ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037
TEL: (650) 589-1660
FAX: (650) 589-5062
LdCastillo@adamsbroadwell.com

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
KYLE C. JONES
MARC D. JOSEPH
RACHAEL E. KOSS
NIRIT LOTAN
MILES F. MAURINO
COLLIN S. McCARTHY

LAURA DEL CASTILLO
Of Counsel

SACRAMENTO OFFICE
520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

November 7, 2018

Via Email

Chair Peter Allen and Planning Commissioners
Planning, Building and Code Enforcement
City of San Jose
200 E. Santa Clara Street, 3rd Floor
San Jose, CA 95113
Planningcom2@sanjoseca.gov
Planningcom3@sanjoseca.gov
Planningcom1@sanjoseca.gov
Planningcom4@sanjoseca.gov
Planningcom5@sanjoseca.gov
Planningcom7@sanjoseca.gov
Planningcom6@sanjoseca.gov

AGENDA ITEM: 7b

Reema Mahamood
Environmental Project Manager
City of San Jose
200 E. Santa Clara St., T-3
San José, CA 95113
Email: reema.mahamood@sanjoseca.gov

Re: Comments on the GP17-017 Initial Study/Addendum to the Diridon Station Area Plan Final Environmental Impact Report

Dear Chair Allen, Honorable Commissioners and Ms. Mahamood:

On behalf of San Jose Residents for Responsible Development, we submit these comments on the GP17-017 Initial Study/Addendum ("Addendum") to the Diridon Station Area Plan ("DSAP") Final Environmental Impact Report ("FEIR") prepared by the City of San Jose ("City") pursuant to the California Environmental Quality Act ("CEQA"). We are providing these comments in advance of the November 7 Planning Commission hearing on this Project.

The 4.25-acre Project site is comprised of five non-contiguous parcels located on Dupont Street and McEvoy Street, between West San Carlos Street and Park Avenue, in the Diridon Station Area of the City. The Project proposes to change the General Plan land use designation on all five parcels to Transit Residential ("TR") through a General Plan Amendment ("GPA").[1] The TR designation allows a residential density of 50 to 250 dwelling units/acre ("DU/AC") with a floor area ratio of 2.0 to 12.0 and buildings ranging from five to 25 stories. This change could result in a future development of 170 to 850 residential units.

As these comments demonstrate, the Addendum fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. It overwhelmingly fails to perform its function as an informational document that should provide public agencies and the public with detailed information about the effect that a proposed project is likely to have on the environment.

Substantial evidence shows that the Addendum contains fatal flaws under CEQA and that the Project is likely to cause significant adverse impacts that are not adequately analyzed and mitigated in the Addendum or in previous DSAP CEQA documents. Specifically, the Addendum improperly piecemeals review of development on the Project site. Furthermore, the Addendum fails to adequately identify, evaluate, and mitigate the following impacts:

- Failure to adequately disclose, analyze, and mitigate significant impacts related to hazardous site conditions;
- Failure to analyze health risk impacts;
- Failure to analyze energy impacts;
- Failure to analyze noise impacts

The Addendum must be withdrawn, and the City must address these errors and deficiencies. Because of the substantial omissions in the Addendum, and because of the potentially significant impacts associated with the Project, revisions that are necessary to comply with CEQA will be, by definition, significant. Therefore, an EIR will need to be circulated for public comment.

[1] Initial Study/Addendum, Dupont General Plan Amendment File No. GP17-017, October 2018 (hereinafter "Addendum").

We prepared our comments with the assistance of hazards expert James J.J. Clark of Clark & Associates.[2] Mr. Clark's comments are attached to this letter along with each expert's curriculum vitae. The City must respond to these expert comments separately and individually.

I. INTEREST OF THE COMMENTERS

San Jose Residents for Responsible Development ("San Jose Residents") is an unincorporated association of individuals and labor unions that may be adversely affected by the potential public and worker health and safety hazards, and environmental and public service impacts of the Project. The association includes local residents Kristopher Ugrin and Juan Gutierrez, as well as International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104 and Sprinkler Fitters Local 483, their members, their families and other individuals that live and/or work in the City of San Jose and Santa Clara County.

Individual members of San Jose Residents and the affiliated unions live, work, recreate and raise their families in the City of San Jose and Santa Clara County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to 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. Finally, San Jose Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

[2]*See* Letter from James J.J. Clark, Clark & Associates, to Laura del Castillo re: Comment Letter on Dupont Street General Plan Addendum Mixed-Use Initial Study/Addendum File No. GP17-017 November 6, 2018 (hereinafter, "Clark Comments"), **Attachment A**.

II. THE CITY ILLEGALLY PIECEMEALS THE GENERAL PLAN AMENDMENT FROM THE PROJECT

CEQA prohibits a project proponent from seeking approval of a large project in a smaller pieces in order to take advantage of environmental exemptions or lesser CEQA review for smaller projects.[3] California courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."[4] CEQA requires that a project be described with enough particularity that its impacts can be assessed.[5] 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."[6] Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project's impacts and undermining meaningful public review.[7]

CEQA prohibits such a piecemeal approach and requires review of a Project's impacts as a whole.[8] "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.[9] 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."[10] Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.[11]

---

[3] *Arviv Enterprises, Inc. v. South Valley Area Planning Com*., 101 Cal. App. 4th 1337, 1340 (2002).
[4] *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 CalApp.3d 185, 193.
[5] *Id.* at 192.
[6] *Id.* at 197-198.
[7] *See, e.g., Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376.
[8] 14 Cal. Code Reg. § 15378, subd. (a); *Burbank- Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.
[9] 14 Cal. Code Reg., § 15378.
[10] *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego*, (1989) 214 Cal.App.3d 1438, 1452.
[11] *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).

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*, 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.[12] A site plan showed that the owner had plans to redevelop the entire property.[13] 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]."[14]

In *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora,* 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*.[15] 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 (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."[16]

Here, the City improperly segmented the Project because the site had already been associated with a specific development project prior to the filing of the GPA application. The same Applicant identified in the Addendum for the General Plan Amendment also filed an application for a Planned Development Permit PDC17-057 ("PD permit") on December 13, 2017 for the exact same Project site at 205 Dupont

---

[12] *Plan for Arcadia v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 718, 721
[13] *Id.* at 719.
[14] *Id.* at 723, 726.
[15] *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226-1227 ("*Tuolumne*").
[16] *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).

Street.[17] That project, called "Dupont Village," proposed to demolish nine existing commercial buildings and construct a 7-story 458-unit residential structure.[18]

The high-density residential development contemplated in the PD permit application could not be approved without this Project. Specifically, the GPA will change the land use designation from Mixed Use Commercial with a residential density of 50 DU/AC, which would not have allowed for the Dupont Village Project, to the TR designation which allows up to 250 DU/AC. For unknown reasons, the Applicant withdrew the Dupont Village application in February 2018,[19] but remains the Applicant for the GPA. Based on this information, it is likely the Applicant intends to reapply for the Dupont Village permit or a permit for a similar development after the GPA is considered.

Not only did this decoupling of the GPA from the actual development project illegally segment the Project, but the Addendum itself contains fatal flaws that render it inadequate under CEQA. As described below, even if the Dupont Village project is no longer moving forward, the City is required to analyze project-level impacts when project-level development information is known, namely the maximum allowable capacity of 850 residential units. The City failed to do a project-level analysis of impacts, and instead simply provides a general program-level analysis in the Addendum.

The City's segmentation of the GPA from the Dupont Village or any future development project violates CEQA. In addition, substantial evidence shows that any development on the site under either the Dupont Village plan or the maximum allowable capacity under the currently proposed GPA may result in potentially significant impacts. The City must withdraw the Addendum and prepare an EIR.

III. THE CITY MUST PREPARE A SUBSEQUENT OR SUPPLEMENTAL EIR FOR THIS PROJECT

CEQA has two basic purposes, neither of which is satisfied by the Project's

---

[17] *See* Addendum, p. 3 (Project Applicant - Salvador Caruso Design Corporation); 205 Dupont Street ("Dupont Village") Application, PDF 11 (Salvatore Caruso Design Corporation), **Attachment B**; Email from Salvatore Caruso to Nizar Slim, Planner, San Jose ("When can we expect comments on both the GP and PD applications."), **Attachment C.**

[18] Dupont Village, Environmental Evaluation Application, **Attachment D.**

[19] Dupont Village Application.

Addendum. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.[20] The EIR is the "heart" of this requirement.[21] 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."[22]

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."[23] An adequate EIR must contain facts and analysis, not just an agency's conclusions.[24] CEQA requires an EIR to disclose all potential direct, indirect, and cumulative significant environmental impacts of a project.[25]

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.[26] If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[27] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[28] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable

---

[20] 14 CCR § 15002(a)(1) ("CEQA Guidelines"); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[21] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.
[22] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[23] 14 CCR, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[24] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[25] PRC, § 21100(b)(1); 14 CCR, § 15126.2(a).
[26] 14 CCR, § 15002(a)(2) and (3); *Berkeley Jets,* 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.
[27] PRC, §§ 21002.1(a), 21100(b)(3).
[28] *Id.*, §§ 21002-21002.1.

through permit conditions, agreements or other legally binding instruments.[29] A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[30] This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[31]

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.[32] CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.[33] A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project "would not have a significant effect on the environment."[34]

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
>
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or

---

[29] 14 CCR, § 15126.4(a)(2).
[30] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).
[31] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.
[32] 14 CCR, §§ 15060, 15063(c).
[33] *See, e.g.,* PRC, § 21100.
[34] *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

> (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.[35]

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events occur:

> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
>
> (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
>
> (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
>
> > (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
> >
> > (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
> >
> > (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
> >
> > (D) Mitigation measures or alternatives which are

[35] PRC, § 21166.

> considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[36]

Only where ***none*** of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further documentation.[37] For Addendums specifically, CEQA allows Addendums to a previously certified EIR if minor changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.[38] The City's decision not prepare a subsequent EIR must be supported by substantial evidence.[39]

Here, the City lacks substantial evidence for its decision not to prepare a subsequent EIR because at least one of the triggering conditions in Section 15162 has occurred. As explained below, substantial evidence shows that the Project may have one or more significant effects not discussed in the previous EIR. Specifically, the Project may have significant impacts associated with hazardous site conditions, as described by Mr. Clark. Moreover, the Addendum completely fails to evaluate the Project's potentially significant impacts related to public health risks, energy, and noise.

Accordingly, Mr. Clark's substantial evidence, and the City's lack thereof, requires that the City prepare a subsequent or supplemental EIR to adequately address the Project's potentially significant impacts related to hazardous site conditions, public health, energy use, and noise.[40]

---

[36] 14 CCR, § 15162(a)(1)-(3).
[37] 14 CCR, § 15162(b).
[38] 14 CCR, § 15164.
[39] *Id*. §§ 15162 (a), 15164(e), and 15168(c)(4).
[40] 14 CCR, § 15162 ("no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]"); § 15164 ("The [agency's] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.").

A. The City Failed to Adequately Describe the Existing Setting for Hazards and Substantial Evidence Shows the Project Will Result in Significant Impacts Related to Hazardous Site Conditions

1. Failure to Identify All Relevant Hazardous Waste Sites Within One Mile of the Project Site

CEQA documents must describe the existing environmental setting in enough detail to enable a proper impact analysis,[41] thus it is vital to the CEQA process that accurate information be compiled to describe the current conditions of the community in which the proposed project is to be sited. The Addendum lists a few sources of off-site contamination.[42] However, according the Mr. Clark's review of the Geotracker website, maintained by the State Water Quality Control Board, there are 187 different cases of hazardous waste sites within a mile of the project site.[43] Furthermore, Mr. Clark notes that "[a]t least 26 of the sites are still open and may have active remediation or verification monitoring being performed."[44] According to Mr. Clark, the chemicals of concern at the active sites include "chlorinated solvents (perchloroethylene, trichloroethylene, 1,2-dichloroethylene, etc…), petroleum hydrocarbons from USTs releases (gasoline, diesel, waste oils), or polychlorinated biphenyls (PCBs)," with the closest active site being less than 900 feet away from the Project.[45] Mr. Clark provides detailed evidence of these sites in his comments.

Mr. Clark finds that the Addendum fails to accurately describe the conditions surrounding the site" and thus concludes that the "recognized environmental concerns (RECs) warrant a substantial analysis by the City in a revised EIR to ensure that workers, current residents, future residents, and sensitive receptors (e.g., Edge School below) are not adversely impacted by the identified wastes."[46]

---

[41] *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.
[42] Addendum, p. 40.
[43] Clark Comments, p. 22.
[44] *Id.*
[45] *Id.*
[46] Clark Comments, p. 22.

2. Inadequate Analysis of Significant Impacts

CEQA requires an analysis of whether the Project would create a significant hazard to the public or the environment through the release of hazardous materials into the environment.[47] The Addendum describes the Project's potential impacts stating that contaminated soil and groundwater could "expose construction workers and future users of redevelopment sites to health risks through direct contact and/or inhalation of soil or groundwater vapors of volatile organic compounds."[48] The Addendum then refers to the previous DSAP FEIR and states that specific requirements would "be determined during the subsequent environmental review that would be required when a specific development project is submitted."[49] This is improper deferral where evidence shows that potentially significant impacts may occur.

The DSAP FEIR provided a general review of potential site hazards, stating that "prior to development or redevelopment of any parcel as part of implementation of DSAP, a Phase I site assessment shall be conducted by a qualified professional."[50] The DSAP FEIR also pointed to several other agencies and regulations and concluded that implementation of "General Plan policies, appropriate clean-up actions, and precautionary measures" would ensure that future development on the site would result in less-than-significant impacts related to hazards and hazardous materials.[51] However, without a site-specific Phase I site assessment, the Addendum may not rely on the DSAP FEIR or other laws and regulations to evaluate and mitigate hazardous impacts.

Indeed, Mr. Clark finds several flaws with the Addendum's analysis. First, Mr. Clark explains that the Addendum gives "contradictory descriptions" of the potential for asbestos-containing materials ("ACMs") and lead-based paint that exist at the site.[52] Mr. Clark reviewed site conditions and finds that "[g]iven the age of the buildings to be demolished and the nature of the project site it is clear that a high potential for industrial chemicals to be present in soils on site..."[53]

---

[47] CEQA Guidelines App. G.
[48] Addendum, p. 39.
[49] *Id.*, at 40.
[50] DSAP FEIR, p. 246.
[51] *Id.*, at 248.
[52] Clark Comments, p. 11.
[53] *Id.*

Mr. Clark further explains that the disturbance of ACM and lead-based paint impacted soils is a significant impact "given the proximity of new and existing residential properties to the Site" and that "[e]ntrainment of the impacted dust generated during demolition and construction activities could have long lasting impacts on the community."[54] Lead is listed by the State of California, under Proposition 65, as a carcinogen and cause for developmental health effects.[55] According to Mr. Clark, exposure to lead is a serious concern for decreases in intelligence scores for young children and for increased blood pressure in adults. Furthermore, exposure through impacted soils via incidental ingestion or dermal absorption and through the inhalation of fine dust (particulate matter) impacted with the chemicals is the primary route of exposure for workers, community members and sensitive receptors near the project site.[56]

This issue is further exacerbated because of the Project site's proximity to the Edge School (previously the Sunol Community School), which is located less than 50 meters from the site's western boundary, according to Mr. Clark. He then states that "it is clear that the project will have a potential significant impact on the community that has not been adequately analyzed or mitigated,"[57] and that the City must evaluate the potential impacts from hazardous wastes generated at the existing site, including lead, asbestos on the Edge School in an EIR.[58]

Mr. Clark thus finds that "given the volume of soils likely to be graded on site and the volume of soils to be excavated in the construction of any underground parking lots it is imperative that the public be given an opportunity to understand and assess the extent of any soil contamination prior to beginning the project, as required under CEQA."[59] Mr. Clark concludes that the Project site "has not been adequately evaluated with regard to potential hazards" and the City cannot rely on the previous 2014 DSAP FEIR because it "defers evaluation and mitigation to other laws and agencies."[60]

---

[54] *Id*.
[55] OEHHA. 2018. Chemicals Know to the State to Cause Cancer or Reproductive Toxicity. State of California, Environmental Protection Agency, Office of Environmental Health Hazard Assessment. May 25, 2018
[56] Clark Comments, p. 11.
[57] *Id*., at 7.
[58] *Id*.
[59] *Id*., at 11-12.
[60] *Id*., at 12.

The Addendum's reliance on regulations and laws outside of CEQA to mitigate the risks related to disposal of contaminated groundwater is misplaced. Indeed, case law has shown that 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."[61] 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."[62] Thus, the ruling supports the notion that 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 noise levels would likely comply with local noise standards, "compliance with the ordinance does not foreclose the possibility of significant noise impacts."[63] The court ordered the County to prepare an EIR. The ruling demonstrates the possibility that a project may follow 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 follow applicable regulations, without further explanation or enforceability, may not fulfill the requirements of CEQA.

---

[61] *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.
[62] *Id.*
[63] *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.

Here, the City fails to provide any information explaining how reliance on the DSAP FEIR and compliance with the outside laws and regulations, without a site-specific Phase I, would reduce the potentially significant risks related to contaminated groundwater and soil, including impacts to worker and public health. As a result, the Addendum is not supported by substantial, or any, evidence. As Mr. Clark found, the Project poses a significant risk to workers, community members, and local businesses if these issues are not adequately evaluated and mitigated. The City may not rely solely on compliance with regulations or laws as reducing impacts without a full analysis of impacts and enforceable mitigation.

IV. THE ADDENDUM FAILS TO COMPLY WITH CEQA'S REQUIREMENTS FOR PROGRAM-LEVEL ENVIRONMENTAL REVIEW

The City violated CEQA by failing to evaluate future development allowed by the General Plan Amendment. This approach has been expressly rejected by the Courts.

The Addendum suggests it is only a programmatic review document and future development will require project-level analysis. However, the City has stated in numerous other cases, that the City can approve subsequent projects as within the scope of the program covered by a prior environmental impact report, negative declaration or addendum – and ***not require further environmental review if the information regarding potentially significant impacts is known at the time the prior environmental review document was prepared***. The legal standard to challenge that finding would require the public to provide substantial evidence that the subsequent project is larger than what was allowed by the prior document, that there are substantial changes in the circumstances under which the project is undertaken or that new information which was not known and could not be known at the time the negative declaration was prepared shows that there are new or more severe impacts or new mitigation measures to reduce those impacts, such as in the case of hazards above. Here, since the City has information now that future development allowed by the General Plan Amendment may result in significant impacts, the City is required to prepare an environmental impact report at this time.

The Addendum fails to comply with CEQA's requirements for a program level environmental review document. Courts have expressly rejected the Addendum's

approach of deferring analysis of reasonably foreseeable significant environmental impacts from a general plan amendment. CEQA Guidelines section 15146(b) specifically instructs agencies to consider the environmental effects of amending a local general plan, even though the specific impacts of future development projects are not yet known:

> "An EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption, or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow."

CEQA Guidelines section 15152 allows agencies to "tier" a project-specific analysis to a program EIR for a general plan amendment, but warns that "[t]iering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects" and "does not justify deferring" an analysis of the general plan amendment to a later CEQA document.

The Addendum explains that future development allowed under the proposed General Plan Amendment would allow up to 850 residential units on the site. However, the Addendum does not analyze impacts from the potential development.

A. The Addendum Fails to Consider and Analyze Significant Impacts from the General Plan Amendment

The General Plan amendment would allow for the future development of up to 850 dwelling units on a 4.25 acre site. Furthermore, a specific development project was proposed for this site before the GPA process began. However, the Addendum provides *no analysis whatsoever* of either the actual previously proposed development project, or the maximum development proposed through this GPA. Rather, the Addendum states that it is "a 'Program' level document that addresses only the impacts of changing the type of land use planned for the property. There is no specific development proposal."[64] The Addendum then vaguely alludes to future zoning changes and environmental review.[65]

[64] Addendum, p. 8.
[65] *Id.*

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.[66] It is well established that an agency must analyze the future development contemplated in a plan amendment.[67] CEQA requires analysis of the environmental effects of a project at the earliest possible stage in the planning process.[68] 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 precluded informed decisionmaking.[69] 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. Instead, the Addendum states that the project is a GPA and provides only limited analysis. However, there are several resources areas where the City is required to provide project-level analysis when project-level information, site conditions, and potentially significant impacts are known. The City's failure to analyze these impacts from future development contemplated by the Project violates CEQA as a matter of law.

1. Air Quality and Public Health Risks

The Addendum's air quality analysis defers assessment of the Project's impacts and, thus, fails to comply with CEQA. According to the Addendum, "[f]uture development under the DSAP may also involve new sources of [toxic air contaminants ("TACs")] that could contribute to community risks and hazards" but that "future redevelopment of the project site under the proposed GPA would be required to complete site-specific modeling and incorporate mitigation as appropriate."[70] However, despite the fact that health risk assessments were not conducted, the Addendum concludes that future development projects would comply

[66] *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).
[67] *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; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370-371.
[68] *City of Redlands v. San Bernardino County*, 96 Cal.App.4th at 410.
[69] *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").
[70] Addendum, p. 20.

with Bay Area Air Quality Management District ("BAAQMD") and City requirements, as well as General Plan Policies, and that both construction and operational impacts associated with public exposure to toxic air contaminants would be less than significant with mitigation.[71]

The Addendum's air quality analysis fails to comply with CEQA in several ways. First, the Addendum's deferral of a project-specific air quality assessment is an approach that has been rejected by the courts, as explained above.

Second, compliance with applicable BAAQMD and City regulations and policies does not automatically obviate the need for further analysis of impacts,[72] again explained above.

Third, the City has not adequately incorporated compliance with these policies 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.[73] 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."[74] Similarly, the Addendum 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, the City's own evidence shows that construction and operation of the Project may result in significant impacts, requiring preparation of an EIR. As highlighted above, the Addendum states that "[f]uture development under the DSAP may also involve new sources of TACs that could contribute to community risks and hazards."[75] Despite this recognition of exposure of people to toxic air contaminants, the Addendum unlawfully defers preparation of construction and operational health risk assessments to identify potential health risks and mitigation measures.

---

[71] *Id.*, at 20-21.
[72] *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.
[73] *Id.*, at 651.
[74] *Id.*, at 656.
[75] Addendum, p .20.

Mr. Clark finds that there is potential for significant health risks, stating that "[g]iven the potential emissions from construction activities on site, the City must provide an estimate of construction emissions and a health risk assessment to assess the potential health risks posed to sensitive receptors in the surrounding community and among future residents."[76] Furthermore, Mr. Clark finds that "[g]iven the potential emissions from increased traffic, and the existence of project-level information, such as the maximum build-out of the site, or at the very least the previously proposed project for the site, the City is required under CEQA to provide a health risk assessments based upon the operational emission of the project on sensitive receptors in the surrounding community and among future residents."[77]

Therefore, the City's failure to analyze and mitigate the health risks from either the Dupont Village build-out or maximum build-out on the Project site violates CEQA.

2. Energy Use

Under CEQA, wasteful, uneconomic, inefficient or unnecessary consumption of energy means exceeding a threshold of significance in the energy use impact areas identified in Appendix F.[78] This includes asking whether the project's energy requirements by amount and fuel type during construction, operation, maintenance and/or removal and from materials will be significant, whether the project complies with existing energy standards, whether the project will have a significant effect on energy resources and whether the project will have significant transportation energy use requirements, among other questions.

For each of these questions, CEQA Guidelines Appendix F asks whether the project decreases overall per capita energy consumption, decreases reliance on fossil fuels, and increases reliance on renewable energy sources. Appendix F explains that these are the means to ensure wise and efficient use of energy. If a project does not decrease overall per capita energy consumption, decrease reliance on fossil fuels, and increase reliance on renewable energy sources, then the Project does not ensure

[76] Clark Comments, p. 9.
[77] *Id.*, at 10.
[78] CEQA Guidelines Appendix F.

wise and efficient use of energy and, therefore, results in a wasteful, inefficient and unnecessary consumption of energy.

Here, the Addendum fails to compare the Project energy use to CEQA's thresholds for measuring wasteful, uneconomic, inefficient or unnecessary consumption of energy in Appendix F. In fact, the only time energy use is mentioned is in the language of Policy MS-14.4 as part of the list of applicable General Plan polices to address greenhouse gas emissions.[79] Policy MS-14.4 requires implementation of the City's Green Building Policies which are intended to reduce energy consumption. However, this can hardly be considered an adequate analysis of and mitigation for project-specific energy use impacts from either the Dupont Village build-out or maximum build-out under the currently proposed GPA.

Furthermore, the Addendum contains no analysis of whether the energy use of development allowed under the GPA is carbon neutral under Governor Brown's Executive Order B-55-18. The question is, for example, whether the allowable development's energy requirements by amount and fuel type during construction, operation, maintenance and/or removal and transportation is carbon neutral. This analysis of carbon neutrality is consistent with Appendix F's explanation of the means to ensure wise and efficient use of energy. The Addendum contains no such analysis, and reliance on the 2014 DSAP FEIR is misguided given the DSAP FEIR's outdated information and failure to meet these energy evaluation standards.

Therefore, the City's failure to analyze and mitigate the energy use for either the Dupont Village build-out or maximum build-out on the Project site under the currently proposed GPA is inconsistent with the requirements of CEQA.

3. Noise Impacts

CEQA requires an evaluation of noise impacts from new development. However, the Addendum fails to provide a project-level noise evaluation during construction and during operation, which is crucial given the Project's proximity to CalTrain operations. Instead, the Addendum simply refers to the DSAP FEIR, which concluded that implementation of General Plan policies and other applicable regulations would "ensure that future development allowed under the DSAP would

[79] Addendum, p. 34.

not be exposed to interior and exterior noise levels in excess of City standards."[80] The Addendum then concludes that both construction and operational noise impacts will be less than significant.

However, as explained above, despite a project's stated compliance with applicable regulations and policies, the lead agency still must evaluate and mitigate potentially significant impacts in a CEQA document.[81] Furthermore, the City's failure to provide a more detailed noise assessment is counter to the very language in the DSAP FEIR, which states clearly that future projects "with a residential component will need to complete additional studies, including…. [n]oise reports."[82]

Therefore, the City's failure to analyze and mitigate the noise impacts from either the Dupont Village build-out or maximum build-out on the Project site is inconsistent with the requirements of CEQA.

V. CONCLUSION

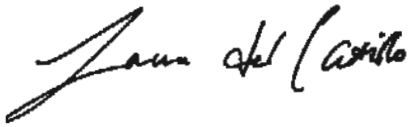
It is essential that the City's CEQA review adequately identify and analyze the Project's foreseeable direct, indirect and cumulative impacts. It is also imperative that any and all feasible mitigation measures be presented and discussed. Indeed, CEQA requires nothing less. As discussed above, the Addendum fails to meet the informational and public participation requirements of CEQA, because it improperly segments environmental review, fails to comply with the requirements for program-level environmental review, fails to evaluate the project-level impacts in the areas of public health, energy use, and noise, and lacks substantial, if any, evidence to support the City's environmental conclusions. Moreover, substantial evidence exists that the Project will result in significant impacts from hazardous site conditions requiring the City to prepare an EIR.

---

[80] Addendum, p. 54.
[81] *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.
[82] DSAP FEIR, p. 75.

Thank you for your consideration of these comments.

Sincerely,



Laura E. del Castillo

Attachments

LEDC:acp