sup>

To mitigate this significant impact, the DEIR proposes three measures: MM HAZ-1.1, MM HAZ-1.2, and MM HAZ-1.3.<sup>104</sup> These measures require the Applicant to submit a soil sampling plan "prior to the start of soil sampling." Soil sampling will occur "after demolition but prior to the issuance of grading permits." Due to the timing of these measures, workers are not protected during the demolition phase, when contaminated soil could become airborne.<sup>105</sup> This is a serious oversight given

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<sup>97</sup> DEIR, p. 137.

<sup>98</sup> See DEIR, pp. 138-139.

<sup>99</sup> *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, 377 ("But when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users.")

<sup>100</sup> DEIR, p. 138.

<sup>101</sup> See DEIR, p. 133, Appendix E, p. 2.

<sup>102</sup> SWAPE Comments, p. 2.

<sup>103</sup> *Ibid.*

<sup>104</sup> DEIR, pp. 140-141.

<sup>105</sup> See SWAPE Comments, p. 1.

that inhalation of arsenic (as dust) may cause respiratory effects and skin irritation.<sup>106</sup>

Moreover, the City should have conducted the soil sampling prior to drafting the DEIR so the results could have been disclosed in the environmental document. This would ensure adequate disclosure of contaminants that could affect the health of the workers and members of the community.<sup>107</sup> The DEIR does not provide any reason why the soil sampling must be delayed until after demolition. According to our experts, the soil can be sampled now, despite the presence of pavement on site.<sup>108</sup>

Therefore, the DEIR has unjustifiably deferred its hazards analysis in violation of CEQA. This deferral has limited the informational value of the DEIR and it has placed construction workers and the public at risk by allowing demolition to occur before the soil sampling occurs and the contamination levels of the soil are known.

### **9. The DEIR Fails to Provide Information on the Projects Considered in the Cumulative Impacts Analysis.**

CEQA provides two methods of analyzing cumulative impacts. Under the method selected by the DEIR, lead agencies evaluate cumulative impacts by considering the impacts of a *defined* list of related projects.<sup>109</sup> According to the DEIR, the following projects were considered:

- Santana West
- Stevens Creek Boutique Hotel
- Garden City Mixed-Use
- North San Jose Phase II
- Downtown Strategic Plan Phase II
- *Campbell Pending Projects*
- *Santa Clara Pending Projects*<sup>110</sup>

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<sup>106</sup> SWAPE Comments, p. 2.

<sup>107</sup> SWAPE Comments, pp. 1-2.

<sup>108</sup> SWAPE Comments, p. 2.

<sup>109</sup> See CEQA Guidelines, § 15130.

<sup>110</sup> DEIR, p. 166 (emphasis added).

No information is provided about these “pending projects” in the nearby jurisdictions of Campbell and Santa Clara, including what qualifies as “pending” and when that determination was made. Accordingly, it is impossible for the reader to determine if the list of cumulative projects is underinclusive, in violation of CEQA.<sup>111</sup> The DEIR must provide additional information about the related projects considered as part of the cumulative impacts analysis.

### III. CONCLUSION

As demonstrated above, the DEIR fails to adequately disclose, evaluate, and mitigate the Project’s impacts, resulting in a legally deficient CEQA document. The City must prepare a revised DEIR that addresses these inadequacies and recirculate the revised DEIR for public review.

Sincerely,



Natalie B. Kuffel

NBK:acp

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<sup>111</sup> See, e.g., *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61 (holding that the EIR was inadequate because it had failed to include 60 percent of the projects then under environmental review).