

ATTACHMENT 1.C.

Public Comment Letters on the Draft Initial Study/Mitigated Negative Declaration

Letter from the

**Letter from Laura E. Horton of Adams Broadwell Joseph and Cordozo, dated
October 19, 2015, plus attachments**

Cannery Park/Hanover

GP15-001, PDC15-001, PD15-004, and PT15-001

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October 19, 2015

VIA OVERNIGHT AND ELECTRONIC MAIL

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**Re: Comments on the Initial Study/Mitigated Negative Declaration
for the Cannery Park/Hanover Project (File Nos. GP15-001,
PDC15-001, PD15-004, and PT15-001)**

Dear Mr. Keyon:

These comments are submitted on behalf of the **San Jose Residents for Responsible Development** ("Residents") regarding the Initial Study and Mitigated Negative Declaration ("IS/MND") prepared by the City of San Jose ("City") for the Cannery Park/Hanover Project ("Project"), proposed by the Hanover Company ("Applicant"). The Project involves several components, including a General Plan Amendment to change the land use designation from Mixed Use Neighborhood to Urban Residential and Combined Industrial/Commercial; a General Plan Text Amendment to the Jackson-Taylor Residential Strategy; a Planned Development Rezoning and Permit to allow for the construction and operation of 403 apartments and up to 5,000 square foot of retail and common amenity space; and a Tentative Map to reconfigure the boundaries of 4 lots into 3 lots, all on an approximately 11.43 gross acre site.

As explained more fully below, the IS/MND 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.* The City may not approve the Project until the City prepares an environmental impact report ("EIR") that adequately analyzes the Project's potentially significant

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impacts, and incorporates all feasible mitigation measures to minimize those 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 Karl Baumheckel, Mark Ross and Conrad Pierce; 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/MND and its supporting documents, we have concluded that the IS/MND does not comply with the basic requirements of CEQA. The IS/MND contains many errors and fails to meet the informational and public participation requirements of CEQA because it does not provide evidence to support the City's environmental conclusions. Moreover, substantial evidence exists that the Project may result in significant impacts, and mitigation and avoidance measures that are provided do not comply with CEQA. These potentially significant impacts are related to air quality, greenhouse gas ("GHG") emissions, hazardous site conditions, noise, and cumulative impacts. Because there is substantial evidence supporting a fair argument that the Project may have one or

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more significant effects on the environment, the City cannot approve an IS/MND and must instead prepare an EIR. All of these issues are discussed more fully below.

We reviewed the IS/MND for the Project with the assistance of experts Matthew Hagemann and Jessie Jaeger from Soil Water Air Protection Enterprise (“SWAPE”),¹ and noise expert Neil Shaw.² Their attached technical comments with copies of their *curricula vitae* are submitted in addition to the comments in this letter. Accordingly, they must be addressed and responded to separately.

III. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.³ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment, but also informed self-government.”⁴ 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.”⁵

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.⁶ 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.⁷

¹ See Letter from Matt Hagemann and Jessie Jaeger (“SWAPE Comments”), to Laura Horton re: Comments on the Cannery Park Hanover Planned Development Zoning & General Plan Amendment, October 15, 2015, **Attachment A**.

² See Letter from Neil Shaw (“Shaw Comments”), to Laura Horton re: PDC15-001/GP15-001 Cannery Park Cannery Park/Hanover – San Jose GP15-001, PDC15-001, PD15-004, and PT15-001, October 13, 2015, **Attachment B**.

³ See CEQA § 21000; CEQA Guidelines § 15002.

⁴ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).

⁵ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁶ See CEQA § 21100.

⁷ CEQA §§21080(d), 21082.2(d); CEQA Guidelines §§ 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*

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.⁸

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.”⁹ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.¹⁰ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹¹

“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

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.

⁸ CEQA § 21064.5 (emphasis added).

⁹ E.g. *Communities For a Better Env’t. v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320.

¹⁰ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹¹ *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”).

might also be reached.”¹² Substantial evidence can be provided by technical experts or members of the public.¹³

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, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.”¹⁴ Deferring formulation of mitigation measures to post-approval studies is generally impermissible.¹⁵ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.¹⁶ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.¹⁷ The Courts have held that simply requiring a project applicant to obtain a future report and

¹² CEQA Guidelines § 15384(a).

¹³ 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.

¹⁴ CEQA Guidelines § 15126.4(a)(2).

¹⁵ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; CEQA § 21061.

¹⁶ *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.

¹⁷ *Id.*

then comply with any recommendations that may be made based upon the report is insufficient to meet the standard for properly deferred mitigation.¹⁸

With respect to this Project, the IS/MND fails to satisfy the basic purposes of CEQA. The IS/MND fails to adequately disclose, investigate, and analyze the Project's potentially significant impacts, and fails to provide substantial evidence to conclude that impacts will be mitigated to a less than significant level. Because the IS/MND lacks basic information regarding the Project's potentially significant impacts, the IS/MND's conclusion that the Project will have a less than significant impact on the environment is unsupported.¹⁹ The City failed to gather the relevant data to support its findings, and substantial evidence shows 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 preparation of an EIR.

A. Greenhouse Gas Impacts

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].”²⁰ The IS/MND finds that the project's GHG emissions will not exceed the thresholds of significance set forth by the Bay Area Air Quality Management District (“BAAQMD”). Thus, the IS/MND concludes that “[t]he project will not have a significant impact due to greenhouse gas emissions, therefore no mitigation is required.”²¹ However, as demonstrated by Mr. Hagemann and Ms. Jaeger, the IS/MND's finding is not supported by substantial evidence. Rather, Mr. Hagemann and Ms. Jaeger conclude that “the Project will have significant unmitigated GHG impacts” and that an EIR “should be prepared to address these issues.”²²

1. GHG Significance Thresholds

BAAQMD's significance criteria for GHG emissions states that a project would have a significant impact if it produces “total emissions of more than 1,100

¹⁸ *Id.*

¹⁹ CEQA § 21064.5.

²⁰ IS/MND, p. 65.

²¹ IS/MND, PDF p. 5.

²² SWAPE Comments, p. 1.

metric tons of CO₂e annually AND more than 4.6 metric tons of CO₂e per service population annually.”²³ In other words, if a project complies with one of the above thresholds, the project will have a less than significant GHG impact. Although the significance criteria cited in the IS/MND is consistent with these BAAQMD thresholds, the Air Quality Assessment (“AQA”) in Appendix A to the IS/MND cites to an incorrect threshold. The AQA states that the BAAQMD threshold for operational CO₂e emissions is 10,000 MT/year, which is not exceeded by the Project.²⁴ This is not the correct threshold.

As Mr. Hagemann and Ms. Jaeger explain, the May 2010 BAAQMD CEQA Guidelines state that for land use development projects such as residential, commercial, industrial, and public land uses and facilities, the threshold of compliance for annual emissions is less than 1,100 MTCO₂e/year.²⁵ A 10,000 MTCO₂e/year threshold is applied to stationary-source projects only, which include land uses that accommodate industrial processes and equipment that emit GHG emissions and require Air District permits.²⁶ Given that this Project will be used for commercial and residential purposes, the applicable GHG threshold is 1,100 MTCO₂e/year. Mr. Hagemann and Ms. Jaeger suggest that this discrepancy be corrected in an updated AQA.²⁷

Despite the incorrect threshold cited in the AQA, the IS/MND acknowledges the correct thresholds of 1,100 MTCO₂e/year and 4.6 MTCO₂e per service population.²⁸ Using these thresholds, the IS/MND concludes that the Project would not exceed the thresholds and thus would have a less than significant GHG impact.²⁹ The IS/MND further states that because the Project will not exceed the BAAQMD thresholds for GHG emissions, the Project will not conflict with any

²³ BAAQMD CEQA Guidelines, p. 2-2, [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines May%202011 5 3 11.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011%205%203%2011.ashx).

²⁴ IS/MND, Appendix A, p. 1.1-16.

²⁵ BAAQMD CEQA Guidelines, p. 2-4, [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Draft_BAAQMD_CEQA_Guidelines May 2010 Final.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Draft_BAAQMD_CEQA_Guidelines_May_2010_Final.ashx).

²⁶ *Id.*

²⁷ SWAPE Comments, p. 8.

²⁸ IS/MND, p. 65.

²⁹ *Id.*

applicable plan, policy, or regulation adopted for the purpose of reducing greenhouse gas emissions.³⁰

Based upon their review of the IS/MND and the Project's AQA, Mr. Hagemann and Ms. Jaeger find that the analysis of the Project's potential GHG impacts is flawed, and that the GHG impact is significant and unmitigated. Thus, Mr. Hagemann and Ms. Jaeger conclude that "[a]n EIR should be prepared to assess the Project's GHG emissions using the correct assumptions, and should implement additional mitigation measures to reduce the impact to less than significant levels."³¹

2. *The IS/MND Uses Unsubstantiated Input Parameters to Estimate Project Emissions*

As explained by Mr. Hagemann and Ms. Jaeger, the IS/MND relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2013.2.2 ("CalEEMod").³² CalEEMod provides recommended default values based on site specific information, such as land use type and equipment. If more specific project information is known, the user can change the default values and input project-specific values, but those changes must be justified by substantial evidence.³³ Mr. Hagemann and Ms. Jaeger reviewed the Project's CalEEMod output files and found that "several of the values inputted into the model are not consistent with information disclosed in the IS/MND."³⁴

First, Mr. Hagemann and Ms. Jaeger find that the values for "Land Use Types" and "Sizes" in the Project's CalEEMod output files are "inconsistent with information disclosed in the IS/MND."³⁵ The IS/MND states that approximately 5,000 square feet of commercial retail space is proposed for the Project site.³⁶ The IS/MND fails to disclose what will occupy the 5,000 square feet of retail space. However, the CalEEMod output file includes 5,500 square feet for "Quality Restaurant" land use type. As explained by Mr. Hagemann and Ms. Jaeger, this

³⁰ *Id.*

³¹ SWAPE Comments, p. 7.

³² CalEEMod website, <http://www.caleemod.com/>.

³³ SWAPE Comments, p. 3.

³⁴ *Id.*

³⁵ *Id.*, at 3 – 4.

³⁶ IS/MND, p. 4.

value is from a previously approved Planned Development Zoning approved by the City in 2011 and “does not reflect the current proposed Project description and thus should be modified.”³⁷ However, because they cannot verify what land use type the 5,000 square feet of retail space will include, they assume that the use of “Quality Restaurant” is appropriate.³⁸

In addition, the Project proposes construction of 739 parking spaces, of which 560 would be in an enclosed structure and 179 would be surface spaces.³⁹ However, as Mr. Hagemann and Ms. Jaeger point out, the CalEEMod output file only included the Enclosed Parking Structure with 531 spaces, which “greatly underestimates the number of parking spaces the Project proposes and results in an underestimation of emissions as a result of the construction of the spaces.”⁴⁰ Furthermore, the CalEEMod output file allocates 8,500 square feet to “User Defined Recreational” land use. However, Table 1 of the IS/MND indicates that this was approved in the previous Planned Development Zoning and is not proposed for the current Project.⁴¹ Therefore, this input is inconsistent with the Project and should be removed. According to Mr. Hagemann and Ms. Jaeger, “[t]he inconsistencies in the proposed ‘Land Uses’ and ‘Sizes’ present a significant issue” and “an updated CalEEMod model must be conducted in order for the air quality assessment to accurately estimate Project emissions.”⁴²

Second, Mr. Hagemann and Ms. Jaeger find that the values inputted for grading are inconsistent with the IS/MND. The CalEEMod output files indicate that during the “Grading” construction phase, approximately 30,000 cubic yards (“CY”) of material would be exported off-site.⁴³ However, Mr. Hagemann and Ms. Jaeger find that “this is incorrect, as it contradicts information provided in the IS/MND.”⁴⁴ The IS/MND states that the Project would require “the grading of approximately 13,000 [CY] of cut and 14,500 CY of fill, requiring approximately 1,500 CY of import.”⁴⁵ Mr. Hagemann and Ms. Jaeger conclude that “to be consistent with the IS/MND, a new CalEEMod model must be conducted that

³⁷ SWAPE Comments, p. 3.

³⁸ *Id.*, at 4.

³⁹ IS/MND, p. 5.

⁴⁰ SWAPE Comments, p. 4.

⁴¹ IS/MND, p. 4.

⁴² SWAPE Comments, p. 4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ IS/MND, p. 6.

accounts for a total of 27,500 CY of material exported from the site, and 1,500 CY of material imported to the site.”⁴⁶

Third, Mr. Hagemann and Ms. Jaeger find that the “Off-Road Equipment List” in the CalEEMod output files, under which a total of 35 pieces of construction equipment will be needed for all six phases of construction, is inexplicably different from the construction equipment listed in the “Trips and VMT” table.⁴⁷ There appears to be a discrepancy of 16 pieces of off-road equipment between the two lists.⁴⁸ Mr. Hagemann and Ms. Jaeger conclude that “[b]ecause the inputs in this table are used to provide the number and length of vehicle trips for workers, vendors, and hauling, the lower equipment count greatly underestimates these numbers and therefore, do not accurately reflect the proposed Project conditions.”⁴⁹ Thus, the IS/MND underestimates the total air pollutants emitted during construction of the Project.⁵⁰

Fourth, the vehicle trips calculated in the model are underestimated. The CalEEMod output files include vehicle trips from the proposed “Condo/Townhouse” land use as the only trips in the emissions model. However, Mr. Hagemann and Ms. Jaeger explain that the Project also proposes to construct 5,000 square feet of retail, which will also generate vehicle trips during operation.⁵¹ These vehicle trips were not included in the emissions model. According to Mr. Hagemann and Ms. Jaeger, “[b]y omitting these trips from the proposed retail land use, the mobile-source emissions during Project operation are greatly underestimated.”⁵²

Upon reviewing the IS/MND’s Traffic Impact Analysis in Appendix G, Mr. Hagemann and Ms. Jaeger find further evidence that the trip calculation in the AQA underestimates emissions from vehicle trips. According to Table 6 of the Traffic Impact Analysis, the Project will result in approximately 2,780 gross daily trips, which includes both the residential and retail land uses.⁵³ However, the CalEEMod output files only include a total of approximately 2,567 daily weekday

⁴⁶ SWAPE Comments, p. 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, at 5.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ IS/MND, Appendix G, p. 25.

trips for the residential land use. This indicates that the model underestimates the Project's total daily trips by approximately 213 trips.⁵⁴ In addition, Mr. Hagemann and Ms. Jaeger find that the CalEEMod output files also decrease the Saturday and Sunday trip rates for the residential land use from the default values of 7.16 and 6.07, respectively, to 4.5.⁵⁵ This reduction is not explained anywhere in the IS/MND or its supporting appendices.

Therefore, Mr. Hagemann and Ms. Jaeger conclude that "the City failed to provide substantial evidence supporting . . . any of the aforementioned flawed outputs in its air quality analysis."⁵⁶

Mr. Hagemann and Ms. Jaeger prepared a new model using more site-specific information and correct modeling parameters. They include the updated CalEEMod output files as an attachment to their letter. When the correct input parameters are used, Mr. Hagemann and Ms. Jaeger find that Project's GHG emissions increase from 3,611 MTCO₂e/year to 4,045 MTCO₂e/year.⁵⁷ As explained further below, the Project will result in significant GHG impacts; thus, Mr. Hagemann and Ms. Jaeger conclude that "an EIR should be prepared to include an air quality analysis that uses correct input parameters."⁵⁸

3. *The IS/MND Overestimates the Service Population Generated by Project*

According to Mr. Hagemann and Ms. Jaeger, "[t]he IS/MND overestimates the service population that the Project will generate, and as a result, the Project's GHG impact is underestimated."⁵⁹ The IS/MND states that "operation of the project would result in the emission of approximately 3.8 MTCO₂e per year per service population" (of 880 people).⁶⁰ The IS/MND calculated the service population 880 people⁶¹ using the City's Parkland Schedule of Fees, Resolution No. 77153.⁶²

⁵⁴ SWAPE Comments, p. 5.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*, at 6.

⁵⁸ *Id.*, at 7.

⁵⁹ *Id.*, at 8.

⁶⁰ IS/MND, p. 65

⁶¹ *Id.*, at p. 99.

⁶² City of San Jose, Parkland Schedule of Fees, Resolution No. 77153,

http://sanjose.granicus.com/MetaViewer.php?view_id=&event_id=1466&meta_id=534627

However, according to Mr. Hagemann and Ms. Jaeger, the City's calculation greatly overestimates the service population.

According to the IS/MND's Traffic Impact Analysis, the Project proposes to construct 47 studios, 231 one-bedroom, and 125 two-bedroom units, totaling to 403 apartment units.⁶³ A residential population of 880 people would assume that approximately 2.18 people will occupy each unit, including the studios and one-bedroom apartments. According to Mr. Hagemann and Ms. Jaeger, this is an "absurd assumption, and results in a drastic overestimation of the number of people likely to occupy these apartments."⁶⁴ They find that a "more reasonable value can be calculated using values disclosed in Table II-12 of the *City of San Jose Housing Element 2014-2023*."⁶⁵

Table II-12 in the *Housing Element* provides a breakdown of average persons per room in all occupied rented units. Using the weighted average of this data, Mr. Hagemann and Ms. Jaeger calculate an average of 0.78 persons per room and estimate a more realistic service population. Mr. Hagemann and Ms. Jaeger note that the "persons per room" occupancy rate includes both bedrooms and living rooms, and excludes bathrooms and kitchens, according to the *Housing Element*.⁶⁶ Thus, they assume that the studio apartments will have one room, the one-bedroom apartments will have two rooms (bedroom and living room), and the two-bedroom apartments will have three rooms (two bedrooms and living room).⁶⁷

Mr. Hagemann and Ms. Jaeger apply the .78 person per room calculation to one-bedroom and two-bedroom apartments, but assume that studio apartments contain one person per apartment. Applying this analysis, they find that the 47 studios apartments would have an occupancy rate of one persons per unit, the 231 one-bedroom apartments would have an occupancy rate of 1.56 persons per unit (0.78×2 rooms), and the remaining 125 two-bedroom apartments would have an occupancy rate of 2.34 persons per unit ($3 \text{ rooms} \times 0.78 \text{ persons}$). Mr. Hagemann

⁶³ IS/MND, Appendix G, p. 67.

⁶⁴ SWAPE Comments, p. 8.

⁶⁵ *Id.*

⁶⁶ *City of San Jose 2014-2023 Housing Element*, City of San Jose, October 2014, p. II-19, http://www.hcd.ca.gov/housing-policy-development/housing-resource-center/plan/he/housing-element-documents/san_jose_5th_draft100314.pdf, **Attachment C**.

⁶⁷ SWAPE Comments, p. 9.

and Ms. Jaeger then conservatively estimate a residential service population of approximately 696 residents.

In addition, Mr. Hagemann and Ms. Jaeger notes that the proposed retail space will also result in employees that must be added to the service population. “Based on a rate of 300 square feet per employee, 5,000 square feet of proposed retail space will generate approximately 17 jobs, resulting in the addition of 17 employees on-site.”⁶⁸ Thus, Mr. Hagemann and Ms. Jaeger conclude that the Project will result in a total service population of 713 people.

Based on this total service population, Mr. Hagemann and Ms. Jaeger calculate the GHG emissions per service population, using the IS/MND’s estimation of 3,531 MTCO₂e/yr, to be 5.0 MTCO₂e/sp/year. In addition, they calculate the GHG emissions per service population, using the revised model of 3,966 MTCO₂e/yr, to be 5.6 MTCO₂e/sp/year. Both of these values exceed the 4.6 MTCO₂e/sp/year significance threshold set forth by BAAQMD (see table from SWAPE letter below).

IS/MND Model	MT CO₂e/year	MT CO₂e/sp/year
GHG Emissions	3,531	5.0
Threshold	1,100	4.6
<i>Exceedance</i>	<i>Yes</i>	<i>Yes</i>
SWAPE Model	MT CO₂e/year	MT CO₂e/sp/year
GHG Emissions	3,966	5.6
Threshold	1,100	4.6
<i>Exceedance</i>	<i>Yes</i>	<i>Yes</i>

Therefore, Mr. Hagemann and Ms. Jaeger conclude that “[s]ince the Project exceeds both thresholds, the Project’s GHG emissions would result in a significant GHG impact.”⁶⁹ They further conclude that “[a]n updated analysis of the Project’s

⁶⁸ *Id*; *Evergreen Area Retail Study*, Office of Economic Development and Planning Department City of San Jose, September 2005, p. 43, <https://www.sanjoseca.gov/documentcenter/view/9771>, **Attachment D**.

⁶⁹ SWAPE Comments, p. 10.

GHG emissions using correct values should be included in an EIR, and additional mitigation, including the development of . . . Greenhouse Gas Reduction Strategy measures, should be identified and implemented in an effort to reduce the Project's impacts to a less-than-significant level."⁷⁰

B. Noise Impacts

Under CEQA, a project may have significant impacts if it would result in "[e]xposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance or applicable standards of other agencies" or "substantial temporary or periodic [or permanent] increase in ambient noise levels in the project vicinity above levels existing without the project,"⁷¹ among other impacts. For the former, the IS/MND concludes that the impacts would be potentially significant unless mitigation is incorporated, and for the latter, the IS/MND concludes the impacts are less than significant. According to Mr. Shaw's review of the IS/MND, the noise impact analysis is flawed for two reasons.

First, the IS/MND failed to disclose all necessary information to enable the public to adequately review the analysis and conclusions. In its discussion of construction noise impacts, the IS/MND states that noise impacts "depend on the noise generated by various pieces of construction equipment, the timing and duration of noise generating activities, and the distance between construction noise sources and noise sensitive receptors."⁷² However, as Mr. Shaw explains, the IS/MND "fails to include details regarding what kind of construction equipment will be necessary" for the Project and thus fails to adequately assess noise impacts.⁷³

In addition, Mr. Shaw notes that the IS/MND includes an aerial map showing a property identified on Figure 4 as "Japantown Associates, LLC."⁷⁴ However, "[t]he [IS/MND] fails to disclose the activities in the Japantown Associates property."⁷⁵ Given the close proximity of the Japantown Associates site to the Project, Mr. Shaw states that "the City of San Jose is required to disclose and

⁷⁰ *Id.*

⁷¹ IS/MND, p. 90.

⁷² *Id.*, at 94.

⁷³ Shaw Comments, pp. 2 – 3.

⁷⁴ IS/MND, pp. 11 – 15.

⁷⁵ Shaw Comments, p. 2.

analyze all direct, indirect, and cumulative impacts on the proposed project's residential units.”⁷⁶

Second, the IS/MND did not adequately analyze and mitigate all potentially significant noise impacts. The IS/MND concludes that “[r]esidential uses on the project site would be exposed to exterior noise levels exceeding the City’s exterior noise standards and interior noise levels could exceed the City’s interior noise level goal of 45 dBA DNL” and “[c]onstruction noise could exceed ambient noise levels by up to 15 dBA when activities are located nearest to receptors.”⁷⁷

The IS/MND then provides mitigation measures, discussed further below, and states that the Project will be in compliance with City’s General Plan and Noise Code.⁷⁸ The City’s General Plan requires:

[N]oise studies for land use proposals where known or suspected loud intermittent noise sources occur which may impact adjacent existing or planned land uses. For new residential development affected by noise from heavy rail, light rail, BART or other single-event noise sources, implement mitigation so that recurring maximum instantaneous noise levels do not exceed 50 dBA Lmax in bedrooms and 55 dBA Lmax in other rooms.⁷⁹

Mr. Shaw notes that the Lmax for location ST-2 is given in Table 5, Summary of Short-Term Noise Measurement Data of Appendix F, as “82,” which can be interpreted as 82 dBA.⁸⁰ He explains: “This means the building envelope would need to mitigate the noise by at least 32 dB in bedrooms and by at least 27 dB in other rooms for this exposure. The [IS/MND] fails to provide adequate quantitative analysis or recommended mitigation measures to demonstrate how this goal is to be achieved.”⁸¹

⁷⁶ *Id.*

⁷⁷ IS/MND, p. 92.

⁷⁸ *Id.*, at 83.

⁷⁹ *Id.*, at 86.

⁸⁰ Shaw Comments, p. 2.

⁸¹ *Id.*, at 3.

Furthermore, Mr. Shaw states that “the impact of the compressor noise from the Gordon Biersch brewery appears to be 72 to 74 dBA DNL” and the “reported Lmax . . . at this location can be higher than 90 dBA.”⁸² Thus, Mr. Shaw finds that “[t]o meet the 50 dBA Lmax limit for bedrooms means the building envelope needs to provide at least 40 dB or more of mitigation. The [IS/MND] fails to provide any substantial evidence that this level of mitigation is being incorporated into the project; therefore, the impact is still potentially significant and must be evaluated in an EIR.”⁸³ Mr. Shaw further concludes that “the project is inconsistent with the General Plan.”⁸⁴

The IS/MND proposes a list of several mitigation measures to address impacts from noise exposure of the Project residents and noise impacts from construction of the Project. However, Mr. Shaw finds that these measures fail to reduce the Project’s noise impacts to below a level of significance.

Regarding noise exposure of Project residents, the IS/MND concludes that the impact is less than significant after mitigation.⁸⁵ However, Mr. Shaw finds that this conclusion “is not supported.”⁸⁶ Measure MM NOI-1 requires several mitigation measures be incorporated into the Project’s final design plans to reduce interior noise levels to 45 dBA DNL.⁸⁷ However, Mr. Shaw finds that “these measures do not ensure the interior noise levels will also meet the 50 dBA Lmax criteria for bedrooms.”⁸⁸ The IS/MND admits the levels at the nearest residence adjacent to the proposed project can be as high as 84 dBA Leq.⁸⁹ Mr. Shaw notes that no time period for the Leq measurement is provided, but he assumes that one-hour Leqs are implied.⁹⁰ Mr. Shaw states that “the longer the Leq measurement period, the more the impact of intermittent spikes and impulse sounds are diminished and so the level of the maximum sounds, Lmax, are ‘hidden.’”⁹¹ According to Mr. Shaw, a “continuous barrier of 10’ of sufficient surface weight will only provide mitigation of about 6 dB at the low frequencies, so the impact with

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ IS/MND, p. 90.

⁸⁶ Shaw Comments, p. 3.

⁸⁷ IS/MND, p. 92.

⁸⁸ Shaw Comments, p. 3.

⁸⁹ IS/MND, p. 94.

⁹⁰ Shaw Comments, p. 3.

⁹¹ *Id.*, at 4.

mitigation will be about 78 dBA, which will still exceed the 55 dB Leq limit for noise levels at the property line and also exceed the 50 dBA Lmax criteria for bedrooms in existing residential units.”⁹² As such, Mr. Shaw finds that the City’s findings for this impact are “unsupported.”⁹³

Regarding construction impacts, Mr. Shaw finds that the conclusion that this impact is less than significant with mitigation is “unsupported.” As explained above, the IS/MND does not provide adequate detail on the equipment necessary for construction, thus thwarting a full review under CEQA. Mr. Shaw states that according to the Envision San José 2040 General Plan Comprehensive Update Environmental Noise Assessment, “[t]he impact for all stages of construction for domestic housing is greater than 80 dBA Leq. The noise impact for individual pieces of construction equipment varies from 72 dBA to 94 dBA and the Lmax level can be appreciably higher.”⁹⁴ Thus, he states that “[g]iven the [IS/MND’s] failure to disclose the type of equipment needed . . . the impact of construction activities on the residences adjacent to the proposed project is not adequately analyzed in the [IS/MND] . . .”⁹⁵

Nevertheless, the IS/MND proposes several mitigation measures to address construction impacts. Mr. Shaw finds these measures to be “vague, ineffective, or unenforceable and [they] cannot be relied upon to reduce impacts.”⁹⁶ According to Mr. Shaw, measure NOI-2(b) is “overly optimistic as the grading and other activities for the proposed project will occur prior to framing and exterior wall installation, and this requires the construction adjacent to the existing residential units be performed first.”⁹⁷ Given the fact that details regarding the order of construction and schedule are unknown at this time, Mr. Shaw finds that the “mitigation measure may not be practical or be implemented.”⁹⁸ Thus, the IS/MND has “failed to provide all the information necessary to evaluate whether this measure is actually effective and enforceable.”⁹⁹

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*, at 3.

⁹⁵ *Id.*

⁹⁶ *Id.*, at 4.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

In addition, Mr. Shaw finds that the IS/MND has “failed to demonstrate the effectiveness and enforceability of measures NOI-2(c)-(f) because it provides no quantitative analysis for the level of mitigation using this equipment, nor examples of “quiet” equipment that the project would need to use.”¹⁰⁰ Furthermore, Mr. Shaw finds that measure NOI-2(h) “is not specific enough and does not mitigate the potentially significant impact to less than significant because to achieve 10 dB of mitigation would require a continuous noise barrier of sufficient surface weight and more than 25’ in height,”¹⁰¹ which is not discussed in the measure.

Therefore, Mr. Shaw concludes that “a fair argument still exists that the noise impacts remain potentially significant and an EIR must be prepared.”¹⁰²

C. Hazards

Under CEQA, a project may have a significant impact if it would “[c]reate a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials” or “[c]reate 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.”¹⁰³

According to the IS/MND, groundwater beneath the Project site is known to be contaminated with volatile organic compounds (“VOCs”), including trichloroethylene (“TCE”) and tetrachloroethylene (“PCE”).¹⁰⁴ The IS/MND does provide an analysis of, and mitigation for, the potential for vapor intrusion from the presence of VOCs in soil and groundwater. According to Mr. Hagemann and Ms. Jaeger, however, “[t]he IS/MND inadequately mitigates impacts associated with the contaminated shallow groundwater.”¹⁰⁵ Specifically, the IS/MND fails to analyze potential impacts from these contaminants in the context of dewatering and groundwater discharge. In addition, the IS/MND fails to adequately analyze and mitigate the risk of worker and public exposure to these contaminants. Thus, for these reasons, the IS/MND fails to comply with CEQA.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*, at 4 – 5.

¹⁰³ IS/MND, p. 68

¹⁰⁴ *Id.*, at 66.

¹⁰⁵ SWAPE Comments, p. 2.

1. *Dewatering Impacts*

The IS/MND fails to comply with CEQA because it fails to sufficiently describe the Project and analyze and mitigate potentially significant impacts related to dewatering. According to the IS/MND, the historic high groundwater depth is less than 10 feet in the area of the Project.¹⁰⁶ The IS/MND states that “[d]ewatering of utility trenches and/or basement excavation below a depth of seven feet may be required, in addition to subgrade stabilization and waterproofing beneath some slabs.”¹⁰⁷ However, the IS/MND fails to further describe the Project’s dewatering requirements and specific mitigation measures to prevent any impacts resulting from dewatering and disposal of contaminated groundwater. The IS/MND merely states that “[t]hese conditions can be minimized through standard engineering methods identified in the geotechnical report,”¹⁰⁸ and generally cites to City Policy and the state-wide Construction General Permit, stating:

The project will follow the state-wide Construction General Permit for guidance on construction-period pumped groundwater discharges if needed. Any post-construction groundwater would discharge to on-site landscaped areas or storm water treatment features large enough to accommodate the volume.¹⁰⁹

As Mr. Hagemann and Ms. Jaeger’s point out in their comments, the IS/MND “does not recognize that ‘pumped groundwater discharges’ may contain VOCs, including PCE and TCE.”¹¹⁰ Furthermore, Mr. Hagemann and Ms. Jaeger find that the IS/MND and appendices include “no discussion about how the contaminated groundwater beneath the Project site will be handled and contained to prevent release of TCE and PCE to the environment.”¹¹¹ Mr. Hagemann and Ms. Jaeger state that “[f]ailure to properly handle contaminated groundwater could result in release of contaminants to adjacent waterways, possibly endangering habitat and human health.”¹¹²

¹⁰⁶ IS/MND p. 61.

¹⁰⁷ *Id.*, at 75.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ SWAPE Comments, p. 3.

¹¹¹ *Id.*, at 2.

¹¹² *Id.*

Mr. Hagemann and Ms. Jaeger conclude that the IS/MND's general reference to the California Construction General Permit does not adequately address this issue. Instead, they find that "specific measures to properly handle and contain VOCs, including TCE and PCE should be included in an EIR. Such measures would include storage of pumped groundwater in tanks for testing and subsequent disposal."¹¹³

Dewatering from any project must be disclosed and any potentially significant impacts from dewatering activities must be analyzed in an EIR. "The improper handling of contaminated water could result in a potentially significant impact that is unanalyzed and unmitigated in the IS/MND."¹¹⁴ Therefore, Mr. Hagemann and Ms. Jaeger conclude that "an EIR should be prepared and should include measures for proper disposal of the water based on analytical results, including discharge to the sewer under permit from the City of San Jose."¹¹⁵

2. *Worker and Public Health*

Mr. Hagemann and Ms. Jaeger find that "[w]orkers involved in excavation of the basement and utility trenches for the Project may be exposed to contaminated groundwater when shallow groundwater is exposed."¹¹⁶ The workers may be exposed to TCE and PCE "through dermal contact and through inhalation."¹¹⁷ Mr. Hagemann and Ms. Jaeger point to "strong evidence that TCE can cause kidney cancer in people and some evidence for trichloroethylene-induced liver cancer and malignant lymphoma."¹¹⁸ Furthermore, "[s]tudies in humans suggest that exposure to PCE may lead to a higher risk of getting bladder cancer, multiple myeloma, or non-Hodgkin's lymphoma."¹¹⁹

The public in general is also at risk of exposure because "[w]orkers may also cause health risks to the public when leaving the site wearing contaminated and stained clothing. When coming into contact with on-site workers, family members

¹¹³ *Id.*, at 3.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*, at 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.*, citing <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=172&tid=30>, **Attachment E**.

¹¹⁹ *Id.*, citing <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=264&tid=48>, **Attachment F**.

and others may be exposed to health risks when touching contaminated clothing and may inhale vapors when in contact with on-site workers.”¹²⁰

The IS/MND provides no mitigation to protect workers from exposure to TCE and PCE. The IS/MND merely provides that the Project will be in conformance with adopted City plans and policies, including EC-7.5 which states only: “Disposal of groundwater from excavations on construction sites shall comply with local, regional, and state requirements.”¹²¹ However, the IS/MND’s reliance on regulations and laws outside of CEQA to mitigate this 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.”¹²² 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.”¹²³ 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 noise levels would likely comply with local noise standards, “compliance with the ordinance does not foreclose the possibility of significant noise impacts.”¹²⁴ The court ordered the County to prepare an EIR. The ruling demonstrates the

¹²⁰ SWAPE Comments, p. 2.

¹²¹ IS/MND, p. 67.

¹²² *Communities for a Better Env’t v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.

¹²³ *Id.*

¹²⁴ *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.

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 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 or 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.¹²⁵ 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.¹²⁶ 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.”¹²⁷ 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.”¹²⁸

Similarly, the IS/MND for this Project indicates that the provisions of the outside laws and regulations would reduce the risks related to disposal of

¹²⁵ *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 650.

¹²⁶ *Id.*, at 651.

¹²⁷ *Id.*, at 656.

¹²⁸ *Id.*

groundwater without actually analyzing the impact.¹²⁹ 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.¹³⁰ 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 disposal of contaminated groundwater.

Furthermore, according to Mr. Hagemann and Ms. Jaeger, “[t]his City policy is mute on how the health and safety is to be protected from TCE and PCE, both of which are likely human carcinogens.”¹³¹ Thus, even if the City did incorporate compliance with the law as mitigation, it would not necessarily address the worker and public health issue. Therefore, Mr. Hagemann and Ms. Jaeger find that “[e]xposure of workers to the contaminated groundwater constitutes a potentially significant impact that is unanalyzed and unmitigated in the IS/MND; thus, an EIR should be prepared to include mitigation to protect workers from exposure to TCE and PCE during construction, including provisions for VOC vapor monitoring, protective clothing, and respiratory equipment.”¹³²

D. Cumulative Impacts

The City is required to disclose and analyze the cumulative impacts of a project “when the project’s incremental effect is cumulatively considerable.”¹³³ EIRs and IS/MNDs are required to discuss significant impacts that the proposed project will cause in the area that is affected by the project.¹³⁴ “This area cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting.”¹³⁵

The Guidelines specifically direct the City to “define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for

¹²⁹ IS/MND, p. 22.

¹³⁰ *Id.*, at 29.

¹³¹ SWAPE Comments, p. 2.

¹³² *Id.*

¹³³ 14 CCR § 15130(a).

¹³⁴ *Bakersfield Citizens*, 124 Cal.App.4th at 1216 (emphasis added); see 14 CCR § 15126.2(a).

¹³⁵ *Bakersfield Citizens*, 124 Cal.App.4th at 1216.

the geographic limitation used.”¹³⁶ The courts have held that it is vitally important that CEQA documents avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them.¹³⁷ A cumulative impacts discussion “should be guided by the standards of practicality and reasonableness,” but several elements are deemed “necessary to an adequate discussion of significant cumulative impacts” including “[a] list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency.”¹³⁸

The IS/MND concludes that the Project would have no significant cumulative impacts.¹³⁹ The IS/MND’s conclusion is flawed for three reasons.

First, the IS/MND relies on an overly narrow list of cumulative projects with which to compare Project impacts on traffic, noise, air quality, and other impacts, thereby omitting from its analysis impacts from other relevant cumulative projects in the region. Specifically, the cumulative analysis failed to consider the following proposed projects in the Project vicinity:

- Japantown Corporation Yard development project, which includes 600 residential units, up to 25,000 square feet of commercial space, and a private community center on a 5.25 gross acre site located at 696 North 6th Street, just a few blocks from the Project site.
- North San Pedro Tower 3 Residential Project, which is an 18-story high rise with up to 313 residential units, up to 2,000 square feet of ground floor retail, and a three-level above grade parking garage on an approximately 1.52 gross acre site within 1.5 miles of the Project site.
- 45 N. San Pedro Residential (The Modera), which includes demolishing a 11,969 square foot commercial/retail building and constructing an 8-story building with up to 201 residential units, approximately 12,000 square feet of ground floor commercial space, a four level parking

¹³⁶ 14 CCR § 15130(b)(3); *Bakersfield Citizens*, 124 Cal.App.4th at 1216.

¹³⁷ PRC § 21061.; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79. See also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723.

¹³⁸ 14 CCR § 15130(b); *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 928-29.

¹³⁹ IS/MND, p. 125.

- garage (including two levels below grade) on a 0.98 acre project site less than 2 miles from the Project site.
- Post & San Pedro Residential Tower Project, which is a 20-story high rise building with up to 205 residential units, up to 10,900 square feet of ground floor retail, and a four-story parking garage connected to an existing parking garage to the north, all on a 0.47 acre site within 2 miles of the Project site.
- First & Reed Mixed Use Project, which includes the construction of a seven-story, 105 unit apartment building with 2,400 square feet of ground floor retail on an approximately 0.57 gross acre site within 3 miles of the Project site.

There are likely several other projects in the area that were not included in the cumulative analysis. Although the long-term traffic analysis does analyze some proposed projects in the City requiring General Plan amendments and land use changes, it arbitrarily omits any reference to several other closer development projects. Furthermore, the IS/MND fails to analyze these projects in the context of air quality and public health. San Jose is experiencing rapid development, and the City cannot ignore the many cumulative impacts on traffic, air quality, and public health that will result.

Second, the DEIR's cumulative air quality impacts analysis is impermissibly narrow because it fails to analyze projects within the entire San Francisco Bay Area Air Basin and fails to adequately analyze the Project's cumulative contribution. In order to analyze cumulative air emissions, the IS/MND must assess whether the Project, *in conjunction with other reasonably foreseeable projects*, results in air emissions that exceed applicable thresholds.¹⁴⁰ In particular, the City has a duty to analyze the cumulative increase in pollutants for which the Bay Area is listed as nonattainment for the state and federal ambient air quality standards.

As acknowledged in the IS/MND, the U.S. Environmental Protection Agency has classified the region as a nonattainment area for the 8-hour O₃ standard and

¹⁴⁰ 14 CCR 15130(a)(1); 14 CCR 15065(a)(1), (3); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (EIR must disclose an impact as significant when it exceeds a duly adopted CEQA significance threshold); *CBE v. CRA*, 103 Cal.App.4th at 110-111; DEIR AQ Appendix, p. 47 (acknowledging that Project may have cumulatively considerable impact on air quality if Project emissions, "in combination with the emissions from other proposed or reasonably foreseeable future projects, are in excess of established thresholds.").

the 24-hour PM_{2.5} standard.¹⁴¹ However, the IS/MND appears to only assess existing stationary sources within 1,000 feet of the proposed project site¹⁴² for cumulative health risk on residents and then concludes that “the construction emissions would have a less-than-significant impact with respect to cumulative community risk caused during project construction since single-source and cumulative and cancer risk and hazard index to proposed and existing sensitive receptors would be below the BAAQMD thresholds.”¹⁴³

In addition, without further analysis on the Project’s contribution to the Bay Area’s nonattainment status, the IS/MND concludes that “[t]he project will not result in a cumulatively considerable net increase of any criteria pollutant for which the project region is in non-attainment under an applicable federal or state ambient air quality standard since the project size is well below BAAQMD screening levels.”¹⁴⁴ However, this conclusion was based on the erroneous premise that the Project would be considered to have a cumulative impact only if the Project’s own contribution exceeds BAAQMD screening levels. The result is a dismissal of the Project’s cumulative air quality impacts as insignificant by basically claiming that they are a drop in a bucket. This approach has been rejected by the Courts, and fails to comply with CEQA’s requirement that a project mitigate impacts that are “cumulatively considerable.”¹⁴⁵

The IS/MND’s air quality analysis fails to even compare the Project’s construction emissions with any other regional projects and fails to adequately analyze and mitigate for the Project’s cumulative impacts. Rather, the IS/MND simply states that its own emissions will not result in cumulative impacts because they are below BAAQMD thresholds. This lack of analysis is precisely what the courts have rejected. The City must prepare an EIR, which properly analyzes and mitigates the Project’s cumulative air quality impacts.

¹⁴¹ IS/MND, p. 28.

¹⁴² *Id.*, at 38.

¹⁴³ *Id.*, at 39.

¹⁴⁴ *Id.*

¹⁴⁵ PRC § 21083(b)(2); 14 CCR § 15130; *Friends of Oroville v. City of Oroville* (2013) 219 Cal. App. 4th 832, 841-42; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 721.

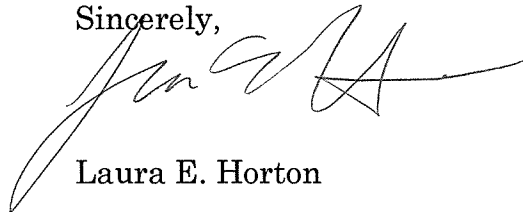
IV. CONCLUSION

The IS/MND fails to adequately describe the Project and fails to adequately analyze and mitigate the Project's potentially significant impacts related to air quality, GHG emissions, noise, hazards, worker and public health, and cumulative impacts. CEQA requires the City to prepare an EIR if there is a fair argument that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment.¹⁴⁶ As discussed in detail above, substantial evidence supports a fair argument that the Project may result in significant adverse impacts that were not adequately analyzed or mitigated in the IS/MND.

We urge the City to fulfill its responsibilities under CEQA by withdrawing the IS/MND and preparing an EIR for the Project. In this way, the City and the public can ensure that all adverse impacts of the Project are mitigated to the full extent feasible and required by law.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura E. Horton', written over the printed name.

Laura E. Horton

LEH:ric

Attachments

¹⁴⁶ CEQA Guidelines § 15063(b)(1).