

The following
items were
received after
packets were
distributed.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

801 GATEWAY BOULEVARD SUITE 1000
SOUTH SAN FRANCISCO CA 94080-7037

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

lgulesser.an@adamsbroadwe.com

SACRAMENTO OFFICE

520 CAPITOL MALL SUITE 350
SACRAMENTO CA 95814-4721

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

MILA A BUCKNER
DANIEL L CARDOZO
CHRISTINA M CARD
THOMAS A ENSLOW
TANYA A GULESSERIAN
MARC D JOSEPH
RACHAEL E KOSS
LINDA T SOBczynski

November 13, 2017

VIA EMAIL and OVERNIGHT DELIVERY

Rosalynn Hughey, Interim Director
Planning, Building and Code Enforcement
City of San Jose
200 E. Santa Clara Street, 3rd Floor
San Jose, CA 95113
Email: rosalynn.hughey@sanjoseca.gov

Dipa Chundur, Environmental Project Manager
Email: dipa.chundur@sanjoseca.gov

Re: **Comments on the Initial Study/Negative Declaration for the Fourth and St. John General Plan Amendment and Rezoning (City File Nos. GP16-013 & C17-032)**

Please accept these comments on behalf of **San Jose Residents for Responsible Development** regarding the City of San Jose's ("City") Initial Study/Negative Declaration ("IS/ND") for the Fourth and St. John General Plan Amendment and Rezoning (File Nos. GP16-013 and C17-032) ("Project") proposed by Brent Lee ("Applicant"). The project site is located at the northeast corner of Fourth Street and St. John Street in San Jose (APNs: 467-20-019, -020, -021, -022, and -040). The Project proposes 1) a General Plan amendment to include the project site into the Downtown Growth Area and to change the General Plan land use designation on the site from Residential Neighborhood and Transit Residential to Downtown and 2) rezoning of the site from General Commercial Zoning District to Downtown Primary Commercial Zoning District (collectively, "Project"). The Project would allow up to 728 dwelling units on the project site or up to 1,189,200 square feet of commercial/office uses.

As explained more fully below, the IS/ND prepared for the Project is significantly flawed and does not comply with the requirements of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.* Moreover, substantial evidence supports a fair argument that the Project may

3963-003nep

result in potentially significant impacts. The City may not approve the Project until the City prepares an environmental impact report ("EIR") that adequately analyzes the Project's potentially significant impacts and incorporates all feasible mitigation measures to minimize the impacts.

I. STATEMENT OF INTEREST

San Jose Residents for Responsible Development 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 Sr., Paul Oller and Mo Salberg; the **International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104**, and their members and their families; and other individuals that live and/or work in the City of San Jose and Santa Clara County.

Individual members of San Jose Residents and the affiliated labor organizations 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. San Jose Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

II. SUMMARY OF COMMENTS

Based on our review of the IS/ND and its supporting documents, we conclude that the IS/ND does not comply with the basic requirements of CEQA. The IS/ND fails to meet the informational and public participation requirements of CEQA, because it improperly segments environmental review, fails to analyze potentially significant impacts compared to the existing baseline, fails to evaluate the proposed Project and lacks evidence to support the City's environmental conclusions. Moreover, substantial evidence exists that the Project may result in significant impacts and the negative declaration proposes no mitigation measures. These

impacts include but are not limited to aesthetics, historical resources, contamination, water quality, public health, air quality, greenhouse gas emissions, land uses, public services and traffic impacts. Because there is substantial evidence supporting a fair argument that the Project may have one or more significant effects on the environment, the City cannot approve the IS/ND and must instead prepare an EIR. All of these issues are discussed more fully below.

We reviewed the IS/ND for the Project with the assistance of traffic engineer Daniel Smith, P.E of Smith Engineering & Management, as well as air quality consultant Hadley Nolan and hazardous materials and hydrology expert Matt Hageman, P.G., C.Hg, of Soil Water Air Protection Enterprise ("SWAPE), each of whom demonstrate that the Project may result in significant, unmitigated impacts that were not analyzed in the IS/ND. Their attached technical comments and their *curricula vitae* (Attachments 1 and 2) are submitted in addition to the comments in this letter. Accordingly, they must be addressed and responded to separately.

III. THE IS/ND IMPROPERLY SEGMENTS ENVIRONMENTAL REVIEW

California courts have also repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."¹ CEQA requires that a project be described with enough particularity that its impacts can be assessed.² As articulated by the court in *County of Inyo v. City of Los Angeles*, "a curtailed, enigmatic or unstable project description draws a red herring across the path of public input."³ Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.⁴

A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. CEQA prohibits such a "piecemeal" approach and requires review of a Project's impacts as a whole.⁵

¹ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 CalApp.3d 185, 193.

² *Id.* at 192.

³ *Id.* at 197-198.

⁴ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376.

⁵ 14 Cal. Code Reg. § 15378, subd. (a); *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

“Project” is defined as “the whole of an action,” which has the potential to result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.⁶ CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.”⁷ Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.⁸

Courts have found improper piecemealing where a lead agency conducts separate CEQA reviews for related activities proposed by the same applicant in the same vicinity. In *Plan for Arcadia v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 718, 721, a developer submitted two applications for developments on a 400-acre property, first a 72-acre shopping center and then a parking lot to serve a racetrack on the property. A site plan showed that the owner had plans to redevelop the entire property.⁹ Although both projects were exempt from CEQA because they predated CEQA’s effective date, it was “clear” to the court that they were “related to each other and that in assessing their environmental impact they should be regarded as a single project under [CEQA].”¹⁰

In *Tuolumne*, the court articulated “general principles” for determining whether two actions are one CEQA project, including “how closely related the acts are to the overall objective of the project,” and how closely related they are in *time, physical location, and the entity undertaking the action*.¹¹ The court rejected arguments that a shopping center and nearby road alignment were “separate and independent” projects, and held that (1) separate approvals do not sever the connections between two activities; (2) the broad definition of a CEQA “project” extends beyond situations where a future activity is “necessitated by” an earlier one

⁶ 14 Cal. Code Reg., § 15378.

⁷ *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego*, (1989) 213 Cal.App.3d 1438, 1452.

⁸ *Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 396-97, 253 Cal.Rptr. 426 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school’s occupancy of a new medical research facility).

⁹ *Id.* at 719.

¹⁰ *Id.* at 723, 726.

¹¹ *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonoma* (2007) 155 Cal.App.4th 1214, 1226-1227 (“*Tuolumne*”).

(noting that when actions “actually will be taken,” the appropriate inquiry is whether they are related to one another, i.e. they comprise the “whole of an action” or “coordinated endeavor”); and (3) the applicable standard is not always whether two actions “could be implemented independently of each other.”¹²

Here, the City improperly segmented the Project in two ways. First, the Project was already included in a separate Notice of Preparation of an EIR circulated to the public for the City’s Downtown Strategy 2040 Project.¹³ The project described in the NOP included:

Amending the General Plan’s Land Use/Transportation Diagram to reflect a slight modification to the boundaries of Downtown along North 4th Street between East St. John and East Julian Streets (Figure 3);...

Other General Plan amendments as necessary to update Strategy 2000, such as extending the horizon year and changing the General Plan Land Use/Transportation Diagram to reflect modifications to the boundaries of Downtown.¹⁴

According to the March 2017 Revised NOP, any future development will result in significant impacts, requiring an EIR:

As of August 2016, approved and/or constructed residential development in Downtown is now approaching residential capacities identified in Phase 1 (7,500 residential units)... However, the required Phase 1 traffic mitigation from the Strategy 2000 EIR...has not been completed and is not programmed within the City’s five-year Traffic Capital Improvement Program (CIP).

¹² *Id.* at 1228-1230 (citing 14 Cal. Code Reg. § 15378(c) and analyzing *Sierra Club v. W. Side Irr. Dist.* (2005) 128 Cal.App.4th 690, 698-700).

¹³ Notice of Preparation of a Draft Environmental Impact Report for the Downtown Strategy 2040 Project (File No. PP15-102), p. 5 and Figure 3, October 6, 2015 and Notice of Preparation of a Draft Environmental Impact Report for the Downtown Strategy 2000 Update (Downtown Strategy 2040), Revised March 2017 at <https://www.sanjoseca.gov/DocumentCenter/View/66970> (“Revised NOP”).

¹⁴ Revised NOP, p. 7.

November 13, 2017

Page 6

Without implementation of the traffic mitigation, development beyond Phase 1 cannot proceed under the current Strategy 2000 EIR (with Addenda) and future projects would need to prepare individual EIRs or other CEQA documents to receive approvals, potentially delaying development that would benefit the fiscal health of the City.¹⁵

Despite this, the Applicant requested to proceed with the Project separately, and the City prepared an IS/ND that concludes the Project would have no impacts. Clearly, the City's own documents show that the Project may result in potentially significant traffic impacts requiring preparation of an EIR. Also, the Project is part of a much larger plan to update the Downtown Strategy. The City's preparation of an IS/ND and segmentation of the Project from the Downtown Strategy violate CEQA.

Second, up until the same day that the City released the IS/ND, the Applicant had an application for a Site Development Permit ("SDP") and Vesting Tentative Map ("VTM") pending for the exact same Project site.¹⁶ The high-density residential development contemplated in the SDP and VTM could not be approved without the Project, namely 1) the General Plan amendment to include the project site into the Downtown Growth Area and to change the General Plan land use designation on the site from Residential Neighborhood and Transit Residential to Downtown and 2) rezoning of the site from General Commercial Zoning District to Downtown Primary Commercial Zoning District.

However, as of September 15, 2017, the City requested revisions to the Phase 1 report, the Traffic Report, the Air Quality Assessment and the Noise and Vibration Report.¹⁷ The City also requested analysis of shade and shadow and contamination and indicated review of the historic report was underway.¹⁸ Shortly thereafter, on October 13th, the Applicant requested to set aside the SDP and rezoning and proceed with the General Plan changes in order to get the General

¹⁵ Revised NOP, p. 4.

¹⁶ Attachment 3: Universal Planning Application submitted by Brent Lee, July 27, 2017; Attachment 11: Site Development Permit Plans, October 13, 2017; Attachment 6: Letter from Erik Schoennauer to Stefanie Farmer withdrawing applications for site development permit and tentative map, October 24, 2017.

¹⁷ Attachment 4: Email from Richard Smeaton to Erik Schoennauer, September 15, 2017.

¹⁸ *Id.*

November 13, 2017

Page 7

Plan amendment done this year.¹⁹ City staff made their best effort to accommodate the Applicant by agreeing to the Applicant's request. A day later, on October 14th, City staff stated that the initial study had to be revised "with all references to the specific project on the subject site stripped from the document."²⁰ The revision of the initial study needed to be done within three days in order to release it to the public seven days later. The City also explained that the Applicant needed to withdraw its other applications. In its rush to meet the Applicant's request to process the General Plan amendment this year, the City then released the IS/ND for public review and the Applicant withdrew its SDP and VTM applications, both on October 24, 2017.²¹

The labored process of reviewing late-submitted reports from the Applicant and preparing a factually and legally inadequate environmental review document for the Project and potential future development at the Project site resulted in a less-than-half-baked IS/ND that illegally segments the Project and, as discussed below, is riddled with legal and factual errors. Fortunately, State law requires more.

The City's segmentation of the Project from the Downtown Strategy and segmentation of the Project from the development applications violates CEQA. Also, the City's own records show that the Project, with or without the SDP and VTM, may result in potentially significant impacts. The City must withdraw the IS/ND and prepare an EIR.

IV. THE IS/ND VIOLATES CEQA BY FAILING TO ANALYZE THE PROJECT'S IMPACTS AS COMPARED TO THE EXISTING SETTING

CEQA requires a lead agency to assess a project's impacts on the environment.²² Any significant impacts must be mitigated or avoided to the extent feasible.²³

¹⁹ Attachment 5: Email from Erik Schoennauer to Ned Thomas, Re: H17-042 (4th and St John) Timeline and Resubmittals, October 13, 2017.

²⁰ Attachment 5: Email from Ned Thomas to Erik Schoennauer, October 14, 2017 (emphasis in original).

²¹ IS/ND, October 24, 2017 <https://www.sanjoseca.gov/index.aspx?NID=5720>; Attachment 6: Letter from Erik Schoennauer to Stefanie Farmer withdrawing applications for site development permit and tentative map, October 24, 2017.

²² Pub. Res. Code § 21002.1(a), 21061; 14 Cal. Code Reg. § 15125, subd. (d).

9961-003ncp

To determine whether a project will have a significant impact, the lead agency must first identify the relevant “environment,” and then determine whether the project will cause a “significant effect on the environment.”²⁴ CEQA defines these terms as follows:

“Environment means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.”²⁵

“Significant effect on the environment means a substantial, or potentially substantial, *adverse change* in the environment.”²⁶

Additional guidance is provided in section 15125 of the CEQA Guidelines, which provides that an environmental review document must describe the environment in the project’s vicinity “as it exists before the commencement of the project”

The courts have repeatedly held that a project’s impacts must be measured against the existing physical conditions in the area, not the conditions that could occur under the current legal standards. For example, in *Environmental Planning and Information Council v. County of El Dorado* (“EPIC”) (1982) 131 Cal.App.3d 350, 352 [182 Cal.Rptr. 317], the court invalidated an EIR that compared the impacts of a general plan amendment (the proposed project) to the existing general plan. The court held that the County should have considered the effects of the general plan amendment as measured against the level of development that had actually occurred (*i.e.*, the existing physical environment).²⁷ Failure to do so misled the public and agency decisionmakers about the project’s impacts.²⁸

²³ Pub. Res. Code §§ 21002, 21002.1(b), 21081, 21080.5(d)(2)(i).

²⁴ Pub. Res. Code § 21002.1; 14 Cal. Code Reg. §§ 15063, 15064.

²⁵ Pub. Res. Code § 21060.5 (emphases added).

²⁶ Pub. Res. Code § 21068 (emphasis added).

²⁷ *Environmental Planning and Information Council v. County of El Dorado* (“EPIC”) (1982) 131 Cal.App.3d 350, 354 [182 Cal.Rptr. 317].

²⁸ *Id.* at p. 358.

Similarly, in *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186-187, 190-191 [228 Cal.Rptr. 868], the court held that the lead agency should have evaluated the impact of a general plan amendment on the existing physical environment, not the environment as it could have existed under the current general plan. The court reasoned: “As in *EPIC*, an environmental analysis based on a comparison between what was possible under the existing general plan and what was permitted under the amendment was ‘illusory.’”²⁹

Thus, CEQA requires the City to analyze the Project’s impacts by determining whether there would be an adverse impact as measured against the *existing* environment in the area.

The City failed to analyze the Project’s impacts as compared to the existing setting in at least two resource areas, traffic and greenhouse gas emissions.

With respect to traffic, the IS/ND traffic analysis evaluated the Project’s alleged traffic emissions as compared to land uses that *could, but do not, exist* under the current General Plan. The Project site is currently occupied by surface parking areas and two single-family homes. Traffic engineer Dan Smith explains that “the IS/ND’s transportation analysis (and the greenhouse gas analysis) deduct...project trips associated with 49 units of residential and commercial supporting 10 jobs that are presumed to be developed under the existing General Plan and zoning.”³⁰ In other words, the IS/ND’s analysis uses assumptions that deduct phantom dwelling units and employment generated by land uses that could be, but are not, on the property under the current General Plan. Mr. Smith explains that “[s]ince the trip generation for the current parking is attributable to nearby development that will remain and the 2 homes are vacant, there could be no deduction in the analysis of the project for existing uses (or perhaps arguably,

²⁹ *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186-187, 190-191 [228 Cal.Rptr. 868]; see also *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246 [227 Cal.Rptr. 899] (agency must compare rezoning to “existing physical environment” to provide a realistic assessment of impacts); *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1468-1469 [38 Cal.Rptr.2d 93] (focus is on extent to which project may cause adverse change to preexisting physical conditions).

³⁰ Attachment 1: Letter from Dan Smith, Smith Engineering & Management, to Tanya Gulesserian, Subject: Fourth and St. John General Plan Amendment and Rezoning (City File NOS: GP16-013 and C17-032), November 11, 2017, p. 3.

deduction for the 2 single family homes could be allowed).”³¹ Because of this legal error, the IS/ND concludes that the Project’s traffic would not exceed the City’s threshold of more than 250 peak hour trips, which would trigger a project-specific traffic analysis.

Similarly, with respect to GHG emissions, the IS/ND evaluated the Project’s alleged GHG emissions as compared to land uses that could, but do not, exist under the current General Plan. According to the IS/ND’s GHG Memo:

To assess the GHG emissions, the City modeled “a build-out scenario that was based on the development assumptions used for the long-range GPA cumulative traffic analysis, which assumed an average development density on the project site of 337 units and commercial square footage to support 22 new jobs, after accounting for the dwelling units and employment generated by the existing General Plan land use designations on the site.”³²

In other words, the IS/ND’s analysis uses assumptions that deduct phantom dwelling units and employment generated by land uses that could be, but are not, on the property under the current General Plan. Because of this legal error, the IS/ND concludes that the Project’s GHG impacts would not exceed the Bay Area Air Quality Management District’s (“BAAQMD”) significance thresholds.

The City failed to evaluate the proposed Project’s traffic and GHG emissions as compared to the existing setting, rendering the analysis “illusory.”³³ This misled the public and agency decisionmakers about the project’s impacts.³⁴ The City is required to revise its analyses and disclose the Project’s potentially significant impacts in an EIR.

V. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.³⁵ “Its purpose is to inform the public

³¹ *Id.*

³² IS/ND, Appendix B.

³³ *Christward Ministry v. Superior Court*, *supra*, 184 Cal.App.3d at 190-191.

³⁴ *EPIC*, *supra*, 131 Cal.App.3d at 354.

³⁵ See CEQA § 21000; 14 Cal. Code Reg. § 15002.

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.”³⁶ 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.”³⁷

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.³⁸ 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 “shall” 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.³⁹

In contrast, a mitigated negative declaration (“MND”) 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*.⁴⁰

It is only when there is not even a fair argument of a significant effect on the environment that a negative declaration (“ND”) can be prepared.⁴¹ Because “[t]he

³⁶ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

³⁷ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

³⁸ See Pub. Res. Code § 21100.

³⁹ Pub. Res. Code §§21080(d), 21082.2(d); 14 Cal. Code Reg. §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

⁴⁰ Pub. Res. Code § 21064.5 (emphasis added).

⁴¹ Pub. Res. Code § 21064.

adoption of a negative declaration . . . has a terminal effect on the environmental review process” by allowing the agency to dispense with the duty to prepare an EIR, negative declarations are allowed only in cases where there is not even a “fair argument” that the project will have a significant environmental effect.⁴² The phrase “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”⁴³

Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”⁴⁴ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.⁴⁵ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁴⁶

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”⁴⁷ Substantial evidence can be provided by technical experts or members of the public.⁴⁸

⁴² *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Resources Code, §§ 21100, 21064.

⁴³ Pub. Resources Code, § 21068.

⁴⁴ E.g. *Communities For a Better Env't. v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320

⁴⁵ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 75-1.

⁴⁶ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *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 EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

⁴⁷ 14 Cal. Code Reg. § 15384(a).

⁴⁸ E.g. *Citizens for Responsible and Open Gov't. 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); see also *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1117-1118 (substantial evidence regarding impacts to historic resource included fact-based testimony of qualified speakers at the public hearing); *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064(f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: 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.

Furthermore, it is improper to defer the formulation of mitigation measures under CEQA. Courts have imposed several parameters for the adequacy of mitigation measures. First, the lead agency may not defer the formulation of mitigation measures until a future time unless there are specific performance standards capable of mitigating the project's impacts to a less than significant level. Deferral is impermissible where an agency simply requires a project applicant to obtain a report and then comply with any recommendations that may be made in the report.⁴⁹ Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility. Third, "[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments."⁵⁰ Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.

With respect to this Project, the IS/ND fails to satisfy the basic purposes of CEQA. The IS/ND failed to adequately disclose, investigate, and analyze the Project's potentially significant impacts, and requires no mitigation to reduce potential impacts to less than significant levels. Because the IS/ND lacks basic information regarding the Project's potentially significant impacts, the IS/ND's conclusion that the Project will have no significant impact on the environment is unsupported.⁵¹ The City failed to gather the relevant data to support its findings and repeatedly, and impermissibly, deferred analysis and formulation of mitigation measures to future reports. Finally, the City's own evidence and that of experts

⁴⁹ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604, fn. 5.

⁵⁰ 14 Cal. Code Reg. § 15126.4(a)(2).

⁵¹ Pub. Res. Code § 21064.5.

provide substantial evidence showing that the Project may result in potentially significant impacts. Therefore, a fair argument can be made that the Project may cause significant impacts requiring the City to prepare an EIR.

A. The IS/ND Failed to Consider and Analyze Potentially Significant Impacts from the General Plan Amendment

Although the General Plan amendment would allow for the future development of up to 728 dwelling units or up to 1,189,200 square feet of commercial/office uses, on a less-than-one acre site adjacent to single-family homes, the IS/ND provides *no analysis whatsoever* of these proposed allowable land uses. Rather, the IS/ND states that:

No specific development is proposed at this time. Future development proposed on the site would be required to comply with the allowed land uses and goals of the General Plan Designation and Zoning District, and would require the issuance of appropriate development permits.⁵²

Courts have rejected this position as improper deferral of the environmental analysis that is required upon the adoption or amendment of a general planning document.⁵³

It is well established that an agency must analyze the future development contemplated in a plan amendment.⁵⁴ CEQA requires analysis of the environmental effects of a project at the earliest possible stage in the planning process.⁵⁵ When a Court reviews whether there was an omission of required information from an environmental review document, it reviews whether (1) the document did not contain information required by law and (2) the omission

⁵² IS/ND, p. 3; *see also*, e.g. IS/ND, p. 15.

⁵³ *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 409 (citing *Christward Ministry v. Superior Ct.*, *supra*, 184 Cal.App.3d at 194).

⁵⁴ *City of Redlands v. San Bernardino County* (2002) 96 Cal.App.4th 398, 409; *Christian Ministry v. Superior Court* (1986) 184 Cal.App. 3d 180, 194; *Río Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370-371.

⁵⁵ *City of Redlands v. San Bernardino County*, 96 Cal.App.4th at 410.

precluded informed decisionmaking.⁵⁶ Failure to include the required information is a failure to comply with CEQA.

Here, by deferring analysis of future development contemplated by the Project, the City failed to comply with CEQA. Currently, the General Plan only allows up to 8 dwelling units per acre (“DU/AC”) at a height of 2.5 stories and a floor-to-area ratio (“FAR”) of 0.7 for the portion of the 0.91 acre site that is designated Residential Neighborhood. The General Plan allows 50 to 250 DU/AC up to 25 stories in height and a FAR between 2.0 and 12.0 for the smaller portion of the site designated Transit Residential. The IS/ND fails to describe the respective acreages of the two different existing designations. In contrast, the proposed General Plan amendment would allow up to 800 DU/AC up to 30 stories in height and a FAR of 30.0 on the entire 0.91 acre site.

Despite this significant change in allowable land uses, the City failed to analyze the potential environmental impacts that may occur from allowing the development of up to 728 dwelling units and over one million square feet of commercial on the 0.91 acre site located adjacent to single-family homes and a residential neighborhood. Instead, the IS/ND states that the project is a General Plan amendment and rezoning and future development on the site would be subject to the General Plan Policies and City’s development guidelines.⁵⁷ The City did not share the agency’s expertise, disclose the agency’s analysis, and allow the public to check for accuracy and detect omissions, as required by CEQA.⁵⁸

The City’s failure to analyze future development contemplated by the Project in the IS/ND violates CEQA as a matter of law.

⁵⁶ *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 76-77; *Clover Valley Found. v. City of Rocklin* (2011) 197 Cal.App.4th 200, 211 (courts “scrupulously enforc[e] all legislatively mandated CEQA requirements”).

⁵⁷ See, e.g., IS/ND, p. 15.

⁵⁸ 14 Cal. Code Reg. § 15200.

B. Substantial evidence supports a fair argument that the Project may result in potentially significant impacts on aesthetics.

Under CEQA, an aesthetic impact is considered significant if a project would substantially degrade the existing visual character or quality of the site and its surroundings.⁵⁹

The IS/ND concludes that aesthetic impacts would be less than significant.⁶⁰ The IS/ND states:

The project is limited to a General Plan Amendment and rezoning, which would not alter the existing visual character or quality of the site and its surroundings. Future development of the project site would alter the existing visual character of the property and its surroundings by introducing more dense urban development than what currently exists on the property. The project site is surrounded by residential and commercial uses including one to two-story buildings. Future development on the site will be subject to the Downtown Design Guidelines, Zoning Ordinance, General Plan policies, Municipal Code standards, and other relevant regulations to assure high quality design. Thus, future development would not substantially degrade the existing visual character or quality of the site and its surroundings.⁶¹

The IS/ND concludes that implementation of the General Plan Policies and City's development guidelines would ensure that future development on the site would have a less-than-significant impact on aesthetics.⁶² However, the City's finding is contradicted by the evidence.

Substantial evidence shows that the Project may result in significant impacts on aesthetics, including on neighboring residential properties. The Project site is currently occupied by surface parking areas and two single-family homes.

⁵⁹ CEQA Guidelines, Appendix G.

⁶⁰ IS/ND, p. 15.

⁶¹ IS/ND, p. 15.

⁶² IS/ND, p. 15.

Surrounding land uses include residential to the north, residential to the south, residential to the east and residential/commercial to the west.⁶³

The General Plan amendment would extend the Downtown Growth Area to the Project site and allow buildings up to 30 stories in height, which is 30 stories taller than the existing setting. The 30 story height limit would be adjacent to parcels with a 2.5 story height limit. The General Plan amendment would allow 800 DU/AC in a high-rise building adjacent to single-family homes at a density of 8 DU/AC. For commercial uses, the General Plan amendment would allow a FAR of 30.0 adjacent to parcels with a FAR of 0.7.

City staff stated “any massing of such a large building at this location is going to have impacts on the neighbors.”⁶⁴ Also, contrary to the IS/ND conclusion that City policies and guidelines would ensure that future development on the site would have a less-than-significant impact on aesthetics, City staff explained that “the City has not provided specific design guidelines for a ‘transition zone,’ so we may get stuck with a tall building on the edge [of the Downtown Growth Area].”⁶⁵ Therefore, the City *lacks* the necessary regulations, policies and guidelines to enable a more compatible transition at the edge of the Downtown Growth Area adjacent to residences.

Substantial evidence shows that the Project may result in a potentially significant aesthetic impact on the surrounding residences.

C. Substantial evidence supports a fair argument that the Project may result in potentially significant impacts on historic resources.

Under CEQA, a historic resources impact is considered significant if a project would cause a substantial adverse change in the significance of a historical or archaeological resource as defined in CEQA Guidelines section 15064.5.⁶⁶ Historical resources include a resource listed in, or determined to be eligible by the State Historical Resources Commission, for listing in the California Register of Historical

⁶³ IS/ND, p. 1.

⁶⁴ Attachment 7: Email from Ned Thomas to Rick Smeaton, RE: 4th & St. John Project, October 4, 2017.

⁶⁵ *Id.*

⁶⁶ CEQA Guidelines, Appendix G.
3963-003nep

Resources.⁶⁷ A resource included in a local register or identified as significant in an historical resource survey “shall be presumed to be historically or culturally significant.”⁶⁸ Historical resources also includes “any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California...”⁶⁹ “Generally, a resource shall be considered by the lead agency to be “historically significant” if the resource meets the criteria for listing on the California Register of Historical Resources...”⁷⁰

The IS/ND concludes that implementation of General Plan policies and regulations would ensure that future development would have a less-than-significant impact on cultural or tribal resources.⁷¹ Substantial evidence shows the opposite is true.

As early as December 2016, the City identified that the Victorian home on the Project site qualifies as a Structure of Merit.⁷² In October 2017, the City stated, “[a]fter reviewing and discussing the report with the consultant I agree with their conclusion that the 2 residences are Eligible for the California Register and that proposed demolition would be a potentially significant impact that will require an EIR.”⁷³ The City stated that a “previous report will corroborate and strengthen the findings of significant impacts to the historic homes in the current report.”⁷⁴ According to the City, “[t]here will also be some additional analysis of 6 surrounding historic structures within 150-200 ft. to see if they will need to be monitored for potential cracks during pile driving/construction.”⁷⁵ Thus, the City stated, “[a] Focused EIR is the appropriate CEQA document for the proposed project....The EIR

⁶⁷ 14 Cal. Code Reg. §15064.5(a)(1).

⁶⁸ 14 Cal. Code Reg. §15064.5(a)(2).

⁶⁹ 14 Cal. Code Reg. §15064.5(a)(3).

⁷⁰ *Id.*

⁷¹ IS/ND, p. 31.

⁷² Attachment 8: Email from Shaunn Mendrin to Kimberly Vacca, Subject: Policy Mtg, December 13, 2016,

⁷³ Attachment 9: Email from Susan Walsh to Ned Thomas, Subject: FYI: Update on review of report we received this morning and discussed at our 1pm meeting, October 10, 2017.

⁷⁴ Attachment 10: Email from Ned Thomas to Susan Walsh, October 18, 2017.

⁷⁵ *Id.*

may be used to address restoration of the Victorian houses, which was required as a condition of approval for a previous Special Use Permit at this site.”⁷⁶

Based on the City’s own records, substantial evidence supports a fair argument that the Project may have a significant impact on historic resources, requiring the City to prepare an EIR.

D. Substantial evidence supports a fair argument that the Project may result in potentially significant impacts from hazards on the Project site.

CEQA requires an analysis of whether the Project would create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment.⁷⁷

The IS/ND concludes that implementation of General Plan policies and regulations would ensure that future development on the site would result in less-than-significant impacts related to hazards and hazardous materials. However, substantial evidence supports a fair argument that the Project may result in significant impacts to public health, safety and the environment from known contamination on the Project site.

The IS/ND fails to acknowledge the City’s own evidence that the Project may result in potentially significant impacts due to hazards. The IS/ND admits that “[f]uture development of the site could disturb soils and could expose construction workers and future site occupants to hazardous materials *if present*.”⁷⁸ However, the IS/ND fails to disclose that those hazardous materials *are present*. According to the Phase I Environmental Assessment, the County of Santa Clara Department of Environmental Health explained, “the following conditions still remain at the site:

Soil contains 56 parts per million (ppm) Total Petroleum Hydrocarbons as Gasoline (TPHg) and 19 ppm TPH as Diesel (TPHd). Shallow groundwater contains 1,700 parts per billion (ppb) TPHg, 31 ppb

⁷⁶ *Id.*

⁷⁷ CEQA Guidelines App. G.

⁷⁸ IS/ND, p. 44 (emphasis added).

Benzene 2.5 ppb Toluene, 8.3 ppb Ethylbenzene, 2.7 ppb Total Xylenes, and 1.1 ppb 1,2-Dichloroethane.⁷⁹

The County also explained that changes in land use could result in potentially significant impacts:

“Residual contamination in soil and groundwater at the site could pose an unacceptable risk under certain site development activities such as site grading, excavation, or the installation of water wells. The County and the appropriate planning and building department shall be notified prior to any changes in land use...”⁸⁰

The IS/ND fails to analyze potentially significant impacts from these contaminants during grading and dewatering. In addition, the IS/ND fails to adequately analyze and mitigate the risk of worker and public exposure to these contaminants. Finally, the IS/ND does not provide an analysis of the potential for vapor intrusion from the presence of these compounds in soil and groundwater. Thus, for these reasons, the IS/ND fails to comply with CEQA.

Matt Hagemann, a technical expert in hazardous materials, geology and hydrology, explains that the Project may result in potentially significant impacts from the land uses disturbing known contaminated soil and groundwater on the Project site.⁸¹ Because construction workers, the public and the environment will be exposed to known contamination on site while grading, conducting earth moving operations and dewatering, it is especially critical for the City to fully disclose the potential public health and environmental impacts from contamination on the Project site in an EIR.

⁷⁹ IS/ND, Appendix C: Phase I Assessment, p. 17, citing Letter from Nicole Pullman, Department of Environmental Health, County of Santa Clara to Robert Langlais, Subject: Fuel Leak Case Closure Cornerstone Property, 100 N. Fourth Street, San Jose; Case No. 14-753, SCVWDID No. 07S1E08F05f, March 3, 2006.

⁸⁰ *Id.*, pp. C-11 – C.12 (Letter from Nicole Pullman, Department of Environmental Health, County of Santa Clara to Robert Langlais, Subject: Fuel Leak Case Closure Cornerstone Property, 100 N. Fourth Street, San Jose; Case No. 14-753, SCVWDID No. 07S1E08F05f, March 3, 2006.)

⁸¹ Attachment 2: Letter from Matt Hagemann, P.G., C.Hg, and Hadley Nolan to Tanya Gulesserian, Subject: Comments on the Fourth and St. John General Plan Amendment & Rezoning Project. November 13, 2017

1. Dewatering Impacts

Substantial evidence shows that the Project may result in potentially significant impacts from dewatering contaminated water. According to the IS/ND, local groundwater is located about 14 feet below ground surface. Shallow groundwater on the Project site contains 1,700 ppb TPHg, 31 ppb Benzene 2.5 ppb Toluene, 8.3 ppb Ethylbenzene, 2.7 ppb Total Xylenes, and 1.1 ppb 1,2-Dichloroethane.⁸² The County explained that “[r]esidual contamination in soil and groundwater at the site could pose an unacceptable risk under certain site development activities such as site grading, excavation, or the installation of water wells.”⁸³ According to Mr. Hagemann, the groundwater contamination exceeds effluent limitations and may result in significant impacts during dewatering:

Effluent limitations for benzene in extracted groundwater prior to discharge in a “drinking water area” is 1 ppb and 5 ppb for “discharge to other surface water areas.”⁸⁴ These effluent limitations are well below known levels of groundwater contamination in 2006 when benzene was documented in shallow groundwater at 31 ppb (Phase IESA, p. 17).⁸⁵

The City has consistently acknowledged in its environmental review documents that dewatering of utility trenches and/or basement excavation below a depth of seven feet is often required, in addition to subgrade stabilization and waterproofing beneath some slabs. In addition, a site development permit pending on the Project site up until the day the City released the IS/ND for review shows that underground parking is allowed and contemplated on the Project site.⁸⁶

⁸² IS/ND, Appendix C: Phase I Assessment, p. 17, citing Letter from Nicole Pullman, Department of Environmental Health, County of Santa Clara to Robert Langlais, Subject: Fuel Leak Case Closure Cornerstone Property, 100 N. Fourth Street, San Jose; Case No. 14-753, SCVWDID No. 07S1E08F05f, March 3, 2006.

⁸³ Letter from Nicole Pullman, Department of Environmental Health, County of Santa Clara to Robert Langlais, Subject: Fuel Leak Case Closure Cornerstone Property, 100 N. Fourth Street, San Jose; Case No. 14-753, SCVWDID No. 07S1E08F05f, March 3, 2006.

⁸⁴ https://www.waterboards.ca.gov/rwqcb2/board_decisions/adopted_orders/2012/R2-2012-0012.pdf, p. 9.

⁸⁵ Attachment 2: Letter from Matt Hagemann, P.G., C.Hg, and Hadley Nolan to Tanya Gulesserian, Subject: Comments on the Fourth and St. John General Plan Amendment & Rezoning Project, November 13, 2017.

⁸⁶ Attachment 3: Universal Planning Application submitted by Brent Lee, July 27, 2017.
3963-003acp

Pumped groundwater discharges may contain contaminants. The failure to properly handle contaminated groundwater could result in release of contaminants, possibly endangering habitat and human health.

The IS/ND contains no discussion about how the contaminated groundwater beneath the Project site will be handled and contained to prevent release of contaminants to the environment. The IS/ND merely states that the Project would be required to comply with the Grading Ordinance and submit an Erosion Control Plan to the Director of Public Works.⁸⁷ The IS/ND concludes that implementation of General Plan policies and regulations would ensure that future development on the site would result in less-than-significant impacts related to hydrology and water quality.⁸⁸

The IS/ND's reliance on regulations and laws outside of CEQA to mitigate the risks related to disposal of contaminated groundwater is misplaced for two reasons. First, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts. In *Communities for a Better Env't v. California Res. Agency*, the court struck down a CEQA Guideline because it "impermissibly allow[ed] an agency to find a cumulative effect insignificant based on a project's compliance with some generalized plan rather than on the project's actual environmental impacts."⁸⁹ The court concluded that "[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project."⁹⁰ Thus, the ruling supports the notion that compliance with a lead agency still has an obligation to consider substantial evidence and analyze and mitigate potentially significant impacts despite assured compliance with applicable standard outside of the CEQA process.

In *Keep our Mountains Quiet v. County of Santa Clara*, neighbors of a wedding venue sued over the County's failure to prepare an EIR due to significant noise impacts. The court concluded that "a fair argument [exists] that the Project may have a significant environmental noise impact" and reasoned that although the

⁸⁷ IS/ND, pp. 46 and 48.

⁸⁸ IS/ND, p. 49.

⁸⁹ *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 141, 453.

⁹⁰ *Id.*

3963-003acp

noise levels would likely comply with local noise standards, “compliance with the ordinance does not foreclose the possibility of significant noise impacts.”⁹¹ The court ordered the County to prepare an EIR. The ruling demonstrates the possibility that a project may be in compliance with an applicable regulation and still have a significant impact.

In *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355, the court held that conditions requiring compliance with regulations are proper “where the public agency had meaningful information reasonably justifying an expectation of mitigation of environmental effects.” The ruling suggests that an agency that merely provides a bare assertion that the project will be in compliance with applicable regulations, without further explanation or enforceability, may not fulfill the requirements of CEQA.

Here, the City failed to provide any information explaining how compliance with the outside laws and regulations would reduce the potentially significant risks related to disposal of contaminated groundwater, including impacts to worker and public health. The City may not rely solely on compliance with regulations or laws as reducing impacts without a full analysis of impacts and enforceable mitigation.

Second, the City has not adequately incorporated compliance with these laws as enforceable mitigation. In *Lotus v. Department of Transportation*, an EIR approved by CalTrans contained several measures “[t]o help minimize potential stress on the redwood trees” during construction of a highway.⁹² Although those measures were clearly separate mitigation, the project proponents considered them “part of the project,” and the EIR concluded that because of the planned implementation of those measures, no significant impacts were expected.⁹³ However, the Appellate Court found that because the EIR had “compress[ed] the analysis of impacts and mitigation measures into a single issue, the EIR disregard[ed] the requirements of CEQA.”⁹⁴ The Court continued, stating “[a]bsent a determination regarding the significance of the impacts... it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered.”⁹⁵

⁹¹ *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

⁹² *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 650.

⁹³ *Id.*, at 651.

⁹⁴ *Id.*, at 656.

⁹⁵ *Id.*

Similarly, the IS/ND for this Project indicates that the provisions of the outside policies, laws and regulations would reduce the risks related to hazards without actually analyzing the impacts. The statement that the Project will comply with these laws is comparable to the risk avoidance measures at issue in *Lotus*, which lacked the appropriate level of analysis and were not incorporated as enforceable mitigation. CEQA requires the City to describe all components of the Project that may have a significant impact, and adequately analyze and require mitigation for all potentially significant impacts related to hazards.

Dewatering contaminated water may result in a potentially significant impact that must be disclosed and analyzed in an EIR. The IS/ND's general reference to an Erosion Control Plan or other policies improperly defers the analysis to after Project approval and outside of the public process and does not adequately address this issue. Instead, specific measures to properly handle and contain the contaminants must be included in an EIR.

2. Worker and Public Health

Workers involved in excavation of basement and utility trenches for the Project's future development may be exposed to contaminated soil and groundwater. The workers may be exposed through dermal contact and through inhalation.

The public in general is also at risk of exposure due to the proximity of the Project site to residential neighbors. Furthermore, workers could expose the public to contamination when leaving the site wearing contaminated and stained clothing. When coming into contact with on-site workers, family members and others may be exposed to health risks when touching contaminated clothing and inhaling vapors.

According to Mr. Hagemann, the Project site contains hazardous materials in soil and groundwater "that could pose risks to construction workers, future residents and neighboring residents." Mr. Hagemann explains:

Benzene in groundwater at 31 ppb is in excess of the San Francisco Bay Regional Water Quality Board Environmental Screening Level of 1 ppb in shallow groundwater for a vapor intrusion risk under a

residential scenario.⁹⁶ Vapor intrusion was not contemplated in the IS and no mitigation that would address the benzene-contaminated shallow groundwater was included in the IS.

Benzene is a cancer-causing chemical according to the US EPA.⁹⁷ Future residents could be exposed to benzene through the vapor intrusion pathway and construction workers could be exposed to benzene through direct contact with contaminated groundwater if the water table is exposed during construction. Groundwater is located at a depth of about 14 feet below ground surface (IS, p. 46). Development of the Project site would likely involve excavation that could intercept the shallow water table.⁹⁸

The IS/ND provides no mitigation to protect workers or the public from exposure to contaminants. The IS/ND merely concludes that implementation of General Plan policies and regulations would ensure that future development on the site would result in less than significant impacts to related to hazards and hazardous materials.⁹⁹

The IS/ND's reliance on regulations and laws outside of CEQA to mitigate the risks related to worker and public health is misplaced for the same two reasons explained above. First, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts.¹⁰⁰ The City is still obligated to consider substantial evidence and analyze and mitigate potentially significant impacts despite assured compliance with applicable standard outside of the CEQA process. Furthermore, a project may be in compliance with an applicable regulation and still have a significant impact.¹⁰¹ The City's bare assertion that the

⁹⁶https://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/ESL/ESL%20Workbook_EISs_Interim%20Final_22Feb16_Rev3_PDF.pdf, Table GW-3.

⁹⁷ <https://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=38&tid=14>

⁹⁸ Attachment 2: Letter from Matt Hagemann, P.G., C.Hg, and Hadley Nolan to Tanya Gulesserian, Subject: Comments on the Fourth and St. John General Plan Amendment & Rezoning Project, November 13, 2017.

⁹⁹ IS/ND, p. 45.

¹⁰⁰ *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.

¹⁰¹ *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

project will be in compliance with applicable regulations, without further explanation or enforceability, does not fulfill the requirements of CEQA.¹⁰²

The IS/ND proposes to mitigate the risk of worker exposure to contamination by requiring compliance with policies and standards, including preparation of a Site Management Plan for clean-up and handling of the contaminated soil.¹⁰³ The problems with this approach are, first, that the Site Management Plan need only be reviewed and approved by the City Fire Chief and Planning Department, and not by any regulatory agency charged with overseeing the clean-up of hazardous materials, such as the Santa Clara County Department of Environmental Health or the California Department of Toxic Substances Control (“DTSC”). Second, the City Fire Chief and Planning Department do not have the authority or expertise to approve and oversee contamination clean-up plans. Third, a site management plan “has no regulatory standards and would only be implemented upon Project development and thus improperly defers mitigation to address contamination.”¹⁰⁴

Second, the City has not adequately incorporated compliance with these laws as enforceable mitigation. “Absent a determination regarding the significance of the impacts... it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered.”¹⁰⁵ The IS/ND for this Project indicates that the provisions of the outside policies, laws and regulations would reduce the risks related to hazards without actually analyzing the impacts.

Finally, the IS/ND does not consider the potential impacts of contaminated dust from the Project site reaching nearby sensitive receptors during construction and potential site clean-up. Nearby sensitive receptors include residents of adjacent homes and patrons and employees of nearby commercial establishments. Although the Site Management Plan may provide for worker protections, there is no guarantee that any protections will be put in place for nearby receptors.

¹⁰² *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.

¹⁰³ IS/ND, p. 45.

¹⁰⁴ Attachment 2: Letter from Matt Hagemann, P.G., C.Hg, and Hadley Nolan to Tanya Gulesserian, Subject: Comments on the Fourth and St. John General Plan Amendment & Rezoning Project, November 13, 2017.

¹⁰⁵ *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656.

Because the City's own documents show that hazardous materials exist on the Project site that may mobilize and present risks to workers and the public during future development allowed by the Project, an EIR is required. The EIR must include a health risk assessment, with an analysis of mitigation to protect the health of adjacent residents from the disturbance, removal and disposal of site-related contaminants. If necessary, such mitigation should include public notice of hazardous compounds, and the evaluation of a full range of alternatives under a Remedial Action Plan overseen by Santa Clara County and/or DTSC. These measures would help reduce the risk of significant impacts from contaminated dust escaping the Project site during construction and potential soil remediation.

There is substantial evidence to support a fair argument that the Project may result in a range of potentially significant impacts associated with hazardous materials present on the Project site.

E. Substantial evidence supports a fair argument that the Project may result in potentially significant air quality impacts.

The IS/ND air quality analysis defers assessment of the Project's impacts and, thus, fails to comply with CEQA. According to the IS/ND, "[w]hen future development is proposed, a project-specific air quality assessment will be required to confirm conformance with the BAAQMD thresholds in compliance with General Plan Policy 10-1."¹⁰⁶ With respect to construction emissions, the IS/ND states that the Project would implement "best management practices" to minimize air pollutant emissions during construction. The IS/ND concludes that implementation of the General Plan policies and BAAQMD Guidelines would ensure that future development would have a less than significant impact on air quality.¹⁰⁷

The IS/ND's air quality analysis fails to comply with CEQA in a number of ways. First, the IS/ND's deferral of a project-specific air quality assessment is an approach that has been rejected by the courts. It is an improper deferral of the environmental analysis that is required upon the adoption or amendment of a general planning document.¹⁰⁸ It is well established that an agency must analyze

¹⁰⁶ IS/ND, p. 22.

¹⁰⁷ IS/ND, p. 22.

¹⁰⁸ *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 409 (citing *Christward Ministry v. Superior Ct.*, *supra*, 184 Cal.App.3d at 194).

the future development contemplated in a plan amendment.¹⁰⁹ CEQA requires analysis of the environmental effects of a project at the earliest possible stage in the planning process.¹¹⁰

Second, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts.¹¹¹ The City is still obligated to consider substantial evidence and analyze and mitigate potentially significant impacts, despite assured compliance with applicable standard outside of the CEQA process. Furthermore, a project may be in compliance with an applicable regulation and still have a significant impact.¹¹² The City's bare assertion that the project will be in compliance with applicable regulations, without further explanation or enforceability, does not fulfill the requirements of CEQA.¹¹³

Third, the City has not adequately incorporated compliance with these policies, such as "best management practices," as enforceable mitigation. In *Lotus v. Department of Transportation*, the project proponents considered mitigation measures as "part of the project," and the EIR concluded that because of the planned implementation of those measures, no significant impacts were expected.¹¹⁴ The Appellate Court found that because the EIR had "compress[ed] the analysis of impacts and mitigation measures into a single issue, the EIR disregard[ed] the requirements of CEQA."¹¹⁵ Similarly, the IS/ND for this Project indicates that the provisions of the outside laws and regulations would reduce the risks related to air quality without actually analyzing the impact.

Finally, substantial evidence shows that construction and operation of the Project may result in significant impacts, requiring preparation of an EIR. The IS/ND states that "[f]uture development could introduce new sensitive receptors (residential uses). In addition, construction activity would generate dust and diesel equipment exhaust on a temporary basis that could adversely affect nearby sensitive receptors."¹¹⁶ Despite this recognition of exposure of people to particulate

¹⁰⁹ *Id.*

¹¹⁰ *City of Redlands v. San Bernardino County*, 96 Cal.App.4th at 110.

¹¹¹ *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.

¹¹² *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

¹¹³ *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.

¹¹⁴ *Id.*, at 651.

¹¹⁵ *Id.*, at 656.

¹¹⁶ IS/ND, p. 22.

3463-00.fnc.p

matter and toxic air contaminants, the IS/ND defers preparation of a health risk assessment to identify potential health risks and mitigation measures.¹¹⁷

The IS/ND fails to comply with CEQA. Because substantial evidence to support a fair argument that the Project may result in a range of potentially significant impacts associated with hazardous materials present on the Project site, the City must prepare an EIR.

F. Substantial evidence supports a fair argument that the Project may result in potentially significant GHG emissions.

Under CEQA, a project may have a significant impact if it would “[g]enerate [GHG] emissions, either directly or indirectly, that may have a significant impact on the environment” or “[c]onflict with an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of [GHGs].”

BAAQMD’s significance criteria for GHG emissions states that a project would have a significant impact if it complies with a qualified GHG Reduction Strategy, or produces total emissions of more than 1,100 metric tons of CO_{2e} annually or more than 4.6 metric tons of CO_{2e} per service population annually.¹¹⁸

The IS/ND finds that the Project’s GHG emissions will have a less than significant GHG impact through 2020. Rather than calculate whether the Project’s total emission are more than 1,100 metric tons of CO_{2e} annually, the IS/ND relies on a GHG Memo by Illigworth & Rodkin, Inc. that concludes the Project would not exceed BAAQMD’s threshold of 4.5 metric tons of CO_{2e} per service population annually.¹¹⁹ However, the IS/ND’s finding is not supported by a legally defensible analysis. As a result, the City failed to conduct a legally adequate GHG emissions analysis in the IS/ND.

The GHG Memo analyzes the wrong project and fails to evaluate the Project’s GHG emissions as compared to the existing setting. According to the Memo:

¹¹⁷ IS/ND, p. 22.

¹¹⁸ BAAQMD CEQA Guidelines, p. 2-4,
http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines_May%202011_5_3_11.ashx

¹¹⁹ IS/ND, Appendix B.

To assess the GHG emissions, the City modeled “a build-out scenario that was based on the development assumptions used for the long-range GPA cumulative traffic analysis, which assumed an average development density on the project site of 337 units and commercial square footage to support 22 new jobs, after accounting for the dwelling units and employment generated by the existing General Plan land use designations on the site.”¹²⁰

There are two major legal errors in the City’s GHG analysis. First, the City’s assessment analyzed the wrong project. The Project would allow up to 728 residential units, or 1,189,200 square feet of commercial/office uses (2,973 new jobs).¹²¹ Other sections of the IS/ND acknowledge that the proposed General Plan amendment would allow up to 728 residential units and 1,189,200 square feet of commercial/office.¹²² Therefore, the GHG analysis’ “development assumption,” which assumes 337 units and 22 new jobs, does not reflect the proposed Project and is incorrect.

Second, the City failed to evaluate the proposed Project’s GHG emissions as compared to the existing setting. Instead, it deducts phantom dwelling units and employment generated by land uses that *could be* on the property under the current General Plan, but *are not*. The courts have repeatedly held that a project’s impacts must be measured against the existing physical conditions in the area, not the conditions that could occur under the current legal standards.¹²³ Failure to do so misled the public and agency decisionmakers about the project’s impacts.¹²⁴ An environmental analysis based on a comparison between what was possible under the existing general plan and what was permitted under the amendment is “illusory.”¹²⁵ Therefore, the City is required to assess GHG emissions from the actual project.

¹²⁰ IS/ND, Appendix B.

¹²¹ IS/ND, p. 3. Using the City’s assumption of 2.5 employees per 1,000 square feet of commercial space, $1,189,200/1,000 \times 2.5 = 2,973$ employees.

¹²² See, e.g. IS/ND Air Quality, p. 22, Land Use, p. 53, Population and Housing, p. 61.

¹²³ *Environmental Planning and Information Council v. County of El Dorado* (“EPIC”) (1982) 131 Cal.App.3d 350, 352 [182 Cal.Rptr. 317]; *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186-187, 190-191 [228 Cal.Rptr. 868].

¹²⁴ *Id.* at p. 358.

¹²⁵ *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186-187, 190-191 [228 Cal.Rptr. 868]; see also *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246 [227 Cal.Rptr. 899] (agency must compare rezoning to “existing physical environment” to provide

Finally, the IS/ND admits that the Project would result in significant impacts from GHG emissions after 2020.¹²⁶ The City then refers to mitigation measures in a prior EIR, the Envision San Jose 2040 Final Program EIR, without disclosing those mitigation measures to the public and states that the other EIR found the impact significant and unavoidable. The City's approach violates CEQA.

If the City wanted to rely on any analysis in a prior EIR, then the City was required to comply with CEQA's procedures for doing so:

When a Lead Agency proposes to use an EIR from an earlier project as the EIR for a separate, later project, the Lead Agency shall use the following procedures: (1) The Lead Agency shall review the proposed project with an initial study . . . to determine whether the [earlier] EIR would adequately describe: (A) The general environmental setting of the project; (B) The significant environmental impacts of the project; and (C) Alternatives and mitigation measures related to each significant effect. (2) . . . [P]rovide public review as provided in Section 15087 . . . The notice shall include as a minimum: . . . (B) A statement that the agency plans to use a certain EIR prepared for a previous project as the EIR for this project; . . . and (D) A statement that the key issues involving the EIR are whether the EIR should be used for this project and whether there are any additional, reasonable alternatives or mitigation measures that should be considered . . .¹²⁷

The City did not comply with these procedures. The City did not undertake any written analysis of whether its prior EIR adequately describes the environmental setting, significant impacts, alternatives and mitigation measures for the new General Plan amendment. The prior EIR is not analyzed in the City's IS/ND for the Project. There is no discussion in the IS/ND as to exactly (or even generally) what analysis in the other EIR applies, including what the environmental setting is, where future uses were allowed, which uses the old analysis applies to, and which impacts have been assessed and mitigated. In

a realistic assessment of impacts); *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1468-1469 [38 Cal.Rptr.2d 93] (focus is on extent to which project may cause adverse change to preexisting physical conditions).

¹²⁶ IS/ND, p. 41.

¹²⁷ 14 Cal. Code Reg. § 15153(b).

1963-003nep

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 442-443, the Court held, to the extent that an agency “relied on information not actually incorporated or described and referenced” in the environmental review document, “it failed to proceed in the manner provided in CEQA”.¹²⁸

The City is required to prepare an EIR to evaluate potentially significant GHG emission impacts, to identify mitigation measures to reduce the impact, to disclose whether this Project would exacerbate the significant and unavoidable impact and, if necessary, enable the City Council to adopt overriding considerations for this Project’s impacts.

G. Substantial evidence supports a fair argument that the Project may result in potentially significant land use impacts.

A significant impact on land use exists if the Project would conflict with any applicable land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect.¹²⁹ The IS/ND concludes that with implementation of the Downtown Design Guidelines, General Plan policies, and other applicable regulations, future development allowed by the General Plan Amendment and rezoning would not result in significant land use impacts or conflict with any applicable land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect.”¹³⁰

Substantial evidence supports a fair argument that the Project may result in significant land use impacts by conflicting with the General Plan. The IS/ND explains that the intent of the existing General Plan designation – Residential Neighborhood – “is to preserve the existing character of these neighborhoods and to strictly limit new development to infill projects which closely conform to the prevailing existing neighborhood character as defined by density, lot size and shape,

¹²⁸ In *Vineyard* the court concluded that a later EIR, if it had described its relationship to an earlier EIR, could have been “tiered” to the earlier EIR under CEQA section 21068.5, because the earlier EIR analyzed a water supply project that included the supply for the project analyzed in the later EIR. *Id.* at 442-443. Nonetheless, the reasoning in *Vineyard*, that “[t]he question is . . . not whether the project’s significant environmental effects *can* be clearly explained, but whether they *were*,” applies here. (*Vineyard* at 443.)

¹²⁹ CEQA Guidelines, Appendix G.

¹³⁰ IS/ND, p. 53.

massing and neighborhood form and pattern.”¹³¹ Furthermore, “[n]ew infill development should improve and/or enhance existing neighborhood conditions by completing the existing neighborhood patter and brining infill properties into general conformance with the quality and character of the surrounding neighborhood.”¹³² The IS/ND cites to Downtown Design Guidelines that allegedly “provide direction for new development in the downtown area.”¹³³

However, the City’s design guidelines do nothing to ensure no significant impacts on residences directly abutting the Project site. With respect to this Project on the proposed site, the City stated “any massing of such a large building at this location is going to have impacts on the neighbors.”¹³⁴ The City also explained that the City has not provided specific design guidelines for a “transition zone,” so we may get stuck with a tall building on the edge [of the Downtown Growth Area].”¹³⁵ Therefore, the Project may result in a potentially significant land use impact on the surrounding residences and, contrary to the IS/ND, the City lacks the necessary regulations, policies and guidelines to enable a more compatible transition at the edge of the Downtown Growth Area adjacent to residences.

H. Substantial evidence supports a fair argument that the Project may result in potentially significant public service impacts.

Under CEQA, a public facilities and services impact is considered significant if a project would:

Result in substantial adverse physical impacts associated with the provision or need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times or other performance objectives for any of the public service:

- o Fire protection,
- o Police protection,

¹³¹ IS/ND, p. 51.

¹³² *Id.*

¹³³ IS/ND, p. 53.

¹³⁴ Attachment 7: Email from Ned Thomas to Rick Smeaton, RE: 4th & St. John Project, October 4, 2017.

¹³⁵ *Id.*

- o Schools, or
- o Other public facilities.¹³⁶

The service ratios, response times or other performance standards create a measurable threshold upon which to make a finding of significance. Accordingly, the IS/ND describes the applicable General Plan policies setting forth specific service ratios, response times and other performance standards.

Despite describing the City's acceptable service ratios, response times and other performance standards, the IS/ND contains no description of the *current* service ratios, response times and other performance standards and no analysis of the proposed Project's effects on them.

For example, the IS/ND explains that the City should provide at least 0.59 SF of space per capita in library facilities,¹³⁷ but only explains how many libraries there are and the nearest one.¹³⁸ The IS/ND then concludes no impact "since it represents infill development."¹³⁹ The IS/ND's analysis is incomparable to the threshold and the stated reason ("infill") for its consistency is meaningless.

As another example, the IS/ND explained that for police protection, the response time goal is 6 minutes or less for 60% of all Priority 1 calls, and 11 minutes or less for 60% of all Priority 2 calls.¹⁴⁰ The IS/ND then states how many patrol divisions, districts, patrol beats and patrol beat building blocks there are in the City.¹⁴¹ Again, the IS/ND concludes no impact "since it represents infill development."¹⁴² Like the analysis for libraries, the IS/ND's analysis of impacts on police services is incomparable to the thresholds and the stated reason ("infill") for its consistency is meaningless.

The IS/ND's "analysis" for fire protection, parks and schools follows the same pattern. The City failed, as a matter of law, to evaluate the proposed Project's potentially significant impacts on public services in the IS/ND.

¹³⁶ CEQA Guidelines, Appendix G.

¹³⁷ IS/ND, p. 64.

¹³⁸ IS/ND, p. 63.

¹³⁹ IS/ND, p. 65.

¹⁴⁰ IS/ND, p. 64.

¹⁴¹ IS/ND, p. 63.

¹⁴² IS/ND, p. 65.

I. Substantial evidence supports a fair argument that the Project may result in potentially significant transportation impacts.

The IS/ND states that the City of San Jose requires a traffic analysis of proposed General Plan amendments when they would result in more than 250 peak hour trips.¹⁴³ The City concludes that the Project would not meet this threshold. However, the IS/ND relies on a cumulative long-range traffic analysis for another Project, namely a group of contemplated General Plan amendments. This cumulative long-range traffic analysis is inapplicable, based on significant errors with respect to the proposed Project and substantially underestimated the proposed Project's traffic. Furthermore, expert Dan Smith from Smith Engineering & Management reviewed the traffic analysis and concludes that the Project may result in potentially significant traffic impacts requiring preparation of an EIR, along with a traffic analysis for the actual proposed Project.

First, the City's assessment analyzed the wrong project. The Project would allow up to 728 residential units, or 1,189,200 square feet of commercial/office uses (2,973 new jobs). Other sections of the IS/ND acknowledge that the proposed General Plan amendment would allow up to 728 residential units and 1,189,200 square feet of commercial/office.¹⁴⁴ The traffic analysis' "development assumption" that assumes 337 units and 22 new jobs does not reflect the proposed Project and is incorrect.¹⁴⁵ This is because the City relied on a cumulative long-range traffic analysis for another project (a group of General Plan amendments) and did not release a project-specific traffic study that was being prepared for the proposed uses on the site. However, as recently as September 2017, Department of Transportation staff similarly reiterated that any traffic report must include traffic generation assumptions that are in alignment with the project description.¹⁴⁶ According to the City, "[t]he traffic consultant has been asked to re-evaluate trip generation and apply the rate for standard multi-family units rather than student parking ratios, and the analysis needs to be consistent with the project

¹⁴³ IS/ND, p. 70.

¹⁴⁴ See, e.g., IS/ND, Air Quality, p. 22, Land Use, p. 53, Population and Housing, p. 61.

¹⁴⁵ Attachment 1: Letter from Dan Smith, Smith Engineering & Management, to Tanya Gulesserian, Subject: Fourth and St. John General Plan Amendment and Rezoning (City File NOS: GP16-013 and C17-032), November 11, 2017, p. 1.

¹⁴⁶ Attachment 4: Email from Ned Thomas to Erik Schoennauer, Sept. 14, 2017.

description.”¹⁴⁷ Although the City is improperly allowing the Applicant to proceed with the General Plan amendment and rezoning at this time, it’s clear that the City agrees that a traffic analysis is required to analyze the actual project being proposed.

Second, the City’s traffic assessment for a different project unjustifiably discounts the land uses allowed by the proposed General Plan amendment, based on the fact that the Federal Aviation Administration reviews the proposed Project. Mr. Smith explains that the City assumed that FAA review would result in only 337 dwelling units and 8,800 square feet of commercial space, less than half the actual allowable proposed use of 728 dwelling units and 1,189,000 square feet of commercial/office. Mr. Smith correctly points out that FAA review is not justification for considering a smaller project for several reasons. One, it is not supported by any evidence. “[T]here are many structures in downtown San Jose that are much closer to the actual flight path for the airport than the Project site and that are much taller than the height assumed for the Project in the analysis.”¹⁴⁸ Hence, “the City’s assumption to limit the size of the Project in the analysis to less than half the dwelling units that almost certainly could be developed, plus a minor amount of retail commercial, is unreasonable and inconsistent with the good faith effort to disclose impacts that CEQA demands.”¹⁴⁹ Also, there is no enforceable condition in the General Plan amendment that a building over 65 feet is prohibited.¹⁵⁰ Hence, the assumption is factually and legally untenable.

Third, Mr. Smith explains that the City failed to evaluate the proposed Project’s traffic emissions as compared to the existing setting.¹⁵¹ The courts have repeatedly held that a project’s impacts must be measured against the existing physical conditions in the area, not the conditions that could occur under the current legal standards.¹⁵² The Project site is currently occupied by surface parking

¹⁴⁷ *Id.* The email notes that noise and air quality also need to be re-evaluated based on the new traffic analysis.

¹⁴⁸ Attachment 1: Letter from Dan Smith, Smith Engineering & Management, to Tanya Gulesserman, Subject: Fourth and St. John General Plan Amendment and Rezoning (City File NOS: GP16-013 and C17-032), November 11, 2017, p. 2.

¹⁴⁹ *Id.*, p. 2-3.

¹⁵⁰ *Id.*, p. 2.

¹⁵¹ *Id.*, p. 3.

¹⁵² *Environmental Planning and Information Council v. County of El Dorado* (“EPIC”) (1982) 131 Cal.App.3d 350, 352 [182 Cal.Rptr. 317]; *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186-187, 190-191 [228 Cal.Rptr. 868].

areas and two single-family homes. Mr. Smith explains that “the IS/ND’s transportation analysis (and the greenhouse gas analysis) deduct from albeit already underestimated traffic trips from the proposed Project, project trips associated with 49 units of residential and commercial supporting 10 jobs that are presumed to be developed under the existing General Plan and zoning.”¹⁵³ In other words, the IS/ND’s analysis uses assumptions that deduct phantom dwelling units and employment generated by land uses that could be on the property under the current General Plan, but are not. Mr. Smith explains how this is incorrect: “Since the trip generation for the current parking is attributable to nearby development that will remain and the 2 homes are vacant, there could be no deduction in the analysis of the project for existing uses (or perhaps arguably, deduction for the 2 single family homes could be allowed).” The City is required to assess traffic impacts from the actual project.

Fourth, Mr. Smith identifies a potentially significant impact from traffic that must be evaluated in a project-specific traffic study. According to Mr. Smith, the allowable development under the proposed General Plan amendment “would have sufficient trip generation (over 250 trips) to exceed the trip significance thresholds” of 100 AM or PM peak hour trips requiring a traffic study of the Project under Santa Clara County Congestion Management Plan procedures.¹⁵⁴ Mr. Smith also concludes that the Project may potentially add enough trips to Caltrans-controlled intersections, ramps and mainline facilities to require a traffic impact analysis in accordance with Caltrans own procedures.”¹⁵⁵ Mr. Smith concludes that “[s]ubstantial evidence shows that the proposed Project may result in significant traffic impacts.”¹⁵⁶

Finally, the City’s own records show that the Project requires mitigation to reduce its potentially significant impacts on traffic. According to the March 2017 Revised NOP for the City’s Downtown Strategy 2040 Project, which includes the

¹⁵³ *Id.*, p. 3.

¹⁵⁴ Attachment 1: Letter from Dan Smith, Smith Engineering & Management, to Tanya Gulesserian, Subject: Fourth and St. John General Plan Amendment and Rezoning (City File NOS: GP16-013 and C17-032), November 11, 2017.

¹⁵⁵ *Id.*, p. 1 (citations omitted)

¹⁵⁶ *Id.*, p. 4.

proposed Project,¹⁵⁷ any future development will result in significant impacts, requiring an EIR:

As of August 2016, approved and/or constructed residential development in Downtown is now approaching residential capacities identified in Phase 1 (7,500 residential units)... However, the required Phase 1 traffic mitigation from the Strategy 2000 EIR...has not been completed and is not programmed within the City's five-year Traffic Capital Improvement Program (CIP).

Without implementation of the traffic mitigation, development beyond Phase 1 cannot proceed under the current Strategy 2000 EIR (with Addenda) and future projects would need to prepare individual EIRs or other CEQA documents to receive approvals, potentially delaying development that would benefit the fiscal health of the City.¹⁵⁸

Therefore, substantial evidence supports more than a fair argument that the Project may result in significant traffic impacts requiring preparation of an EIR. The EIR must include a project-specific analysis and identify mitigation to reduce the impacts to less-than-significant. According to the City, the Department of Transportation "desires any future project to contribute to signal modification improvements at the intersection of St. John Street and 4th Street."¹⁵⁹ This mitigation must be identified in the EIR.

Accordingly, the City is required to prepare a factually and legally correct, project-specific traffic analysis and to disclose the potentially significant traffic impacts and required mitigation in an EIR.

¹⁵⁷ Notice of Preparation of a Draft Environmental Impact Report for the Downtown Strategy 2040 Project (File No. PP15-102), p. 5 and Figure 3, October 6, 2015 and Notice of Preparation of a Draft Environmental Impact Report for the Downtown Strategy 2000 Update (Downtown Strategy 2040), Revised March 2017 at <https://www.sanjoseca.gov/DocumentCenter/View/66970> ("Revised NOP").

¹⁵⁸ Revised NOP, p. 4.

¹⁵⁹ Attachment 12: Letter from Kimberly Vacca, City of San Jose, to Erik Schoennauer, Re: File No. GP16-013, A General Plan Amendment request to change the Land Use/Transportation Diagram designation from Residential Neighborhood to Transit Residential on a 0.98 acre site, located on the east side of N 4th street at 120 N. 4th Street, December 2, 2016, p. 4.

VI. CONCLUSION

The IS/ND fails to meet the informational and public participation requirements of CEQA, because it improperly segments environmental review, fails to analyze potentially significant impacts compared to the existing baseline, fails to evaluate the proposed Project and lacks evidence to support the City's environmental conclusions. Moreover, substantial evidence exists that the Project may result in significant impacts requiring the City to prepare an EIR. Thank you for your consideration of these comments.

Sincerely,



Tanya Gulesserian

Attachments

TAG:acp