

Comment Letter C

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VIA E-MAIL AND U.S. MAIL

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**Re: Comments on the Draft Environmental Impact Report for the
Great Oaks Mixed Use Project, SCH No. 2013032047**

Dear Mr. Keyon:

We are writing on behalf of **San Jose Residents for Responsible Development** regarding the Draft Environmental Impact Report ("DEIR") prepared for the Great Oaks Mixed Use Project ("Project"). The Project site is approximately 76 acres located adjacent to and just north of State Route 85 and south of Monterey Highway. The Project includes: (1) amending the General Plan Land Use/Transportation Diagram to change the land use designation on portions of the Project site from Combined Industrial/Commercial to Mixed Use Neighborhood and Urban Residential; (2) rezoning the Project site to A(PD) Planned Development; (3) development of up to 154,000 square feet of commercial uses, 260,000 square feet of office uses and 720 residential units; and (3) updating the Edenvale Area Development Policy to reflect the proposed development on-site and the redistribution of the existing entitlements on-site to other locations in Edenvale Area 2. The DEIR addresses the proposed amendments to the City's General Plan and Zoning Ordinance at a program level of detail and the proposed commercial, office and residential uses at a project level.

As explained more fully below, the DEIR does not comply with the requirements of the California Environmental Quality Act (“CEQA”). The City of San Jose (“City”) may not approve the Project until the errors in the DEIR are corrected and a revised document is recirculated for public review and comment.

I. STATEMENT OF INTEREST

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 impacts of the Project. **The association includes: City of San Jose residents Mark Ross, Daniel Kiefer, Eddie Maxie, Conrad Pierce, Jeffrey Funston, Michael Smith and William Serpa; 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 unions live, work, recreate and raise their families in Santa Clara County, including the City of San Jose. They would be directly affected by the Project’s environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. 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 THE DEIR’S INFORMATIONAL AND ANALYTICAL DEFICIENCIES

As these comments will demonstrate, the DEIR fails to comply with the requirements of CEQA and may not be used as the basis for approving the Project. The DEIR fails in significant aspects to perform its function as an informational document that is meant “to provide public agencies and the public in general with

detailed information about the effect which a proposed project is likely to have on the environment” and “to list ways in which the significant effects of such a project might be minimized.”¹

Substantial evidence indicates that the Project is likely to cause significant adverse impacts. The DEIR is legally defective due to its failure to adequately identify, evaluate and mitigate these potentially significant impacts. The errors and deficiencies of the DEIR include the following:

1. The DEIR fails to adequately disclose, analyze and mitigate potentially significant impacts from the presence of dieldrin in Project site soils;
2. The DEIR fails to adequately disclose, analyze and mitigate potentially significant impacts from the presence of arsenic on the Project site;
3. The DEIR fails to adequately disclose, analyze and mitigate potentially significant impacts from total petroleum hydrocarbons on the Project site;
4. The DEIR fails to adequately disclose, analyze and mitigate potentially significant impacts from unanalyzed soil that is stockpiled on the Project site;
5. The DEIR completely fails to disclose, analyze and mitigate potentially significant impacts from measures proposed to mitigate significant impacts from contaminated soil;
6. There is no substantial evidence to support the conclusion in the DEIR that the Project’s toxic air contaminant emissions would result in less than significant health impacts because the City relied on an outdated air dispersion model, incorrect emission rate and inflated source height;
7. Substantial evidence shows that the Project would result in unidentified significant health impacts to sensitive receptors from diesel particulate matter emissions; and

¹ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391.

8. The DEIR fails to disclose the Project's inconsistencies with the City's General Plan's goals and policies for protecting citizens from toxic air contaminants and soil contaminants.

The DEIR must be withdrawn and revised to address these errors and deficiencies. Because of the substantial omissions in the information disclosed in the DEIR, revisions necessary to comply with CEQA will be, by definition, significant. In addition, substantial revision will be required to address impacts that were not disclosed in the DEIR. Because these revisions are significant, the revised DEIR will need to be recirculated for additional public review and comment.²

We prepared our comments regarding the DEIR analyses with the assistance of technical experts Mr. Matthew Hagemann and Mr. Anders Sutherland. Mr. Hagemann's and Mr. Sutherland's comments are attached to this letter as Attachment A, along with their qualifications.

III. CEQA REQUIRES THE DISCLOSURE OF ALL POTENTIALLY SIGNIFICANT PROJECT IMPACTS AND THE INCORPORATION OF ALL FEASIBLE MITIGATION MEASURES NECESSARY TO REDUCE SUCH IMPACTS TO BELOW A LEVEL OF SIGNIFICANCE

CEQA has two basic purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.³ Except in certain limited circumstances, CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR").⁴ An EIR's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, an EIR "protects not only the environment but also informed self-government."⁵

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."⁶ CEQA requires an EIR

² Pub. Resources Code § 21091.1; 14 Cal. Code Regs. ("CEQA Guidelines") § 15088.5.

³ CEQA Guidelines § 15002(a)(1).

⁴ See, e.g., Pub. Resources Code § 21100.

⁵ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

to disclose all potential direct and indirect, significant environmental impacts of a project.⁷ In addition, an adequate EIR must contain the facts and analysis necessary to support its conclusions.⁸

The second purpose of CEQA is to require public agencies to avoid or reduce environmental damage when possible by requiring appropriate mitigation measures and through the consideration of environmentally superior alternatives.⁹ If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹⁰ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹¹ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

As discussed in detail below, the DEIR fails to meet either of these two key goals of CEQA. The DEIR fails to adequately and completely describe the environmental setting against which to measure the Project's potentially significant impacts and fails to adequately disclose, evaluate and mitigate all potentially significant environmental impacts of the Project.

IV. THE DEIR FAILS TO ADEQUATELY DISCLOSE, EVALUATE AND MITIGATE SIGNIFICANT IMPACTS FROM CONTAMINATED SOIL AND FAILS TO SUPPORT ITS IMPACT FINDINGS WITH SUBSTANTIAL EVIDENCE

Hazards and hazardous materials expert Matt Hagemann reviewed the DEIR and concluded that it fails to adequately disclose, evaluate and mitigate potentially

⁶ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

⁷ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

⁸ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

⁹ CEQA Guidelines § 15002(a)(2)-(3); see also, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

¹⁰ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹¹ Pub. Resources Code §§ 21002-21002.1.

significant health risks from contaminated soils.¹² Residual pesticide contamination was not adequately assessed and may pose risks to construction workers, nearby residents, future residents and the public. Additionally, the Project site may be contaminated from the presence of underground and above ground storage tanks, a condition not adequately evaluated in the DEIR. Finally, the DEIR fails to adequately analyze impacts from potentially contaminated soil that is stockpiled on the Project site. Additional investigation of contamination on the Project site is necessary and a revised DEIR must be prepared to adequately address these issues and to identify appropriate mitigation.

A. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Potentially Significant Impacts from the Presence of Dieldrin in Project Site Soils

The Project site was used for agriculture for more than sixty years.¹³ To evaluate potential contamination on the Project site from past pesticide use, soil sampling was conducted in 2000 and 2007. The 2000 sampling results showed dieldrin, an organochlorine pesticide, present in Project soils at concentrations ranging from 0.049 to 0.086 mg/kg, which exceed the residential California Human Health Screening Level (“CHHSL”) of 0.035 mg/kg.¹⁴ The 2007 sampling results showed dieldrin at a concentration of 0.031 mg/kg, which is just below the CHHSL.¹⁵

Mr. Hagemann reviewed the sampling results, DEIR and Project documents. Based on his review and experience in the field of hazardous materials, he concluded that there is insufficient evidence to support the conclusion in the DEIR that “it is unlikely that the presence of dieldrin in shallow soil at the site would pose a significant risk to human health.”¹⁶ Mr. Hagemann provides two reasons for his conclusion.

¹² See **Attachment A**: Letter from Matt Hagemann and Anders Sutherland re: Comments on the Great Oaks Mixed Use Project, June 25, 2014.

¹³ DEIR, p. 188.

¹⁴ **Attachment A**, p. 2.

¹⁵ *Id.*

¹⁶ DEIR, p. 195; **Attachment A**, pp. 2-3.

First, Mr. Hagemann notes that despite evidence that dieldrin is present in Project soils in concentrations that exceed the CHHSL, no removal of contaminated soil occurred.¹⁷ This is concerning because, as Mr. Hagemann explains, organochlorine pesticides such as dieldrin can persist in soil for hundreds of years and, according to the U.S. Environmental Protection Agency, are probable human carcinogens.¹⁸ Most uses of dieldrin were banned from use in the U.S. almost 30 years ago because of its harmful effects on humans and the environment. Mr. Hagemann explains that “[i]n humans, dieldrin decreases the effectiveness of the immune system, may increase infant mortality, reduces reproductive success may cause cancer and birth defects, and damages the kidneys.”¹⁹ Therefore, in Mr. Hagemann’s opinion, the concentrations of dieldrin present on the Project site may cause significant health impacts to construction workers, future residents and tenants, and the public.²⁰

Second, the City’s conclusion that the Project would result in a less than significant impact from dieldrin contamination is unsupported because there was no regulatory oversight of the sampling conducted in 2000 and 2007. Further, there is no indication that sampling was conducted in accordance with regulatory guidance, such as the California Department of Toxics Substances Control (“DTSC”) Interim Guidance for Sampling Agricultural Properties.²¹ Mr. Hagemann explains that to adequately determine and disclose the extent of soil contamination on the Project site, and the health impacts that may result from the contamination, soil sampling should be conducted with regulatory supervision and in accordance with regulatory guidance.²²

In his comments, Mr. Hagemann also provides that the City’s proposed condition to require remediation of dieldrin contaminated soils on the Project site prior to the issuance of building permits is inadequate to reduce the Project’s impacts from contaminated soil to a less than significant level. Mr. Hagemann explains that,

¹⁷ **Attachment A**, p. 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*, pp. 2-3.

²¹ *Id.*

²² *Id.*, pp. 1-5.

given the past agricultural use of the site, the existing evidence of soil contamination, and the fact that collection of samples were conducted without regulatory oversight and without reference to regulatory guidance...[a]dditional sampling must be conducted now, prior to Project approval, under regulatory oversight and in accordance with regulatory guidance. The sampling results must be included in a revised DEIR that is circulated for public review...Only with regulatory oversight can the adequacy of the sampling be ensured and the potential health risks from the presence of dieldrin be adequately evaluated and mitigated.²³

Because there is no evidence that prior sampling was sufficient to determine the extent of dieldrin contamination in Project site soils, the DEIR does not (and could not) fully analyze the Project's potentially significant impacts from dieldrin contamination. Further, the DEIR does not propose mitigation that would reduce significant health impacts to construction workers, future residents and tenants, and the public from dieldrin contamination to a less than significant level. Thus, the Project's public health impacts from the presence of dieldrin on the site are significant and unmitigated. A revised DEIR must be prepared to include a full evaluation of health risks from the presence of dieldrin on the Project site.

B. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Potentially Significant Impacts from the Presence of Arsenic in the Soils on the Project Site

The DEIR recognizes that arsenic present in Project site soils poses a risk to construction workers, future residents and the public. The DEIR states that “[e]levated levels of arsenic were found in soils in the agricultural buildings area and within the orchard area southeast of the buildings.”²⁴ The DEIR considers these elevated levels of arsenic to be a significant impact.²⁵

To mitigate the Project's significant impact from arsenic contamination, the City proposes that, “prior to building permit issuance, the project proponent shall have a qualified hazardous materials consultant complete additional soil sampling as needed *to define the specific areas of arsenic contamination on-site and evaluate*

²³ *Id.*, p. 2.

²⁴ DEIR, p. 196.

²⁵ *Id.*

*human health risks associated with it.*²⁶ Then, “[p]rior to site development, remedial measures required to reduce human health risks to future site occupants from exposure to concentrations of arsenic above background levels shall be implemented...”²⁷ The DEIR includes “possible remedial measures,” such as excavation and disposal of contaminated soil at an off-site facility, and the use of engineering and administrative controls, like consolidation and capping of on-site soil and restricting certain uses of the site.²⁸ To address significant impacts from arsenic contaminated soil during construction, the DEIR requires preparation of a site management plan and/or health and safety plan prior to issuance of a Planned Development permit, which may include best management practices such as dust suppression measures.²⁹

Mr. Hagemann reviewed the City’s analysis and mitigation for the Project’s potentially significant impacts from arsenic contamination. He concludes that the analysis and mitigation are inadequate and unsupported, and that the arsenic present on the Project site poses significant, unmitigated health impacts to construction workers and the public.

In his comments, Mr. Hagemann provides that arsenic is a known human carcinogen. Exposure to even low concentrations of arsenic can cause nausea, vomiting, decreased production of red and white blood cells, abnormal heart rhythm and damage to blood vessels.³⁰

In both 2000 and 2007 arsenic was detected on the Project site in concentrations that exceed the CHHSL.³¹ Accordingly, a Phase I Environmental Site Assessment Update prepared for the Project site states that additional soil sampling should be conducted to better evaluate the presence of arsenic in site soils, that a corrective action plan be developed and approved by a regulatory agency, and that a plan be prepared to address potential exposure to elevated arsenic concentrations during construction.³² Yet, as Mr. Hagemann explains, **none** of these actions have been taken. Instead, the City proposes that the Project applicant

²⁶ *Id.* (emphasis added).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*, p. 197.

³⁰ **Attachment A**, p. 3.

³¹ *Id.*

³² *Id.*

perform these measures *after Project approval* as mitigation for the Project's significant impacts from arsenic contamination.³³ The City's approach completely flies in the face of CEQA's requirements.

Under CEQA, the existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.³⁴ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.³⁵

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago.³⁶ Today, the courts are clear that, "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant effects can be determined."³⁷ In fact, it is:

a central concept of CEQA, widely accepted by the courts, that the significance of a project's impacts cannot be measured unless the DEIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.³⁸

The DEIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of Project impacts.³⁹ Section 15125 of the CEQA

³³ DEIR, p. 196.

³⁴ *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 316.

³⁵ CEQA Guidelines § 15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

³⁶ *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.

³⁷ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

³⁸ *Save Our Peninsula Comm. V. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 1109, 1121-22.

³⁹ *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1121-22.

Guidelines provides that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”⁴⁰ This level of detail is necessary to “permit the significant effects of the Project to be considered in the full environmental context.”⁴¹

Here, the City proposes that the Project applicant conduct soil sampling *after Project approval* “to define the specific areas of arsenic contamination on-site and evaluate human health risks associated with it.”⁴² Thus, the City could not have determined, during the environmental review process, the extent of the Project’s significant health impacts to construction workers and the public from arsenic contaminated soil present on the Project site. Further, the City cannot conclude that proposed measures would reduce the Project’s impacts to a less than significant level. Consequently, the Project’s health impacts from arsenic contamination remain significant and unmitigated.

Additional soil sampling must be conducted now to establish the environmental setting from which to measure the extent of the Project’s significant health impacts from arsenic contamination. The City must include the results in a revised DEIR, along with a corrective action plan and a site management and/or health safety plan in order to enable meaningful public review, as required by CEQA.

C. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Potentially Significant Impacts from the Presence of Underground and Above Ground Storage Tanks on the Project Site

The DEIR acknowledges that two underground storage tanks and two aboveground storage tanks were documented on the Project site. The DEIR states that three of the tanks were removed, but no formal regulatory closure of the tanks was obtained.⁴³ The Phase I Update prepared for the Project notes that total petroleum hydrocarbons as diesel (“TPH(d)”) were detected in the soil at 120 mg/kg at the location of one of the tanks, which exceeds the San Francisco Bay Regional

⁴⁰ CEQA Guidelines § 15125(d).

⁴¹ *Id.*

⁴² DEIR, p. 196.

⁴³ *Id.*, p. 186.

Water Quality Control Board Environmental Screening Level of 100 mg/kg for shallow soil in a residential setting.⁴⁴

According to the U.S. Department of Health and Human Services, TPH can affect the central nervous system, blood, immune system, lungs, skin and eyes, and can cause headaches and dizziness.⁴⁵ In his comments, Mr. Hagemann explains that “[t]he exceedance of the 120 mg/kg threshold for TPH(d) in soil may cause residents to be exposed to odors that may lead to health impacts that include headaches and dizziness. Residents may be exposed to TPH(d) odors when gardening or when children are playing with the soil.”⁴⁶

Based on his experience and review of the Project, Project documents and scientific literature, Mr. Hagemann concludes that the public health risk associated with TPH present on the Project site “is a significant, unmitigated impact that was not identified in the DEIR.”⁴⁷ The DEIR completely fails to disclose the exceedance of a regulatory screening level for TPH in Project site soil. The City must prepare a revised DEIR that adequately discloses, analyzes and mitigates the Project’s significant impacts from TPH present in Project site soils.

Further, the Phase I Update prepared for the Project notes that an earlier Phase I Environmental Site Assessment prepared for the site stated that no formal regulatory closure of the tanks was obtained. The earlier Phase I recommended that formal regulatory closure be obtained and documentation of removal activities be transmitted to regulatory agencies.⁴⁸ Despite these recommendations, the DEIR contains no evidence that petroleum tank removal activities have been reported to regulators or that agency approval of the tank removals was obtained. Mr. Hagemann explains that a revised DEIR must document that the petroleum tanks were removed with cleanup sufficient to support residential development.⁴⁹ Without this documentation, there is no support for the City’s conclusion that “[i]t is

⁴⁴ **Attachment A**, p. 4.

⁴⁵ **Attachment B**: U.S. Dept. of Health and Human Services, Total Petroleum Hydrocarbons; *see also* Toxicological Profile for Total Petroleum Hydrocarbons (TPH), U.S. Department of Health and Human Services, available at <http://www.atsdr.cdc.gov/toxprofiles/tp123.pdf>.

⁴⁶ **Attachment A**, p. 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

unlikely that any significant environmental concerns associated with the USTs and ASTs are present or that any further investigation is required.”⁵⁰

D. The DEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Impacts from the Presence of Unanalyzed Soil that is Stockpiled on the Project Site

The DEIR states that 200 cubic yards of stockpiled soil of unknown origin or quality on the Project site “could be contaminated.”⁵¹ The DEIR recognizes this is a significant impact. To mitigate the impact, the DEIR requires a soil management plan be developed *prior to issuance of a Planned Development Permit* (but after Project approval).⁵² The plan shall identify “management practices for characterizing the stockpiled soil.”⁵³ If concentrations of contaminants are found to be above residential CHHSLs, the DEIR requires remedial measures to be taken. The DEIR contains possible remedial actions, including excavation and disposal of contaminated soil and use of engineering and administrative controls (consolidation and capping of the soil, land use covenants).⁵⁴

The City’s approach fails to satisfy CEQA’s most basic tenet – to inform decisionmakers and the public about the potential, significant environmental impacts of the Project before harm is done to people and the environment.⁵⁵ As Mr. Hagemann explains in his comments, sampling the stockpiled soil must be conducted now, prior to Project approval.⁵⁶ The sampling results should be compared to regulatory screening levels. Only then can the City determine the extent of the Project’s potentially significant impacts associated with stockpiled soil, propose measures sufficient to mitigate those impacts and timely disclose those impacts and mitigation measures to the public for review. As it stands, the Project’s impacts from stockpiled soil of unknown origin or quality remain significant, unmitigated and undisclosed.

⁵⁰ DEIR, p. 193.

⁵¹ *Id.*

⁵² *Id.*, p. 194.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ CEQA Guidelines § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354; *County of Inyo v. Yorty*, 32 Cal.App.3d at 810.

⁵⁶ **Attachment A**, pp. 4-5.

E. The DEIR Completely Fails to Disclose, Analyze and Mitigate Potentially Significant Impacts from Measures Proposed to Mitigate Impacts from Contaminated Soil

CEQA requires that all potential environmental impacts be analyzed and that all significant impacts be mitigated, including impacts from mitigation measures themselves. Where mitigation measures would, themselves, cause significant environmental impacts, CEQA requires an evaluation of those secondary (indirect) impacts.⁵⁷

Here, the City proposes conditions or measures to address dieldrin and arsenic contamination and potentially contaminated stockpiled soil. Possible remedial measures include excavation and disposal of contaminated soil off-site. As Mr. Hagemann explains, excavation and exportation of contaminated soil may result in additional significant impacts. For example, the measures may result in: (1) significant health impacts on neighboring residents from diesel particulate matter emissions from construction equipment and trucks; (2) significant health risks to the public from inhalation of contaminated dust generated during excavation and transportation; (3) significant traffic impacts associated with trucks that will transport the soil; and (4) significant impacts from emissions of criteria air pollutants and greenhouse gas emissions from construction equipment and trucks required for soil transport. The DEIR completely fails to disclose, analyze and mitigate these potentially significant impacts.

V. THE DEIR FAILS TO ADEQUATELY DISCLOSE SIGNIFICANT AIR QUALITY IMPACTS FROM TOXIC AIR CONTAMINANTS AND FAILS TO SUPPORT ITS AIR QUALITY IMPACT FINDINGS WITH SUBSTANTIAL EVIDENCE

The DEIR states:

[c]onstruction of the project would expose sensitive receptors in the project area to diesel particulate matter (DPM) from construction related activities. Sensitive receptors in the project area include existing nearby off-site

⁵⁷ CEQA Guidelines § 15064(d).

residences and future residences on-site that would be occupied while construction is continuing in other areas of the project site.⁵⁸

Further,

[a] health risk assessment of the project construction activities was conducted that evaluated potential health effects at nearby sensitive receptors from construction emissions of DPM. A dispersion model was used to predict the off-site concentrations resulting from project construction so that lifetime cancer risks could be predicted.⁵⁹

The dispersion model and health risk assessment results found that cancer risks posed by toxic air contaminant (“TAC”) emissions during Project construction (5.2 in one million for off-site residential child cancer risk, 0.3 in one million for off-site residential adult cancer risk, 7.4 in one million for on-site child cancer risk and 0.4 in one million for on-site residential adult cancer risk) are below the Bay Area Air Quality Management District’s (“BAAQMD”) threshold used for evaluating cancer risk (10 in one million).⁶⁰ Based on these results, the City concluded that the Project’s TAC emissions would not result in significant health risks to existing and future residents from Project construction.⁶¹

Mr. Hagemann and Mr. Sutherland reviewed the dispersion model and health risk assessment prepared for the Project. They discovered “several methodological errors that result in an underestimate of the significance of air quality impacts from [diesel particulate emissions (“DPM”)] emissions during Project construction.”⁶² In addition, Mr. Hagemann and Mr. Sutherland conducted a preliminary screening-level air dispersion model utilizing DPM emissions estimates provided in Appendix E to the DEIR, and determined that the Project’s contribution to cancer risk in off-site receptors may exceed BAAQMD’s CEQA threshold of 10 in one million, constituting a significant air quality impact.⁶³

⁵⁸ DEIR, p. 116.

⁵⁹ *Id.*, p. 117.

⁶⁰ *Id.*

⁶¹ *Id.*, p. 118.

⁶² **Attachment A**, p. 5.

⁶³ *Id.*

A. The City’s Conclusion that the Project Would Result in Less than Significant Health Impacts from TAC Emissions is Unsupported Because the City Relied on an Outdated Air Dispersion Model

The City based its conclusion regarding the Project’s impacts from TAC emissions on obsolete air dispersion modeling software – ISC3 -- used by the Project applicant’s consultant. Mr. Hagemann and Mr. Sutherland explain that, since 2006, the U.S. EPA has recommended that AERMOD be used instead of ISC3 because AERMOD contains enhancements in near-field dispersion, boundary layer simulation and plume rise/dispersion, which provide a more accurate determination of impacts from TAC emissions on nearby sensitive receptors.⁶⁴ The applicant’s consultant disregarded EPA’s recommendation.

The City must prepare a revised DEIR that relies on the most up-to-date and precise air dispersion model rather than a model that has been outdated for nearly a decade and underestimates TAC emissions.

B. The City’s Conclusion that the Project Would Result in Less than Significant Health Impacts from TAC Emissions is Unsupported Because the City Relied on an Incorrect Emission Rate

The applicant’s consultant characterized construction exhaust emissions as five area sources covering the Project site. The sources were turned on and off in sequence over the course of the construction timeframe to represent that the Project would be completed in phases. However, as Mr. Hagemann and Mr. Sutherland explain in their comments, the applicant’s consultant inaccurately calculated the emission rate for each area source. Specifically, the consultant incorrectly divided the total DPM emissions for each phase by 365 days per year and ten hours of construction per day, when Project documents show that construction is anticipated to occur for 220 days in 2014, 22 average workdays per month and for nine hours per day.⁶⁵ Had the applicant’s consultant used accurate figures for calculating the emission rate, the emission rate and DPM emissions would be greater.⁶⁶ According to Mr. Hagemann and Mr. Sutherland, the City consultant’s emission rate “does not represent an accurate characterization of DPM emissions association with

⁶⁴ *Id.*, p. 6.

⁶⁵ *Id.*

⁶⁶ *Id.*

construction equipment and activity” and “results in underestimated DPM emissions.”⁶⁷ The erred emission rate and underestimated DPM emissions must be corrected in a revised DEIR that is circulated for public review and comment.

C. The City’s Conclusion that the Project Would Result in Less than Significant Health Impacts from TAC Emissions is Unsupported Because the City Relied on an Inflated Source Height

The applicant’s consultant also used “an inappropriately high source height in its modeling exercise, which resulted in off-site ground level concentrations of DPM to be underestimated.”⁶⁸ The consultant’s report states that, “to represent the construction equipment exhaust emissions, an emission release height of 6 meters (20 feet) was used for each area source. The elevated source height reflects the height of the equipment exhaust pipes and buoyancy of the exhaust plume.”⁶⁹ According to Mr. Hagemann and Mr. Sutherland, “[i]t is unlikely that the average release height of diesel particulate matter from the Project’s construction equipment will be 20 feet because typical dozers, loaders, compactors, etc., are not designed with 20-foot-high exhaust stacks.”⁷⁰

In their comments, Mr. Hagemann and Mr. Sutherland explain that it is more accurate to use an average release height of three meters, or ten feet.⁷¹ This is because the 2003 Office of Environmental Health Hazard Assessment guidance manual for health risk assessment preparation provides that when combining emission sources (i.e., construction equipment used on a site), “in order to obtain a conservative estimate, the values leading to the higher concentration estimates should typically be used (e.g., the lowest stack gas exit velocity and temperature, the height of the shortest stack, and the shortest distance from the receptor to the nearest stack).”⁷² Thus, the shorter ten-foot release height value is the appropriate source height for modeling off-site ground level concentrations of DPM.

⁶⁷ *Id.*

⁶⁸ *Id.*, p. 7.

⁶⁹ Great Oaks Mixed-Used Project - Draft Air Quality and Greenhouse Gas Emissions Assessment, San Jose, California. Illingworth & Rodkin, Inc. June 20, 2013.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, quoting Air Toxics Hot Spots Program Risk Assessment Guidelines. The Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments. Office of Environmental Health Hazard Assessment. August 2003.

D. Substantial Evidence Shows that DPM Emissions During Project Construction Would Result in Significant Health Impacts

Mr. Hagemann and Mr. Sutherland conducted a Tier 1 screening-level health risk assessment of DPM emissions during Project construction in accordance with BAAQMD recommendations.⁷³ Their comments provide a detailed description of the methods they used, including corrections of the applicant's consultant's errors identified above.⁷⁴

Based on their modeling results, Mr. Hagemann and Mr. Sutherland also prepared a screening-level health risk assessment for excess cancers in accordance with BAAQMD recommendations. Their comments provide a detailed explanation of the methods used for the assessment.⁷⁵

Mr. Hagemann's and Mr. Sutherland's modeling and health risk assessment show that total childhood cancer risk during Project construction (14.3 in one million) exceed BAAQMD's threshold of 10 in one million.⁷⁶ This constitutes a significant air quality and public health impact that was not identified in the DEIR. A revised DEIR must be prepared that adequately discloses and analyzes the Project's significant air quality and health impacts from DPM emissions.

In addition, the revised DEIR must include appropriate measures to mitigate the Project's impacts from DPM emissions to a less-than-significant level. Mr. Hagemann and Mr. Sutherland recommend that the revised DEIR include the following BAAQMD measures:

- All excavation, grading, and/or demolition activities shall be suspended when average wind speeds exceed 20 mph;
- Wind breaks (e.g., trees, fences) shall be installed on the windward side(s) of actively disturbed areas of construction; wind breaks should have at maximum 50 percent air porosity;

⁷³ *Id.*, p. 7.

⁷⁴ *Id.*, pp. 7-8.

⁷⁵ *Id.*, p. 9.

⁷⁶ *Id.*

- Minimizing idling time of diesel powered construction equipment to two minutes;
- Development of a plan demonstrating that the off-road equipment (more than 50 horsepower) to be used in the construction project would achieve a project wide fleet-average 45 percent PM reduction compared to the most recent ARB fleet average, implementing:
 - Late model engines,
 - Low-emission diesel products,
 - Alternative fuels,
 - Engine retrofit technology,
 - Add-on devices such as particulate filters; and
- Requiring all contractors use equipment that meets CARB's most recent certification standard for off-road heavy duty diesel engines.⁷⁷

These are feasible mitigation measures that should be considered to reduce the Project's significant air quality and public health impacts from DPM emissions.

VI. THE DEIR FAILS TO DISCLOSE THE PROJECT'S INCONSISTENCIES WITH THE CITY'S GENERAL PLAN

The DEIR is legally inadequate because it fails to identify the Project's inconsistencies with the City's General Plan. CEQA requires an assessment of any inconsistencies between the Project and applicable general plans and regional plans.⁷⁸ A significant impact on land use and planning would occur if the Project would "[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect."⁷⁹

⁷⁷ *Id.*, pp. 9-10.

⁷⁸ CEQA Guidelines § 15125(a), (d).

⁷⁹ CEQA Guidelines Appendix G, section IX(b).

A. The Project is Inconsistent with the General Plan's Goal and Policies Regarding Toxic Air Contaminants

The City's General Plan includes the following goal and policies relevant to the Project's TAC emissions impacts:

Goal MS-11 – Minimize exposure of people to air pollution and toxic air contaminants such as ozone, carbon monoxide, lead and particulate matter.

Policy MS-11.1: Require completion of air quality modeling for sensitive land uses such as new residential developments that are located near sources of pollution such as freeways and industrial uses. Require new residential development project and projects categorized as sensitive receptors to incorporate effective mitigation into project designs or be located an adequate distance from sources of toxic air contaminants to avoid significant risks to health and safety.

Policy MS-11.2: For projects that emit toxic air contaminants, require project proponents to prepare health risk assessments in accordance with BAAQMD-recommended procedures as part of environmental review and employ effective mitigation to reduce possible health risks to a less than significant level. Alternatively, require new projects (such as, but not limited to, industrial, manufacturing, and processing facilities) that are sources of TACs to be located an adequate distance from residential areas and other sensitive receptors.

Policy MS-11.4: Encourage the installation of appropriate air filtration at existing schools, residences and other sensitive receptor uses adversely affected by pollution sources.

Policy MS-11.5: Encourage the use of pollution absorbing trees and vegetation in buffer areas between substantial sources of TACs and sensitive land uses.

The Project is inconsistent with Goal MS-11 and the associated policies designed to protect citizens from toxic air contaminants. As explained above, the City's conclusion that the Project would not result in significant health impacts

from TAC emissions is unsupported because the City relied on an outdated dispersion model, an incorrect emission rate and an inflated source height. Further, substantial evidence shows that the Project would result in significant health impacts from DPM emissions during Project construction. Finally, the City failed to propose any measures to mitigate the Project's impacts from DPM emissions to a less than significant level. The DEIR must be revised to disclose the Project's inconsistency with the General Plan's goal and policies to protect the City's citizens from these health risks.

B. The Project is Inconsistent with the General Plan's Goal and Policies Regarding Soil Contamination

The City's General Plan includes the following goal and policies relevant to the soil contamination present on the Project site:

Goal EC-7: Protect the community and environment from exposure to hazardous soil, soil vapor, groundwater, and indoor air contamination and hazardous building materials in existing and proposed structures and developments and on public properties, such as parks and trails.

Policy EC-7.1: For development and redevelopment projects, require evaluation of the proposed site's historical and present uses to determine if any potential environmental conditions exist that could adversely impact the community or environment.

Policy EC-7.2: Identify existing soil, soil vapor, groundwater and indoor air contamination and mitigation for identified human health and environmental hazards to future users and provide as part of the environmental review process for all development and redevelopment projects. Mitigation measures for soil, soil vapor and groundwater contamination shall be designed to avoid adverse human health or environmental risk, in conformance with regional, state and federal laws, regulations, guidelines and standards.

Policy EC-7.5: On development and redevelopment sites, require all sources of imported fill to have adequate documentation that it is clean and free of contamination and/ or acceptable for the proposed land use considering appropriate environmental screening levels for contaminants. Disposal of

groundwater from excavations on construction sites shall comply with local, regional, and state requirements.

Policy EC-7.8: Where an environmental review process identifies the presence of hazardous materials on a proposed development site, the City will ensure that feasible mitigation measures that will satisfactorily reduce impacts to human health and safety and to the environment are required of or incorporated into the projects. This applies to hazardous materials found in the soil, groundwater, soil vapor, or in existing structures.

Policy EC-7.9: Ensure coordination with the County of Santa Clara Department of Environmental Health, Regional Water Quality Control Board, Department of Toxic Substances Control or other applicable regulatory agencies, as appropriate, on projects with contaminated soil and/or groundwater or where historical or active regulatory oversight exists.

Policy EC-7.11: Require sampling for residual agricultural chemicals, based on the history of land use, on sites to be used for any new development or redevelopment to account for worker and community safety during construction. Mitigation to meet appropriate end use such as residential or commercial/industrial shall be provided.

The Project is inconsistent with Goal EC-7 and the associated policies designed to protect citizens from soil contamination. As explained above, the DEIR fails to adequately disclose, analyze and mitigate the Project's potentially significant impacts from dieldrin, arsenic, TPH present in Project site soils and unknown contaminants that may be present in soil stockpiled on the Project site. The DEIR must be revised to disclose the Project's inconsistency with the General Plan's goal and polices designed to protect the City's citizens from these health risks.

VII. THE CITY MUST PREPARE AND RECIRCULATE A REVISED DEIR AS A RESULT OF ITS INADEQUACIES

CEQA requires a lead agency to recirculate an EIR when significant, new information is added to the EIR following public review, but before certification.⁸⁰

⁸⁰ Pub. Resources Code § 21092.1.

The CEQA Guidelines clarify that new information is significant if “the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project” including, for example, “a disclosure showing that ... [a] new significant environmental impact would result from the project.”⁸¹

As discussed above, the proposed Project will have significant impacts that are different or more severe than those described in the EIR, including air quality and public health impacts and contaminated soil impacts. The EIR also lacks adequate mitigation for these potentially significant impacts. The City must prepare a revised EIR that is circulated for public review and comment.

VIII. CONCLUSION

San Jose Residents for Responsible Development and its individual members thank the City for providing the opportunity to comment on this matter. We urge the City to ensure that the Project’s impacts are fully disclosed, evaluated and mitigated before the Project is allowed to proceed.

Sincerely,

A handwritten signature in blue ink that reads "Rachael E. Koss".

Rachael E. Koss

REK:lj
Attachments

⁸¹ CEQA Guidelines § 15088.5.