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March 13, 2017

**VIA OVERNIGHT AND ELECTRONIC MAIL**

Planning Commissioner Chair Carlyn Obringer  
And Planning Commissioners  
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**Re: Comments on the Initial Study/Mitigated Negative Declaration  
for Concord Village (SCH# 2017022022)**

Dear Chair Obringer and Commissioners:

We are writing on behalf of **Concord Residents for Responsible Development** (“Concord Residents”) to comment on the Initial Study/Mitigated Negative Declaration (“MND”) for Concord Village (“the Project”). The Project is a 230-unit apartment complex that requires approvals for a use permit, minor use permit, and design review.

In 2016, the City considered whether the Project qualified for an exemption from the California Environmental Quality Act (“CEQA”).<sup>1</sup> At that time, we submitted comments explaining that the Planning Commission must deny the requested approvals because the Project is not exempt from CEQA and violates the City’s land use policies and code. After two public hearings in August and September 2016, and discussion with the San Francisco Bay Regional Water Quality Control Board (“RWQCB”), the City determined that the Project fails to

<sup>1</sup> Public Resources Code (“PRC”) §§ 21000 et seq.

qualify for a Category 32 Categorical Exemption (“Infill Development Projects”) because the Project site is on the Cortese List.<sup>2</sup> The Project site is on the Cortese List because the site contains petroleum hydrocarbons, chlorinated solvents, and volatile organic compounds (“VOCs”), including tetrachloroethene (“PCE”), benzene, and toluene. Thus, the City determined it needed to conduct environmental review, pursuant to CEQA. The City then released the MND that is the subject of the comments herein.

Based upon our review of the MND and supporting documentation, we conclude that the MND fails to comply with CEQA. As explained in these comments, substantial evidence supports a fair argument that the Project may result in potentially significant impacts on hazards, air quality and public health, water quality, and greenhouse gases (“GHGs”). The Remedial Action Plan (“RAP”) proposed to clean up contamination is not a health risk assessment and does not include sufficient mitigation to reduce potentially significant impacts on hazards, public health, and water quality to a less than significant level. The City may not approve the MND, use permit, minor use permit, and design review until the City prepares an Environmental Impact Report (“EIR”) that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

In addition, the Project, particularly its parking garage design, is inconsistent with the City’s General Plan and Specific Plan policies that require projects to incorporate design for an integrated pedestrian network in downtown Concord. The Project’s scale defies the Specific Plan’s policy that new development should conform to the scale of surrounding buildings.

Finally, the Project is inconsistent with the City of Concord Development Code (“Development Code”) prohibition on granting use and minor use permits where the use will be detrimental to public health of persons residing or working in the neighborhood.<sup>3</sup>

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<sup>2</sup> See Cal. Code Regs. (“CCR”) §15300.2 (e).

<sup>3</sup> City of Concord Development Code (“Development Code”) 18.435.060 (5).

We prepared these comments with the assistance of hazardous materials expert Matt Hagemann, P.G., C.Hg. former Senior Science Policy Advisor for U.S. EPA Region 9's hazardous materials program, and air quality expert Jessie Jaeger of Soil / Water / Air Protection Enterprise ("SWAPE"). SWAPE's technical comments and curriculum vitae are attached hereto as Exhibit A and are fully incorporated herein.<sup>4</sup>

We request that the Planning Commission reject the MND, deny the use permit, minor use permit, and design review approvals, and direct staff to prepare an EIR to evaluate the Project's unmitigated, potentially significant impacts.

## I. STATEMENT OF INTEREST

Concord Residents for Responsible Development ("Concord Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. Concord Residents includes Eric Haynes, Raul Tiffer, Vincent Copeletti, **International Brotherhood of Electrical Workers Local 302, Plumbers & Steamfitters Local 159, Sprinkler Fitters Local 483, and Sheet Metal Workers Local 104**, and their members and their families who live and/or work in the City of Concord and Contra Costa County.

The individual members of Concord Residents live, work, and raise their families in the City of Concord. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of Concord Residents also have an interest in enforcing the City's planning and zoning laws and the State's 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. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Concord Residents' members

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<sup>4</sup> See generally **Exhibit A**: SWAPE Comments.

are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

## **II. THE PROJECT FAILS TO COMPLY WITH THE CITY OF CONCORD GENERAL PLAN 2030**

The City of Concord's General Plan 2030 (the "General Plan") sets forth numerous policies aimed at promoting an integrated pedestrian network. Among other policies directed at an integrated pedestrian network, the General Plan seeks to "incorporate urban design measures in commercial and mixed use districts which accommodate pedestrians and support walking" and promote "innovative and effective walkway features to enhance the pedestrian environment."<sup>5</sup> The Project fails to comply with the General Plan's policies aimed at enhancing the pedestrian environment. The Project is inconsistent with the General Plan, because the parking garage features: 1) two entries rather than one entry; 2) an entrance on a major pedestrian street; and 3) entrances that are neither screened by landscaping techniques nor treated as opportunities for public art.

## **III. THE PROJECT FAILS TO COMPLY WITH THE SPECIFIC PLAN**

A specific plan is a means by which a General Plan is implemented.<sup>6</sup> The Downtown Specific Plan ("Specific Plan") guidelines and goals seek to establish an integrated pedestrian network<sup>7</sup> and, thus, the Specific Plan implements the General Plan policies aimed at accommodating pedestrians.

The Project thwarts the Specific Plan's policies that are designed to establish an integrated pedestrian network. The MND claims that the Project is consistent with the Specific Plan.<sup>8</sup> However, a primary policy of the Specific Plan is to "accommodate all travel modes, with an emphasis on pedestrians, bicyclists, and transit users."<sup>9</sup> The Specific Plan seeks to realize this policy by creating an

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<sup>5</sup> General Plan Policy T-1.7.7, p. 5-31, Policy T-1.7.2, p. 5-31.

<sup>6</sup> California Government Code § 65450 ("After the legislative body has adopted a general plan, the planning agency may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan.")

<sup>7</sup> Downtown Concord Specific Plan ("Specific Plan"), p. 25, *available at* <http://www.ci.concord.ca.us/pdf/projects/downtownPlan/06042014.pdf>

<sup>8</sup> MND, p. 3-50.

<sup>9</sup> Specific Plan, p. 25.

“integrated pedestrian network...with particular emphasis on streets within the pedestrian priority zone.”<sup>10</sup>

The Project’s parking garage will contain five and a half stories (including a subterranean garage), and features blatant violations of the Specific Plan’s guidelines. By violating Specific Plan guidelines, the Project will directly frustrate the primary vision of the Specific Plan to accommodate all travel modes.<sup>11</sup> In addition, the Project’s apartment building’s five-story height is incongruous with the smaller scale of surrounding buildings, thus further thwarting the policies of the Specific Plan.

1. *The Project’s Parking Garage Contains Two Separate Entries*

The Specific Plan states that “multi-unit residential buildings should consolidate their parking entries and exits to a single entry.”<sup>12</sup> More generally, “breaks in the [residential] ground floor for vehicular and service entries should be minimized.”<sup>13</sup> The Specific Plan calls for minimal breakage in ground floors, especially when such breakage is caused by vehicular traffic, because the “character of the building’s ground floor determines the overall quality of street level pedestrian experience.”<sup>14</sup> The Specific Plan clearly views vehicular and service entries as a negative factor in the pedestrian experience.

The Project contains two entries, one on East Street and one on Port Chicago Highway.<sup>15</sup> The MND focuses on architectural compliance with the Specific Plan, and offers no explanation for divergence from the Specific Plan’s recommendation for one consolidated entry to minimize curbside cuts.<sup>16</sup> By failing to consolidate the vehicular and service entries and exits into one entry, the Project is inconsistent with the enhanced integrated pedestrian network policy contained within the Specific Plan.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, p. 87.

<sup>13</sup> *Id.*, p. 85.

<sup>14</sup> *Id.*

<sup>15</sup> MND, Figure 6 Proposed Site Plan.

<sup>16</sup> MND, p. 2-15; Specific Plan, p. 87.

2. *The Parking Garage's East Street Driveway is on a Major Pedestrian Street*

The Specific Plan states that “parking garage driveways should not be placed on major pedestrian streets.”<sup>17</sup> The Specific Plan’s recommendation is based on the premise that “parking structures are often a disruptive element in the urban fabric.”<sup>18</sup> Furthermore, the Specific Plan declares that “it is important to locate and access parking structures and residential garages such that the overall pedestrian flow and experience on the public streets is not compromised.”<sup>19</sup>

Here, the Project will interfere with the pedestrian experience because one of the Project’s parking garage driveways is placed on East Street<sup>20</sup> and East Street is considered a “key” pedestrian street.<sup>21</sup> Also, East Street is in the pedestrian priority zone, which renders the location of the East Street driveway even more unreasonable and inconsistent with the goals of the Specific Plan.<sup>22</sup>

3. *The Parking Garage's Entrances are Neither Screened by Landscaping Techniques nor Treated as Opportunities for Public Art*

In keeping with its policy of an integrated pedestrian network, the Specific Plan declares that “garage entrances adjacent to sidewalk should be screened with landscaping techniques or should be treated as an opportunity for public art.”<sup>23</sup>

The Project’s plans show no effort to screen the garage entrances or treat them as opportunities for public art. This inconsistency with the Specific Plan is particularly egregious since the entrance is on East Street, which is considered a key pedestrian street and in the pedestrian priority zone. Rather than fully integrating the garage driveways into a street frontage conducive to an integrated pedestrian network, the Project merely offers a few trees as consolation for the

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<sup>17</sup> *Id.*, p. 90.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> MND, Figure 6 Proposed Site Plan.

<sup>21</sup> See Specific Plan, Policy C-3.3, p.111: (“Reduce street crossing widths and increase pedestrian visibility by installing bulb-outs and crosswalk markings at intersections on key pedestrian streets where feasible. Installation of bulb-outs at intersections should be considered along the following streets within the pedestrian priority zone: [list of streets including East Street].” See also *id.*, Fig. 5.1, p. 100 (showing East Street as a “Pedestrian Street.”)

<sup>22</sup> *Id.*; Specific Plan, Policy C-3.3, p. 111.

<sup>23</sup> *Id.*, p. 87.

breaking curbsides and street frontages.<sup>24</sup> Simply flanking the East Street entrance with a couple trees does not constitute “screening with landscaping techniques.” The Port Chicago Highway entrance is not even flanked by two trees. Instead, the Project’s plans only call for planting trees on one side of the Port Chicago Highway entrance, leaving it free to mar the view from the sidewalk and the Wisteria residential community across the street.<sup>25</sup>

Aside from the inadequate screening of the entrances, the Project plans contain no mention of treating the two garage entrances as opportunities for public art.

#### 4. *The Project Fails to Maintain the Scale of Adjacent Buildings*

The Project is within the Todos Santos District of the Specific Plan.<sup>26</sup> Todos Santos Plaza is located just two blocks from the Project site. “Tall buildings” in the area are mostly confined to the vicinity of the BART station and Clayton Road, both to the south of Todos Santos Plaza.<sup>27</sup> Overall, the “urban form around Todos Santos is defined by buildings ranging from low rise/single story to three stories.”<sup>28</sup>

According to the Specific Plan, “infill development within the Todos Santos Neighborhood [is] intended to provide density, *but at the scale of existing development* [italics added].”<sup>29</sup> Specifically regarding residential/mixed-use building design, the Specific Plan intends that new buildings “conform to key aspects of massing.”<sup>30</sup> Furthermore, multi-unit buildings “should depict a rhythm and scale that relates to the surrounding buildings.”<sup>31</sup>

Here, not one building surrounding the Project site comes close to the five story height of the Project.<sup>32</sup> Very few buildings between the Project site and Todos Santos Plaza equal the height of the Project. The five-story Project easily exceeds the “urban form” of one to three-story buildings found in the Todos Santos District.

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<sup>24</sup> **Exhibit B:** Project Plans, L-1.0, Overall Street Level Plan.

<sup>25</sup> *Id.*

<sup>26</sup> Specific Plan, Fig.3.5, p. 38.

<sup>27</sup> *Id.*, p. 39

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, p. 33.

<sup>30</sup> *Id.* p. 88.

<sup>31</sup> *Id.*

<sup>32</sup> MND, p. 2-7.

The tall buildings in the area are mostly confined to the area south of Todos Santos Plaza, not the Project's location east of the plaza.

**IV. THE PROJECT WILL BE DETRIMENTAL TO PUBLIC HEALTH IN THE NEIGHBORHOOD AND THUS DOES NOT QUALIFY FOR USE AND MINOR USE PERMITS**

Development Code Chapter 18.435.060 (A)(5) permits issuance of use and minor use permits only when the use will “not be detrimental to the public health, safety, or welfare of the persons residing or working in the subject neighborhood....” Here, as described in Section V below, the Project will expose Project residents to on-site contaminants and DPM emissions. The RAP would fail to eliminate, or even reduce to a less-than-significant level, detrimental impacts to public health.

Thus, the Planning Commission may not grant the use and minor use permits because the Project will be detrimental to persons residing or working in the subject neighborhood, including the residents of the Project itself.

**V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY RESULT IN POTENTIALLY SIGNIFICANT IMPACTS REQUIRING THE CITY TO PREPARE AN EIR TO COMPLY WITH CEQA**

CEQA has two basic purposes, neither of which the MND satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.<sup>33</sup> CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.<sup>34</sup> The purpose of the EIR is to “inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment, but also informed self-government.”<sup>35</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>36</sup>

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<sup>33</sup> CCR § 15002(a)(1).

<sup>34</sup> See CCR § 15002(f)(1).

<sup>35</sup> *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

<sup>36</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.



Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.<sup>37</sup> The EIR serves to provide public agencies and the general public 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>38</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>39</sup>

Here, the MND fails to satisfy the basic purposes of CEQA by failing to inform the public and decision makers of the Project’s potentially significant impacts and to propose mitigation measures that can reduce those impacts to a less-than-significant level. The City is required to evaluate the Project in an EIR.

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.<sup>40</sup> CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard. Under that standard, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>41</sup> The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration or notices of exemption from CEQA.<sup>42</sup> An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>43</sup>

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<sup>37</sup> CCR § 15002(a)(2)-(3); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1354.

<sup>38</sup> CCR § 15002(a)(2).

<sup>39</sup> CCR § 15092(b)(2)(A)-(B).

<sup>40</sup> See PRC § 21100.

<sup>41</sup> PRC § 21082.2(a); CCR § 15064(f); *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1993) 6 Cal. 4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995). 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994). 29 Cal.App.4th 1597, 1601-1602.

<sup>42</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>43</sup> *Sierra Club v. County of Sonoma*, (1992) 6 Cal.App.4th, 1307, 1318; *Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 [“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative

A mitigated negative declaration may be prepared instead of an EIR only when, after preparing an Initial Study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) Revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where *clearly no significant effect* on the environment would occur; and
- (2) There is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.<sup>44</sup>

Substantial evidence can be provided by technical experts or members of the public.<sup>45</sup> “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”<sup>46</sup> The CEQA Guidelines provide that “if there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.”<sup>47</sup>

As detailed in the following sections, there is a fair argument, supported by substantial evidence, that the Project may result in significant impacts on hazards, land use, air quality and public health, and greenhouse gases. Therefore, the City is required to prepare an EIR to evaluate the Project’s impacts and require all feasible mitigation measures that are necessary to reduce those impacts to a less-than-significant level.

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declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”].

<sup>44</sup> PRC § 21064.5.

<sup>45</sup> See, e.g., *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340 [substantial evidence regarding noise impacts included public comments at hearings that selected air conditioners are very noisy]; *Architectural Heritage Ass’n v. County of Monterey*, 122 Cal.App.4th 1095, 1116-1118 [substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing].

<sup>46</sup> CCR § 15062(f)(1).

<sup>47</sup> *Id.*, § 15062(g).

**A. Substantial Evidence Supports a Fair Argument that the Project may Result in Potentially Significant, Unmitigated Public Health Impacts from Hazards Due to Contamination**

In 2016, the City determined that the Project fails to qualify for a CEQA exemption due to the site's presence on the Cortese List, which documents sites contaminated by hazards and hazardous wastes.<sup>48</sup> Prior Project site uses, including an automotive shop, dry cleaning facility and gas station, led to the contamination of the site and its placement on the Cortese List.<sup>49</sup> The contaminants include a variety of contaminants of concern ("COCs"), including petroleum hydrocarbons, chlorinated solvents, benzene, toluene, and PCE.

A RAP for the Project site is currently undergoing a public comment period.<sup>50</sup> As described by Mr. Hagemann and Ms. Jaeger of SWAPE, the RAP is a clean-up plan and not a document which analyzes and requires mitigation to disclose and ensure the Project's significant hazard impacts are mitigated to less than significant. In its August 17, 2016 letter to the Planning Commission, SWAPE stated that there are "extremely high concentrations" of PCE in soil vapor on site and that the RWQCB lacks the expertise to oversee the Project site's remediation.<sup>51</sup> SWAPE explains that the Department of Toxic Substances Control ("DTSC") is the proper agency to oversee the site remediation.<sup>52</sup> The City, however, continues to rely on the RWQCB to oversee the site remediation.<sup>53</sup>

As explained below, substantial evidence supports a fair argument that the Project may result in potentially significant impacts on public health due to unmitigated on-site contamination.<sup>54</sup>

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<sup>48</sup> City of Concord Planning Commission Hearing, 9/21/2016, *available at* <http://www.cityofconcord.org/page.asp?pid=a06>; *see* [http://www.dtsc.ca.gov/SiteCleanup/Cortese\\_List.cfm](http://www.dtsc.ca.gov/SiteCleanup/Cortese_List.cfm)

<sup>49</sup> Notice of Intent to Adopt a Mitigated Negative Declaration, *available at* [http://www.cityofconcord.org/pdf/dept/planning/EIR/concord\\_village\\_NOI.pdf](http://www.cityofconcord.org/pdf/dept/planning/EIR/concord_village_NOI.pdf)

<sup>50</sup> *See* MND, Appendix A: Remedial Action Plan.

<sup>51</sup> **Exhibit A:** SWAPE Comments, p. 1 – 2.

<sup>52</sup> *Id.*, p. 2.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, p. 3.

1. *The MND and Remedial Action Plan Fail to Identify the Source of On-Site PCE*

To date, the MND and the RAP fail to identify the source of the PCE.<sup>55</sup> As a result, PCE will continue to contaminate the site even if the RAP is implemented.<sup>56</sup> Even worse, implementation of the Project may permanently prevent future remediation.<sup>57</sup> As described by SWAPE, investigations to locate the source of the PCE have thus far been completely inadequate; in fact, it's uncertain that any such investigation has actually occurred:

Only one boring has been completed in the area where the highest level of PCE contamination has been detected in soil vapor (within the southeast-central portion of the Project site). This boring (TR-12) was completed to sample soil vapor only: No soil or groundwater samples were collected at that location within the same vertical interval.

The highest detection of PCE in soil vapor at the Project site was detected in TR-12 at a depth of 16.5 feet (Appendix A, Figure 5). No groundwater sample has been collected at that location (Appendix A, Figure 4) and the only soil sample at that location was collected at a depth of 2.5 feet and that sample was not analyzed for PCE.<sup>58</sup>

The high presence of PCE may indicate the presence of a liquid PCE source known as a dense nonaqueous phase liquid ("DNAPL").<sup>59</sup> A DNAPL source may remain in the subsurface for hundreds of years, serving as a source for soil vapor and groundwater contamination.<sup>60</sup> Without identification and removal of the PCE source, groundwater may continue to be contaminated.<sup>61</sup> Contaminated groundwater may move off site and pose a vapor intrusion risk for adjacent properties.<sup>62</sup> Sampling must be conducted in the vicinity of TR-12 to evaluate the presence of a DNAPL.<sup>63</sup> Without locating the source of the PCE before construction

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<sup>55</sup> *Id.*, p. 2.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, p. 3.

<sup>58</sup> *Id.*, p. 2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

of the Project, substantial evidence suggests the PCE may be entombed by the Project and post-construction remediation will be *impossible*.<sup>64</sup>

2. *The MND Proposes Insufficient Mitigation to Reduce Public Health Impacts from Hazards to Less than Significant*

The MND's proposed mitigation is insufficient for reducing public health impacts from on-site hazards to less than significant.<sup>65</sup> The proposed mitigation consists solely of engineering controls.<sup>66</sup> These engineering controls fail to address the threat posed by the unidentified PCE source and potential for the source to generate future contamination of soil vapor, including contamination of off-site properties that may be subject to vapor intrusion.<sup>67</sup>

3. *PCE Levels Exceed Significance Thresholds*

The Project's potential to result in a high risk of off-site vapor intrusion is illustrated in groundwater data collected from B22 and B7.<sup>68</sup> The groundwater contamination from these borings was measured at 530 micrograms per liter ("ug/L") and 240 ug/L, respectively. These detections, located off-site and situated in a direction that is hydraulically downgradient of the highest soil vapor PCE detections in TR-12, are above health-based Environmental Screening Levels (ESLs).<sup>69</sup> The ESL for deep groundwater as a source of PCE vapors under a commercial/industrial sand scenario is 320 ug/L.<sup>70</sup> As described above, the source for these high levels of PCE have not even been identified and will not be identified according to the proposed RAP. The fact that samples reflect that the site's PCE content exceeds ESLs is further evidence of the need to identify the PCE source. The RAP and MND must not be approved until that source is identified.<sup>71</sup>

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<sup>64</sup> *Id.*, p. 3.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

SWAPE explains that the City must conduct an investigation that advances borings at TR-12 and downgradient.<sup>72</sup> Samples for soil, soil vapor and groundwater should be collected at that location from a minimum of three borings to identify the location of the source and to evaluate the potential for migration of the contaminants in groundwater and soil vapor.<sup>73</sup> Without such an investigation under direction of the DTSC, substantial evidence supports a fair argument that the Project may have a significant, unmitigated impact from hazards.

4. *Substantial Evidence Supports a Fair Argument that Hazardous Materials May Be Emitted within One-Quarter Mile of Four Schools*

CEQA Guidelines Appendix G calls for a finding of significance if a Project may potentially “emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school.”<sup>74</sup> The City adopted this significance criterion for the Project.<sup>75</sup>

No fewer than *four* schools exist within one-quarter mile of the Project site.<sup>76</sup> The schools, and their distances to the Project site, are as follows: Beginnings and Beyond Montessori Christian School (approximately 0.09 miles west of the Project site), Olympic Continuation High School and Crossroads High School (approximately 0.10 miles east of the Project site), and A White Dove Preschool (approximately 0.19 miles east of the Project site).<sup>77</sup> Though the MND acknowledges the presence of the four schools within one-quarter mile, the MND improperly found “less than significant impact” on schools.<sup>78</sup> As described above, substantial evidence supports a fair argument that the Project will result in a potentially significant impact from release of PCE to adjacent properties. Because the Project site is within one-quarter mile of four schools, substantial evidence demonstrates that hazards will be emitted within one-quarter mile of schools.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> CEQA Guidelines Appendix G VIII(c).

<sup>75</sup> *Id.*

<sup>76</sup> See **Exhibit A**: SWAPE Comments, p. 3.

<sup>77</sup> *Id.*

<sup>78</sup> MND, p. 3-41.

**B. Substantial Evidence Supports a Fair Argument that the Project may Result in Potentially Significant, Unmitigated Impacts on Water Quality**

The MND erroneously concludes that the Project will cause no significant impacts to hydrology or water quality that require mitigation.<sup>79</sup> In fact, substantial evidence supports a fair argument that the Project may have potentially significant impact on water quality.<sup>80</sup> As explained by SWAPE, the Project will likely require dewatering because the depth to groundwater at the Project site is only 20 feet.<sup>81</sup> Because the MND does not describe the depth of excavation required for Project construction, the excavation could intercept the water table.<sup>82</sup> Also, the depth to groundwater may have changed since the last measurement was taken. The dewatering necessary for construction may degrade groundwater quality, especially considering the high level of contamination on site.<sup>83</sup> A full EIR must be prepared that presents proper disposal methods for contaminated groundwater and complies with RWQCB National Pollution Discharge Elimination System (“NPDES”) requirements.<sup>84</sup>

**C. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant, Unmitigated Impacts on Public Health**

*1. The MND Improperly Applies Mitigation Measures to Unmitigated Impacts on Air Quality*

The MND improperly applies a mitigation measure to the Project’s unmitigated impacts on air quality. As described under CEQA Guidelines Section 15370, “Mitigation” includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

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<sup>79</sup> MND, p. 3-43 – 3-44.

<sup>80</sup> **Exhibit A:** SWAPE Comments, p. 4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

*Lotus v. Department of Transportation*<sup>85</sup> recently clarified the requirements of CEQA Guideline 15370. In *Lotus*, the court held that “avoidance, minimization and/or mitigation measures,” are not “part of the project.”<sup>86</sup> Rather, they are mitigation measures designed to reduce or eliminate environmental impacts of the Project, and must be treated as such. Mitigation measures cannot be incorporated in an MND’s initial calculation of the Project’s unmitigated impacts because the analysis of unmitigated impacts, by definition, must accurately assess such impacts before any mitigation measures to reduce those impacts are applied.<sup>87</sup> An MND that compresses the analysis of impacts and mitigation measures into a single issue disregards the requirements of CEQA.

Here, review of the proposed Project’s CalEEMod output files demonstrates that a construction-related mitigation measure was applied to the Project’s unmitigated construction emissions. Specifically, the restriction of on-site construction vehicular speed to 15 mph is described as a best management practice included in a mitigation measure.<sup>88</sup> But the CalEEMod output files purportedly representing the projects *unmitigated* emissions include this speed restriction.<sup>89</sup> Not only was the mitigation measure included in violation of *Lotus*, but the mitigation speed of 15 mph was reduced to zero mph in the CalEEMod outputs. Zero mph is an impracticable speed if construction is to occur at all.<sup>90</sup>

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<sup>85</sup> *Lotus v. Dept. of Transportation* (2013) 223 Cal.App.4th 650.

<sup>86</sup> *Id.* at 656.

<sup>87</sup> *Id.* at 651 - 52.

<sup>88</sup> MND, p. 3-73 – 3-74.

<sup>89</sup> MND Appendix B: CalEEMod Files, pp. 139, 173, and 202 (pdf).

<sup>90</sup> **Exhibit A:** SWAPE Comments, p. 6.



As explained by SWAPE, the use of the mile-per-hour restriction in the CalEEMod output of unmitigated air quality emissions renders the MND's air quality analysis inadequate.<sup>91</sup> Furthermore, under *Lotus*, the CalEEMod's inclusion of a mitigation measure in its output for unmitigated impacts violates CEQA.

2. *The MND Improperly Evaluates Diesel Particulate Matter Emissions*

The MND conclusion that sensitive receptor exposure to Project emissions would be less than significant is inaccurate and unsupported.<sup>92</sup> The MND's finding of no significance is based on the assumption that the RAP will be incorporated as part of the Project. However, the RAP only purports to identify and address potential environmental COCs in soil, groundwater, and soil vapor on the Project site. *The RAP has nothing to do with diesel particulate matter ("DPM").* As explained by SWAPE:

The RAP does not include any analysis of diesel particulate matter (DPM) emissions generated from Project construction or operation, nor does it assess the cancer risk posed to nearby sensitive receptors as a result of exposure to toxic air contaminants (TAC) or DPM emissions generated by the Project.<sup>93</sup>

The result of the MND's reliance on the RAP is that the City's CEQA review of the Project *entirely overlooks* cancer risks to sensitive receptors.

a. The MND fails to include a health risk assessment as required by OEHHA guidelines.

The MND's omission of a health risk assessment ("HRA") is inconsistent with the most recent guidance published by Office of Environmental Health Hazard Assessment ("OEHHA"), the organization responsible for providing recommendations and guidance on how to conduct HRAs in California.<sup>94</sup> In February of 2015, OEHHA released its most recent Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments, which was formally

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<sup>91</sup> *Id.*

<sup>92</sup> MND, p. 3-13.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

adopted in March of 2015.<sup>95</sup> This guidance document describes the types of projects that warrant the preparation of a HRA.<sup>96</sup>

Grading and construction of the Project will produce emissions of DPM, a human carcinogen, through the exhaust stacks of construction equipment over an approximate 18.5-month period.<sup>97</sup> The OEHHA document recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors.<sup>98</sup> Once construction is complete, Project operation will generate truck trips, which will generate additional exhaust emissions, and thus continue to expose nearby sensitive receptors to DPM emissions.<sup>99</sup> The OEHHA document recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project, and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (“MEIR”).<sup>100</sup>

Even though the Project has no finite lifetime, SWAPE reasonably assumed that the Project will operate for at least 30 years, if not more.<sup>101</sup> Therefore, under OEHHA guidelines, health risks from Project operation should have also been evaluated by the MND as a 30-year exposure duration.<sup>102</sup> Under OEHHA guidelines, health risk impacts from Project construction and operation should have been evaluated by the MND.<sup>103</sup> The OEHHA guidelines reflect the State of California’s most recent HRA policy, and as such, an assessment of health risks to nearby sensitive receptors from construction and operation should be included in a revised CEQA evaluation for the Project.<sup>104</sup>

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<sup>95</sup> *Id.* at 6 – 7. See also “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/hotspots2015.html](http://oehha.ca.gov/air/hot_spots/hotspots2015.html)

<sup>96</sup> **Exhibit A:** SWAPE Comments, p. 7.

<sup>97</sup> *Id.*

<sup>98</sup> “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/2015/2015GuidanceManual.pdf](http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf), p. 8-18.

<sup>99</sup> **Exhibit A:** SWAPE Comments, p. 7.

<sup>100</sup> “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, available at: [http://oehha.ca.gov/air/hot\\_spots/2015/2015GuidanceManual.pdf](http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf), p. 8-6, 8-15

<sup>101</sup> **Exhibit A:** SWAPE Comments, p. 7.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

- b. A screening-level health risk assessment demonstrates a potentially significant impact to sensitive receptors.

SWAPE prepared a simple health risk screening assessment (“HRSA”) to model the Project’s potential health risks.<sup>105</sup> To model air dispersion, SWAPE utilized AERSCREEN, a model recommended by the United States Environmental Protection Agency since 2011.<sup>106</sup> AERSCREEN is included in the OEHHA<sup>107</sup> and the California Air Pollution Control Officers Associated (“CAPCOA”)<sup>108</sup> guidance as the appropriate air dispersion model for Level 2 health risk screening assessments (“HRSA”). A Level 2 HRSA utilizes a limited amount of site-specific information to generate maximum reasonable downwind concentrations of air contaminants to which nearby sensitive receptors may be exposed.<sup>109</sup> If an unacceptable air quality hazard is determined to be possible using AERSCREEN, a more refined modeling approach is required prior to approval of the Project.<sup>110</sup>

As detailed in SWAPE’s letter,<sup>111</sup> SWAPE calculated the excess cancer risk caused by the Project for three age ranges of sensitive receptors: 0 to 2 years, 2 to 16 years, and 16 to 30 years.<sup>112</sup> Because there are four schools located within one-quarter mile of the Project site, SWAPE determined that it was especially critical to assess risk for child receptors (2 to 16 years).<sup>113</sup> Thus, consistent with OEHHA guidance, SWAPE used Age Sensitivity Factors (ASFs) to account for the heightened susceptibility of young children to the carcinogenic toxicity of air pollution.<sup>114</sup>

The results of SWAPE’s HRSA show that the Project’s excess cancer risks to adults, children, and infants located 25 meters away from the Project all exceed screening levels set forth by the Bay Area Air Quality Management District

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, *available at*: [http://oehha.ca.gov/air/hot\\_spots/2015/2015GuidanceManual.pdf](http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf)

<sup>108</sup> “Health Risk Assessments for Proposed Land Use Projects,” CAPCOA, July 2009, *available at*: [http://www.capcoa.org/wp-content/uploads/2012/03/CAPCOA\\_HRA\\_LU\\_Guidelines\\_8-6-09.pdf](http://www.capcoa.org/wp-content/uploads/2012/03/CAPCOA_HRA_LU_Guidelines_8-6-09.pdf)

<sup>109</sup> **Exhibit A:** SWAPE Comments, p. 7.

<sup>110</sup> *Id.*, pp. 7-8.

<sup>111</sup> *Id.*, pp. 7-10.

<sup>112</sup> *Id.*, p. 9.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

(“BAAQMD”).<sup>115</sup> The BAAQMD significance threshold for DPM is 10 in one million.<sup>116</sup> SWAPE’s HRSA indicates that the Project will cause an excess health risk of 14 in one million for adults, 92 in one million for children, and 220 in one million for infants.<sup>117</sup> Furthermore, the excess cancer risk over the course of a residential lifetime (30 years) for a maximally exposed individual resident is approximately 323 in one million.<sup>118</sup> Consistent with OEHHA guidance, exposure was assumed to begin in the infantile stage of life to provide the most conservative estimates of air quality hazards. SWAPE’s HRSA is a conservative estimate of health risk because it tends to err on the side of health protection. But the purpose of an HRSA is to determine if a more refined, project-specific HRA is necessary.

In regards to the Project, SWAPE determined that a refined HRA is necessary based on the findings of the HRSA.<sup>119</sup> An EIR, including a refined HRA, must be prepared to adequately evaluate the Project’s potentially significant public health impacts, and should include additional mitigation measures to reduce these impacts to a less-than-significant level.<sup>120</sup> Without a refined HRA and mitigation addressing the findings of such an assessment, substantial evidence supports a fair argument that the Project may lead to significant public health impacts due to DPM emissions.<sup>121</sup>

As demonstrated by SWAPE’s analysis above, DPM emissions will in fact cause significant health risk impacts on sensitive receptors. Therefore, the Project’s potential public health impacts require an EIR that must include mitigation measures based on accurately projected DPM emissions.<sup>122</sup>

c. Additional Mitigation Measures

Additional mitigation measures can be found in the California Air Pollution Control Officers Association’s (“CAPCOA’s”) *Quantifying Greenhouse Gas Mitigation Measures*, which attempt to reduce Criteria Air Pollutants, such as DPM, and

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<sup>115</sup> *Id.*, p. 10.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

GHGs.<sup>123</sup> Mitigation for criteria pollutant emissions should include consideration of the following measures in an effort to reduce particulate matter construction emissions to below BAAQMD thresholds.<sup>124</sup> SWAPE's description of these mitigation measures and the proven efficacy of such measures are included below in their entirety:

i. Require Implementation of Diesel Control Measures

The Northeast Diesel Collaborative ("NEDC") is a regionally coordinated initiative to reduce diesel emissions, improve public health, and promote clean diesel technology. The NEDC recommends that contracts for all construction projects require the following diesel control measures:<sup>125</sup>

- All diesel onroad vehicles on site for more than 10 total days must have either (1) engines that meet EPA 2007 onroad emissions standards or (2) emission control technology verified by EPA<sup>126</sup> or the California Air Resources Board (CARB)<sup>127</sup> to reduce PM emissions by a minimum of 85 percent.
- All diesel generators on site for more than 10 total days must be equipped with emission control technology verified by EPA or CARB to reduce PM emissions by a minimum of 85 percent.
- All diesel nonroad construction equipment on site for more than 10 total days must have either (1) engines meeting EPA Tier 4 nonroad emission standards or (2) emission control technology verified by EPA or CARB for use with nonroad engines to reduce PM emissions by a minimum of 85 percent for engines 50 horse power (hp) and greater and by a minimum of 20 percent for engines less than 50 hp.
- All diesel vehicles, construction equipment, and generators on site shall be fueled with ultra-low sulfur diesel fuel (ULSD) or a

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Diesel Emission Controls in Construction Projects, *available at:*

<http://www2.epa.gov/sites/production/files/2015-09/documents/nedc-model-contract-sepcification.pdf>

<sup>126</sup> For EPA's list of verified technology: <http://www3.epa.gov/otaq/diesel/verification/verif-list.htm>

<sup>127</sup> For CARB's list of verified technology: <http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm>

biodiesel blend<sup>128</sup> approved by the original engine manufacturer with sulfur content of 15 parts per million (ppm) or less.

ii. Repower or Replace Older Construction Equipment Engines

The NEDC recognizes that availability of equipment that meets the EPA's newer standards is limited.<sup>129</sup> Due to this limitation, the NEDC proposes actions that can be taken to reduce emissions from existing equipment in the *Best Practices for Clean Diesel Construction* report.<sup>130</sup> These actions include but are not limited to:

- Repowering equipment (i.e. replacing older engines with newer, cleaner engines and leaving the body of the equipment intact).

Engine repower may be a cost-effective emissions reduction strategy when a vehicle or machine has a long useful life and the cost of the engine does not approach the cost of the entire vehicle or machine. Examples of good potential replacement candidates include marine vessels, locomotives, and large construction machines.<sup>131</sup> Older diesel vehicles or machines can be repowered with newer diesel engines or in some cases with engines that operate on alternative fuels (see section "Use Alternative Fuels for Construction Equipment" for details). The original engine is taken out of service and a new engine with reduced emission characteristics is installed. Significant emission reductions can be achieved, depending on the newer engine and the vehicle or machine's ability to accept a more modern engine and emission control system. It should be noted, however, that newer engines or higher tier engines are not necessarily cleaner engines, so it is important that the Project Applicant check the actual emission standard level of the current (existing) and new engines to ensure the repower product is reducing emissions for DPM.<sup>132</sup>

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<sup>128</sup> Biodiesel blends are only to be used in conjunction with the technologies which have been verified for use with biodiesel blends and are subject to the following requirements:

<http://www.arb.ca.gov/diesel/verdev/reg/biodieselcompliance.pdf>

<sup>129</sup> <http://northeastdiesel.org/pdf/BestPractices4CleanDieselConstructionAug2012.pdf>

<sup>130</sup> <http://northeastdiesel.org/pdf/BestPractices4CleanDieselConstructionAug2012.pdf>

<sup>131</sup> Repair, Rebuild, and Repower, EPA, available at: <https://www.epa.gov/verified-diesel-tech/learn-about-verified-technologies-clean-diesel#repair>

<sup>132</sup> Diesel Emissions Reduction Program (DERA): Technologies, Fleets and Projects Information, available at: <http://www2.epa.gov/sites/production/files/2015-09/documents/420p11001.pdf>

- Replacement of older equipment with equipment meeting the latest emission standards.

Engine replacement can include substituting a cleaner highway engine for a nonroad engine. Diesel equipment may also be replaced with other technologies or fuels. Examples include hybrid switcher locomotives, electric cranes, LNG, CNG, LPG or propane yard tractors, forklifts or loaders. Replacements using natural gas may require changes to fueling infrastructure.<sup>133</sup> Replacements often require some re-engineering work due to differences in size and configuration. Typically, there are benefits in fuel efficiency, reliability, warranty, and maintenance costs.<sup>134</sup>

### iii. Install Retrofit Devices on Existing Construction Equipment

PM emissions from alternatively-fueled construction equipment can be further reduced by installing retrofit devices on existing and/or new equipment. The most common retrofit technologies are retrofit devices for engine exhaust after-treatment. These devices are installed in the exhaust system to reduce emissions and should not impact engine or vehicle operation.<sup>135</sup> Below is a table, prepared by the EPA, that summarizes the commonly used retrofit technologies and the typical cost and emission reductions associated with each technology.<sup>136</sup> It should be noted that actual emission reductions and costs will depend on specific manufacturers, technologies and applications.

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<sup>133</sup> Alternative Fuel Conversion, EPA, *available at*: <https://www3.epa.gov/otaq/consumer/fuels/altfuels/altfuels.htm#fact>

<sup>134</sup> Cleaner Fuels, EPA, *available at*: <https://www.epa.gov/verified-diesel-tech/learn-about-verified-technologies-clean-diesel#cleaner>

<sup>135</sup> Retrofit Technologies, EPA, *available at*: <https://www.epa.gov/verified-diesel-tech/learn-about-verified-technologies-clean-diesel#retrofit>

<sup>136</sup> Cleaner Diesels: Low Cost Ways to Reduce Emissions from Construction Equipment, March 2007, *available at*: <https://www.epa.gov/sites/production/files/2015-09/documents/cleaner-diesels-low-cost-ways-to-reduce-emissions-from-construction-equipment.pdf>, p. 26.

Technology	Typical Emissions Reductions (percent)				Typical Costs (\$)
	PM	NO <sub>x</sub>	HC	CO	
Diesel Oxidation Catalyst (DOC)	20-40	-	40-70	40-60	Material: \$600-\$4,000 Installation: 1-3 hours
Diesel Particulate Filter (DPF)	85-95	-	85-95	50-90	Material: \$8,000-\$50,000 Installation: 6-8 hours
Partial Diesel Particulate Filter (pDPF)	up to 60	-	40-75	10-60	Material: \$4,000-\$6,000 Installation: 6-8 hours
Selective Catalyst Reduction (SCR)	-	up to 75	-	-	\$10,000-\$20,000; Urea \$0.80/gal
Closed Crankcase Ventilation (CCV)	varies	-	-	-	-
Exhaust Gas Recirculation (EGR)	-	25-40	-	-	-
Lean NO <sub>x</sub> Catalyst (LNC)	-	5-40	-	-	\$6,500-\$10,000

iv. Use Electric and Hybrid Construction Equipment

CAPCOA’s Quantifying Greenhouse Gas Mitigation Measures report also proposes the use of electric and/or hybrid construction equipment as a way to mitigate DPM emissions. When construction equipment is powered by grid electricity rather than fossil fuel, direct emissions from fuel combustion are replaced with indirect emissions associated with the electricity used to power the equipment. Furthermore, when construction equipment is powered by hybrid-electric drives, emissions from fuel combustion are also greatly reduced. Electric construction equipment is available commercially from companies such as Peterson Pacific Corporation,<sup>137</sup> which specialize in the mechanical processing equipment like grinders and shredders. Construction equipment powered by hybrid-electric drives

<sup>137</sup> Peterson Electric Grinders Brochure, available at: [http://www.petersoncorp.com/wp-content/uploads/peterson\\_electric\\_grinders1.pdf](http://www.petersoncorp.com/wp-content/uploads/peterson_electric_grinders1.pdf)



is also commercially available from companies such as Caterpillar.<sup>138</sup> For example, Caterpillar reports that during an 8-hour shift, its D7E hybrid dozer burns 19.5 percent fewer gallons of fuel than a conventional dozer while achieving a 10.3 percent increase in productivity. The D7E model burns 6.2 gallons per hour compared to a conventional dozer which burns 7.7 gallons per hour.<sup>139</sup> Fuel usage and savings are dependent on the make and model of the construction equipment used. The Project Applicant should calculate project-specific savings and provide manufacturer specifications indicating fuel burned per hour.

v. Implement a Construction Vehicle Inventory Tracking System<sup>140</sup>

CAPCOA's Quantifying Greenhouse Gas Mitigation Measures report recommends that the Project Applicant provide a detailed plan that discusses a construction vehicle inventory tracking system to ensure compliances with construction mitigation measures. The system should include strategies such as requiring engine run time meters on equipment, documenting the serial number, horsepower, manufacture age, fuel, etc. of all onsite equipment and daily logging of the operating hours of the equipment. Specifically, for each onroad construction vehicle, nonroad construction equipment, or generator, the contractor should submit to the developer's representative a report prior to bringing said equipment on site that includes:<sup>141</sup>

- Equipment type, equipment manufacturer, equipment serial number, engine manufacturer, engine model year, engine certification (Tier rating), horsepower, and engine serial number.
- The type of emission control technology installed, serial number, make, model, manufacturer, and EPA/CARB verification number/level.
- The Certification Statement<sup>142</sup> signed and printed on the contractor's letterhead.

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<sup>138</sup> Electric Power Products, *available at*: [http://www.cat.com/en\\_US/products/new/power-systems/electric-power-generation.html](http://www.cat.com/en_US/products/new/power-systems/electric-power-generation.html)

<sup>139</sup> <http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf>

<sup>140</sup> <http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf>

<sup>141</sup> Diesel Emission Controls in Construction Projects, *available at*: <http://www2.epa.gov/sites/production/files/2015-09/documents/nedc-model-contract-sepcification.pdf>

<sup>142</sup> Diesel Emission Controls in Construction Projects, *available at*: <http://www2.epa.gov/sites/production/files/2015-09/documents/nedc-model-contract-sepcification.pdf>

The NEDC Model Certification Statement can be found in Appendix A.

Furthermore, the contractor should submit to the developer's representative a monthly report that, for each onroad construction vehicle, nonroad construction equipment, or generator onsite, includes:<sup>143</sup>

- Hour-meter readings on arrival on-site, the first and last day of every month, and on off-site date.
- Any problems with the equipment or emission controls.
- Certified copies of fuel deliveries for the time period that identify:
  - Source of supply
  - Quantity of fuel
  - Quality of fuel, including sulfur content (percent by weight).

In addition to these measures, we also recommend that the Applicant implement the following mitigation measures, called "Enhanced Exhaust Control Practices,"<sup>144</sup> that are recommended by the Sacramento Metropolitan Air Quality Management District (SMAQMD):

1. The project representative shall submit to the lead agency a comprehensive inventory of all off-road construction equipment, equal to or greater than 50 horsepower, that will be used an aggregate of 40 or more hours during any portion of the construction project.
  - The inventory shall include the horsepower rating, engine model year, and projected hours of use for each piece of equipment.
  - The project representative shall provide the anticipated construction timeline including start date, and name and phone number of the project manager and on-site foreman.
  - This information shall be submitted at least 4 business days prior to the use of subject heavy-duty off-road equipment.
  - The inventory shall be updated and submitted monthly throughout the duration of the project, except that an inventory shall not be required for any 30-day period in which no construction activity occurs.

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<sup>143</sup> Diesel Emission Controls in Construction Projects, *available at*:

<http://www2.epa.gov/sites/production/files/2015-09/documents/nedc-model-contract-sepcification.pdf>

<sup>144</sup>[http://www.airquality.org/ceqa/Ch3EnhancedExhaustControl\\_10-2013.pdf](http://www.airquality.org/ceqa/Ch3EnhancedExhaustControl_10-2013.pdf)

2. The project representative shall provide a plan for approval by the lead agency demonstrating that the heavy-duty off-road vehicles (50 horsepower or more) to be used in the construction project, including owned, leased, and subcontractor vehicles, will achieve a project wide fleet-average 20% NOX reduction and 45% particulate reduction compared to the most recent California Air Resources Board (ARB) fleet average.
  - This plan shall be submitted in conjunction with the equipment inventory.
  - Acceptable options for reducing emissions may include use of late model engines, low-emission diesel products, alternative fuels, engine retrofit technology, after-treatment products, and/or other options as they become available.
  - The District's Construction Mitigation Calculator can be used to identify an equipment fleet that achieves this reduction.
  
3. The project representative shall ensure that emissions from all off-road diesel powered equipment used on the project site do not exceed 40% opacity for more than three minutes in any one hour.
  - Any equipment found to exceed 40% opacity (or Ringelmann 2.0) shall be repaired immediately. Non-compliant equipment will be documented and a summary provided to the lead agency monthly.
  - A visual survey of all in-operation equipment shall be made at least weekly.
  - A monthly summary of the visual survey results shall be submitted throughout the duration of the project, except that the monthly summary shall not be required for any 30-day period in which no construction activity occurs. The monthly summary shall include the quantity and type of vehicles surveyed as well as the dates of each survey.

4. The District and/or other officials may conduct periodic site inspections to determine compliance. Nothing in this mitigation shall supersede other District, state or federal rules or regulations.<sup>145</sup>

These measures are more stringent and prescriptive than those measures identified in the MND.<sup>146</sup> When combined together, the measures that SWAPE recommends offer a cost-effective, feasible way to incorporate lower-emitting equipment into the Project's construction fleet, which subsequently reduces PM and DPM emissions released during Project construction.<sup>147</sup> The City must prepare an EIR to require additional mitigation measures.

**D. Substantial Evidence Supports a Fair Argument that the Project May Result in Potentially Significant, Unmitigated Impacts on GHGs**

The MND's GHG analysis is utterly deficient. A mere paragraph is committed to determining impacts:

The Proposed Project is in compliance with the City's CAP as it is enforced through the City's General Plan and development code. The Proposed Project meets the development standards set forth in Article V of the municipal code and is consistent with the General Plans land use designation (City of Concord, 2016). Additionally, the Proposed Project would not conflict with any applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of GHGs. In accordance with the results of the screening criteria, the Proposed Project would not result in a cumulatively considerable net increase of GHGs. **Less Than Significant.**<sup>148</sup>

The analysis above fails to meet the requirements of CEQA.

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<sup>145</sup> **Exhibit A:** SWAPE Comments, pp. 10-15.

<sup>146</sup> *Id.*, p. 15.

<sup>147</sup> *Id.*

<sup>148</sup> MND, p. 3-34.

1. *The MND Fails to Demonstrate Consistency with the City's Climate Action Plan*

In order to rely on the CAP, 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>149</sup> The analysis must account for all of the GHG emissions generated by the Project.<sup>150</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>151</sup> The CAP itself demands that “any project relying on the CAP for CEQA purposes must demonstrate consistency with the CAP.”<sup>152</sup>

Although the CAP contains an entire section committed to building performance strategies,<sup>153</sup> the MND provides no discussion of integrating these strategies into the Project. The MND presents “the most basic elements” of the CAP, including “incorporate[ation] of advanced energy conservation and efficiency measures in the design of new buildings,”<sup>154</sup> but in no way details nor demonstrates how the Project incorporates such measures.

The MND’s mere statement of compliance (“the Proposed Project is in compliance with the City’s CAP as it is enforced through the City’s General Plan and development code”) is insufficient to satisfy the above CEQA and CAP requirements.

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<sup>149</sup> CCR§15064(h)(3); *see also* CCR §15183.5(b)(2).

<sup>150</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>151</sup> 14 CCR §15183.5 (b)(2).

<sup>152</sup> City of Concord Climate Action Plan, Adopted, July 23, 2013, p.3, available at <http://www.cityofconcord.org/pdf/dept/planning/climate.pdf>

<sup>153</sup> *Id.*, pp. 21-44.

<sup>154</sup> MND, p. 3-33.

a. The Project fails to satisfy CAP objectives for transportation and land use strategies

The CAP calls for implementation of “General Plan policies calling for transit-oriented development around the BART stations through Specific Plans and other tools that specify design standards supportive of pedestrian and bicycle access to the stations.”<sup>155</sup>

The General Plan clearly seeks to reduce GHG emissions.<sup>156</sup> The Specific Plan’s pedestrian friendly guidelines and policies that relate to encouraging development in the downtown core and near the BART (which includes the Project site) are clearly intended to carry out the General Plan goal of reducing GHG emissions.<sup>157</sup> As described in Section II through III of these comments, the Project violates several guidelines, goals, and policies of the General Plan and Downtown Specific Plan. Through violating Specific Plan guidelines and policies aimed at enhancing the pedestrian environment, the Project thwarts the General Plan and Specific Plan objectives to reduce GHG emissions. The Project violates the Specific Plan guidelines and policies because it 1) places a parking garage driveway on a major pedestrian street, 2) fails to screen garage entrances with landscaping techniques or opportunities for public art, and 3) fails to maintain the scale of adjacent buildings. These pedestrian-friendly guidelines and policies, which represent means of implementing the CAP, are all violated by the Project.

In failing to assess the Project’s compliance with the CAP beyond a conclusory statement of consistency, the MND overlooks the above violations.

2. *The Project’s Quantified GHG Emissions Demonstrate a Significant Impact*

Even if the Project were consistent with the CAP—which it is not—the MND’s conclusion that the Project GHG impacts are less than significant remains unsupported. The California Code of Regulations 15064.4(b)(3) states that: “If there

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<sup>155</sup> *Id.*, p. 68.

<sup>156</sup> General Plan Policy T-1.1.2; *see also* General Plan, p. 5-1.

<sup>157</sup> *See* Specific Plan, p. 97.

is substantial evidence that the possible effects of a particular project are still cumulatively considerable *notwithstanding compliance with the adopted regulations or requirements*, an EIR must be prepared for the project [emphasis added].”

SWAPE explains that without first quantifying the proposed Project’s GHG emissions, there is no way of knowing whether the Project will exceed significance thresholds and the extent to which thresholds are exceeded.<sup>158</sup> Thus, it was inappropriate for the City to rely on the CAP to mitigate potential impacts before even establishing the extent of those impacts.<sup>159</sup>

SWAPE conducted a screening-level analysis based on GHG emission estimates provided in the MND and BAAQMD’s Air Quality June 2010 Guidelines.<sup>160</sup> In June 2010, the Air District’s Board of Directors set forth new CEQA thresholds of significance and updated their CEQA Guidelines. Although a court order compelled BAAQMD to no longer recommend the 2010 numeric thresholds as significance thresholds until the district has conducted a full CEQA analysis of the thresholds, the 2010 numeric thresholds are the most recent numeric thresholds set forth by BAAQMD. BAAQMD continues to recommend quantification of GHG emissions, which the City has failed to do in regards to the Project.<sup>161</sup>

SWAPE quantified the Project’s construction and operational GHG emissions and compared the emissions to the BAAQMD recommended thresholds of 1,100 metric tons per year of carbon dioxide equivalents (“MT CO<sub>2</sub>e/year”).<sup>162</sup> SWAPE found that the Project could have a potentially significant impact on climate change:

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<sup>158</sup> **Exhibit A:** SWAPE Comments, p. 16.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*, pp. 17-18.

<sup>161</sup> Quality Guidelines, BAAQMD, May 2012, p. 4-4, *available at* [http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/baaqmd-ceqa-guidelines\\_final\\_may-2012.pdf?la=en](http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/baaqmd-ceqa-guidelines_final_may-2012.pdf?la=en)

<sup>162</sup> **Exhibit A:** SWAPE Comments, p. 17.

Estimated Annual Greenhouse Gas Emissions	
Emission Source	Proposed Project (MT CO <sub>2</sub> E)
Construction (Amortized)	14.69
On-Road Mobile Area	1,465
Electricity	2.86
Natural Gas	303.71
Water and Wastewater	141.24
Solid Waste	53.74
<b>Total</b>	<b>53.21</b>
BAAQMD Significance Threshold	2,034
<i>Exceed?</i>	1,100
	<i>Yes</i>

When correct input parameters are used, the Project's total GHG emissions clearly exceed the BAAQMD threshold of 1,100 MT CO<sub>2</sub>e/year, thus resulting in a significant impact not previously assessed or identified in the MND.<sup>163</sup> As a result, an EIR should be prepared that includes an updated CalEEMod model with a more accurate assessment of the Project's total GHG emissions, and additional mitigation should be identified to reduce the Project's air quality and GHG impacts to a less-than-significant level. In sum, substantial evidence exists to support a fair argument that the Project may have significant, unmitigated impacts on GHG emissions.<sup>164</sup>

### 3. *Additional Mitigation Measures*

SWAPE identified several mitigation measures for GHGs that the MND failed to incorporate. These measures would reduce the Project's operational GHG emissions. These mitigation measures would also reduce the Project's operational DPM emissions, which SWAPE found to be significant as discussed in Section V (C). Thus, the below measures should also be considered when mitigating the Project's operational DPM emissions, as well as GHG emissions. SWAPE's suggested mitigation measures include:

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<sup>163</sup> *Id.*, p. 18.

<sup>164</sup> *Id.*



- Use passive solar design, such as: <sup>165, 166</sup>
  - Orient buildings and incorporate landscaping to maximize passive solar; heating during cool seasons, and minimize solar heat gain during hot seasons; and
  - Enhance natural ventilation by taking advantage of prevailing winds.
- Reduce unnecessary outdoor lighting by utilizing design features such as limiting the hours of operation of outdoor lighting.
- Develop and follow a “green streets guide” that requires:
  - Use of minimal amounts of concrete and asphalt;
  - Installation of permeable pavement to allow for storm water infiltration; and
  - Use of groundcovers rather than pavement to reduce heat reflection.<sup>167</sup>
- Implement Project design features such as:
  - Shade HVAC equipment from direct sunlight;
  - Install high-albedo white thermoplastic polyolefin roof membrane;
  - Install high-efficiency HVAC with hot-gas reheat;
  - Install formaldehyde-free insulation; and
  - Use recycled-content gypsum board.
- Provide education on energy efficiency to residents, customers, and/or tenants. Provide information on energy management services for large energy users.
- Meet “reach” goals for building energy efficiency and renewable energy use.
- Install solar, wind, and geothermal power systems and solar hot water heaters.
- Maximize use of solar energy including solar panels; installing the maximum possible number of solar energy arrays on all building roofs and/or on the Project site to generate solar energy for the facility.

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<sup>165</sup> Santa Barbara Air Pollution Control District, Scope and Content of Air Quality Sections in Environmental Documents, September 1997.

<sup>166</sup> Butte County Air Quality Management District, Indirect Source Review Guidelines, March 1997.

<sup>167</sup> See Irvine Sustainable Travelways “Green Street” Guidelines; [www.ci.irvine.ca.us/civica/filebank/blobdload.asp?BlobID=8934](http://www.ci.irvine.ca.us/civica/filebank/blobdload.asp?BlobID=8934); and Cool Houston Plan; [www.harc.edu/Projects/CoolHouston](http://www.harc.edu/Projects/CoolHouston).

- Include energy storage where appropriate to optimize renewable energy generation systems and avoid peak energy use.
- Plant low-VOC emitting shade trees, e.g., in parking lots to reduce evaporative emissions from parked vehicles.
- Use CARB-certified or electric landscaping equipment in project and tenant operations; and introduce electric lawn, and garden equipment exchange program.
- Install an infiltration ditch to provide an opportunity for 100% of the storm water to infiltrate on-site.<sup>168</sup>

When combined, these measures offer a cost-effective, feasible way to incorporate lower-emitting design features into the proposed Project, which subsequently reduces GHG emissions released during Project operation.<sup>169</sup> An EIR must be prepared to include an updated GHG analysis to ensure that the necessary mitigation measures are implemented to reduce operational emissions.<sup>170</sup>

## VI. CONCLUSION

The Project will result in significant impacts to hazards, air quality and public health, water quality, and GHGs. The Project violates the General Plan, the Specific Plan, and the Development Code. For the foregoing reasons, we respectfully request that the City of Concord Planning Commission reject the MND and deny the use permit, minor use permit, and design approval for Concord Village, until the City prepares an EIR, as required by CEQA, and modifies the Project to be consistent with all laws, regulations and policies.

Sincerely,



Ned Thimmayya

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Exhibits

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<sup>168</sup> **Exhibit A:** SWAPE Comments, pp. 18–19.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*