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September 25, 2015

VIA EMAIL AND OVERNIGHT MAIL

Peterson Vollman
Planner II
City of Oakland
250 Frank H. Ogawa Plaza, Suite 2114
Oakland, CA 94612
Email: pvollmann@oaklandnet.com

Re: Comments on the Draft Environmental Impact Report for the Proposed Jack London Square 4th & Madison Project (ER 15-005)

Dear Mr. Vollman:

We are writing on behalf of Oakland Residents for Responsible Development to provide comments on the Draft Environmental Impact Report ("DEIR") prepared by the City of Oakland ("City"), pursuant to CEQA,[1] for the Jack London Square 4th & Madison Project ("Project"). The Project is being proposed by the Carmel Partners ("Applicant").

The Project includes the demolition of existing structures and construction of two buildings with approximately 330 residential apartment units, 3,000 square feet of ground-floor commercial space, and 365 parking spaces on an approximately 2-acre, 1.5-block site in the Jack London District in Oakland.[2] The site is currently occupied by two buildings that function as office space and a paved parking area. The Project requires various approvals from the City, including a Conditional Use Permit ("CUP"), Design Review, grading and encroachment permits, and a Tentative Parcel Map for condominiums.[3]

[1] Pub. Resources Code, §§ 21000 et seq.
[2] Draft Environmental Impact Report ("DEIR"), Jack London Square 4th & Madison Project, August 2015, pp. 1 – 3.
[3] *Id.*, at 45.

Based upon our review of the DEIR and pertinent agency records, we conclude that the DEIR is inadequate under CEQA and must be withdrawn. The DEIR fails to include a complete, stable, and accurate Project description because it fails to adequately describe important aspects of the Project's design and fails to describe the Project's dewatering requirements. The DEIR also fails to adequately establish the environmental setting for hazards within Project disturbance areas. In addition, the DEIR fails to adequately analyze and mitigate the Project's impacts related to hazards, greenhouse gas ("GHG") emissions, and air quality. Finally, the DEIR proposes measures to reduce significant impacts, including compliance with other laws, that are inadequate and unenforceable. The City must revise the DEIR consistent with these comments, and recirculate the revised DEIR for public review.

We prepared these comments with the assistance of hazards and air quality experts Matt Hagemann, P.G. C.Hg., and Jessie Jaeger from SWAPE.[4] Their technical comments are attached hereto and submitted in addition to the comments in this letter. Accordingly, the City must address and respond to the comments of Mr. Hagemann and Ms. Jaeger separately.

I. STATEMENT OF INTEREST

Oakland Residents for Responsible Development ("Oakland Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes Alan Guan, Risi Agbabiaka, Peter Lew, Bridgette Hall, Tanya Pitts, the International Brotherhood of Electrical Workers Local 595, Plumbers and Steamfitters Local 342, Sheet Metal Workers Local 104, and their members and their families who live and/or work in the City of Oakland and Contra Costa County.

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

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[4] *See* Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Laura Horton re: Draft Environmental Impact Report for the Jack London Square 4th and Madison Project, September 22, 2015 (hereinafter, "SWAPE Comments"), **Attachment A.**

The organizational members of Oakland Residents also have an interest in enforcing the City's planning and zoning laws and the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Oakland Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

II. THE DEIR FAILS TO INCLUDE A COMPLETE PROJECT DESCRIPTION

The DEIR does not meet CEQA's requirements because it fails to include a complete Project description, rendering the entire analysis inadequate. CEQA places the burden of environmental investigation on the government rather than the public. Accordingly, a lead agency may not hide behind its failure to obtain a complete and accurate project description.[5] An accurate and complete project description is necessary to perform an adequate evaluation of the potential environmental effects of a proposed project. In contrast, an inaccurate or incomplete project description renders the analysis of environmental impacts inherently unreliable. Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the project's impacts and undercutting public review.[6]

The DEIR fails to sufficiently describe the Project by failing to adequately describe aspects of the Project's design features and failing to describe dewatering requirements for the Project, which could lead to potentially significant impacts. The DEIR must be revised to address these deficiencies.

A. The Project Fails to Adequately Describe Project Design Features

Several aspects of the Project's design are not adequately described in the DEIR. First, the Project in inconsistent as to how much retail space would be

[5] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.
[6] *See, e.g., Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

constructed. The Project description includes 3,000 square feet of retail space.[7] However, the DEIR also states:

> [T]he analysis contained within this EIR remains valid for a retail component of up to 8,000 square feet within the structures proposed. If the proposed project were modified to include greater than 8,000 square feet of retail, the project would generate more than 100 trips in the PM peak hour and would thus require an additional Congestion Management Program (CMP) Land Use Analysis Program Transportation Impact Analysis.[8]

The DEIR fails to provide decision-makers and the public with an accurate picture of what exactly the Project will entail, and defers the final design with regard to retail space to a later time, thus minimizing the Project's impacts (most clearly with traffic) and undercutting public review. This is counter to CEQA.

Second, the DEIR fails to adequately describe all of the Project's transportation design features. The DEIR states that the current site plan for the Project is merely "conceptual"[9] and there are several aspects of the Project's design that are subject to change. In discussing traffic impacts, the DEIR assumes that Project design will avoid certain impacts and that "the final project design will be reviewed to ensure consistency with applicable design standards..."[10] The DEIR's failure to adequately describe the Project's transportation design features thwarts public review of transportation hazards that could pose a risk to residents in the area, such as pedestrian safety.[11] Simply assuming that the future design will comply with "applicable design standards" without further analysis is counter to CEQA, as described more fully below.

These are examples of the City's failure to identify relevant information in the DEIR in violation of CEQA's fundamental purpose to "alert the public and its responsible officials to environmental changes. . ."[12] For the public and policy-makers to be informed of the environmental consequences, they must be presented with reliable and current information.

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[7] DEIR, p. 45.
[8] *Id.*, at 43.
[9] *Id.*, at 135
[10] *Id.*
[11] *Id.*
[12] *Laurel Heights*, 47 Cal. 3d at 392.

B. The Project Fails to Describe Dewatering Requirements

The Project description fails to describe dewatering activities that may be associated with excavation and trenching at the Project site. According to the DEIR, and its supporting studies, groundwater at the site was encountered at 5.7 to 10 feet below the ground surface (bgs).[13] The DEIR vaguely states that according to a Preliminary Geotechnical Assessment for the Project site, the Project's underground parking may require construction dewatering and waterproofing of foundation elements.[14] However, the DEIR does not provide any further description of dewatering requirements. The DEIR merely states that "[a]ny groundwater dewatering would limited in duration and would be subject to permits from East Bay Municipal Utility District (EBMUD) or the Regional Water Quality Control Board (RWQCB), depending if the discharge were to the sanitary or storm sewer system."[15] The DEIR then concludes that the Project "would have no significant impacts on groundwater."[16]

The DEIR's conclusion is not supported by substantial evidence because it provides no analysis and mitigation of potentially significant impacts from encountering contaminated groundwater during site excavation, or any other groundwater impacts related to dewatering, according to Mr. Hagemann and Ms. Jaeger. As explained by Mr. Hagemann and Ms. Jaeger, "[g]roundwater is less than 10 feet below ground surface . . . and maximum depths of the excavation of the Project site will likely expose the water table."[17] In addition, they state that "[e]xposure of the water table will allow for any contamination to partition from water to the atmosphere, potentially putting construction workers at risk who would breathe the fumes."[18]

Furthermore, construction dewatering has the potential to introduce pollutants into the storm drain systems. For example, groundwater from dewatering could contain sediment that, if not properly managed, could be discharged to the storm drain system. In addition, shallow soil contamination could introduce further contamination to storm drains and other water bodies. The City is required to assess both the discharge quantity and quality based on the Project, the site and groundwater characteristics. Instead, the DEIR merely assumes

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[13] DEIR, p. 251.
[14] *Id.*, at 251-252.
[15] *Id.*
[16] *Id.*, at 252.
[17] SWAPE Comments, p. 3.
[18] *Id.*

permitting processes outside of the CEQA process would mitigate impacts to less than significant levels. CEQA prohibits this approach, as explained further below.

Without additional information and analysis, the Project's impacts to workers, the public, and hydrological resources cannot be determined. The City must describe potential dewatering activities so the public and decision makers can fully assess the Project's impacts on the environment. Because the DEIR does not include an adequate description of dewatering activities, Mr. Hagemann and Ms. Jaeger conclude that the City failed to provide a stable Project description, and failed to "disclose, analyze, and mitigate a potentially significant impact regarding exposure to contaminated groundwater. . ."[19] The DEIR must be revised and recirculated to include a more stable Project description.

III. THE DEIR FAILS TO PROVIDE AN ADEQUATE DESCRIPTION OF THE ENVIRONMENTAL SETTING

CEQA requires the lead agency to include a description of the physical environmental conditions in the vicinity of a project as they exist at the time environmental review commences.[20] The EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts. "The adequacy of an EIR is determined in terms of what is reasonably feasible, in light of factors such as the magnitude of the project at issue, the severity of its likely environmental impacts, and the geographic scope of the project."[21] "A legally adequate EIR . . . must contain sufficient detail to help ensure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug."[22]

Specifically, the City failed to conduct the requisite due diligence to investigate and disclose in the DEIR the presence and character of contamination within the Project impact area. According to the DEIR, the Project site has a history of industrial uses dating to the early 1900s, including an engine manufacturing company, a plywood company, a pipe yard, a machine shop, warehouses, and offices.[23] As explained by Mr. Hagemann and Ms. Jaeger, "[t]hese

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[19] *Id.*
[20] CEQA Guidelines § 15125(a); *see* also *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.
[21] CEQA Guidelines § 15024(a).
[22] *Kings County Farm Bureau v. City of Handford* (1990) 221 Cal.App.3d 692, 733.
[23] DEIR, p. 245.

activities have led to soil contamination of the Project site, which has not been adequately evaluated given the proposed residential land use."[24] Furthermore, as discussed above, "[g]roundwater contamination is also present beneath the Project site and may pose a health risk to construction workers and to future occupants of commercial buildings."[25]

The DEIR states that an additional evaluation of the Project site is to be conducted in order to fully assess hazardous site conditions; however, this assessment is improperly deferred and impacts that may result from any necessary cleanup activities are not disclosed. A 2014 Phase I Environmental Site Assessment ("ESA")[26] found soil contamination with detected concentrations of semi-volatile organic compounds, total petroleum hydrocarbons, and metals, in the soil and groundwater on the site. The Phase I ESA also found the potential that "more pervasive soil impacts may exist across the Property. These soil impacts, if present, could affect soil management options and costs."[27] The Phase I ESA also found the potential for sources of groundwater contamination upgradient of the Project site, stating that "if the underlying groundwater is impacted, this could affect the podium design and require additional groundwater management during construction."[28] Finally, the Phase I ESA found that review of available CAL-EPA database information indicates there are comingled gasoline plumes in the vicinity of the Property. The Phase I ESA states that the plumes may have migrated beneath the Property and could pose issues with respect to vapor intrusion, although it downplays that issue based on the "proposed design of the future residential development."[29]

In addition, a 2006 Phase I ESA, which was referenced in the 2014 Phase I ESA, documented soil and groundwater contamination found in a 1996 investigation.[30] Detected soil contaminants included phenol, chlorobenzene, and total petroleum hydrocarbons as diesel. Contaminants detected in groundwater included barium, molybdenum and nickel. The Project site was "closed" by the Alameda County Department of Public Health in 1996, but as Mr. Hagemann and

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[24] SWAPE Comments, p. 2.
[25] *Id.*
[26] Phase I Environmental Site Assessment, Engeo, December 2014, 430 Jackson Street, Oakland, California, **Attachment B** (without attachments).
[27] *Id.*, at 1.
[28] *Id.*, at 2.
[29] *Id.*
[30] Phase I Environmental Site Assessment, AEI, February 2006, 430 Jackson Street, Oakland, California, **Attachment C** (without attachments).

Ms. Jaeger note, "the closure letter did not consider that land use would change to a residential setting."[31]

Mr. Hagemann and Ms. Jaeger explain that on the basis of these findings, the 2014 ESA recommended that a risk management plan ("RMP") should be developed prior to demolition and construction to address potential unknown environmental issues, and contamination sampling be conducted to address potential developmental constraints and construction dewatering issues.[32]

The City has not conducted further sampling to establish the current site conditions and has not developed an RMP as recommended in the Phase I ESA. Thus, Mr. Hagemann and Ms. Jaeger conclude that "the DEIR fails to adequately disclose environmental conditions at the Project site that may affect the health of construction workers and adjacent residents."[33]

The DEIR acknowledges the potential for harm, stating that "[s]oil and groundwater contamination could adversely affect construction workers who may come into direct contact with those materials. In addition, if these materials are improperly managed and disposed of during construction, they could be released to the environment and pose a potential risk to future site occupants, other members of the public, and the environment."[34] However, the DEIR vaguely states that a Phase II ESA, which would "include further investigation of soil and groundwater conditions," is "currently planned," without providing further information.[35] The DEIR also defers the development of an RMP, and even then the RMP development is dependent on the results of the Phase II ESA, despite the clear need for the RMP. The DEIR also states that "[c]ompliance with applicable regulations and the City's SCAs would ensure that the proposed project would not create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment."[36] This is counter to CEQA, as explained further below.

Mr. Hagemann and Ms. Jaeger find that "a revised EIR needs to be prepared to include and disclose the results of soil and groundwater sampling under a Phase

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[31] SWAPE Comments, p. 3.
[32] *Id.*
[33] *Id.*
[34] DEIR, p. 247.
[35] *Id.*
[36] *Id.*, at 248.

II ESA investigation completed prior to Project certification ... Impacts of any necessary mitigation should also be disclosed, including dust emissions from construction equipment needed to excavate contaminated soil and emissions from trucks hauling contaminated soil from the site."[37]

Mr. Hagemann and Ms. Jaeger further state:

> The DEIR must ensure the RMP addresses any contaminants that may affect the health and safety of workers or the health and safety of adjacent residents. Exposure pathways, including the inhalation of dust generated from contaminated soil and soil contact by workers, should be evaluated. Numerous residents are located in the Allegro apartments, some as close as 20 feet away, so the risk to those neighbors should be assessed from the inhalation pathway.[38]

Mr. Hagemann and Ms. Jaeger then conclude that a "revised DEIR should be prepared to include an updated evaluation of environmental conditions at the Project site and to provide for mitigation prior to Project certification."[39]

At a minimum, the City is required to conduct an investigation and characterize potential contamination in a revised DEIR in sufficient detail to enable meaningful public review. The City's failure to fully disclose, analyze, and mitigate potential hazards on the Project site renders the DEIR inadequate as an informational document under CEQA. The DEIR must be revised to include all information necessary for the public to evaluate impacts from site hazards.

IV. THE DEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS

CEQA has two basic purposes, neither of which the DEIR satisfies. First, CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project.[40] CEQA requires that an agency analyze potentially significant environmental impacts in an EIR.[41] The EIR should not rely on scientifically outdated information to assess the significance of impacts,

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[37] SWAPE Comments, p. 3.
[38] *Id.*
[39] *Id.*, at 2.
[40] CEQA Guidelines § 15002(a)(1).
[41] *See* Pub. Resources Code § 21000; CEQA Guidelines § 15002.

and should result from "extensive research and information gathering," including consultation with state and federal agencies, local officials, and the interested public.[42] To be adequate, the EIR should evidence the lead agency's good faith effort at full disclosure.[43] Its purpose is to inform the public and responsible officials of the environmental consequences of their decisions *before* they are made. For this reason, 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.[44] Thus, the EIR protects not only the environment but also informed self-government."[45]

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.[46] The EIR serves to provide public agencies, and the public in general, with information about the effect that a proposed project is likely to have on the environment and to "identify ways that environmental damage can be avoided or significantly reduced."[47] If a project has a significant effect on the environment, the agency may approve the project only upon a finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible," and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081.[48]

The DEIR fails to satisfy the basic purposes of CEQA. Specifically, the DEIR fails to reflect a good faith effort at public disclosure by failing to adequately analyze and mitigate the Project's potentially significant impacts related to greenhouse gas emissions and air quality (in addition to hazards discussed above). The DEIR also fails to propose measures that could reduce these Project impacts to a less than significant level. In sum, the DEIR fails to inform decision-makers and the public of the Project's potentially significant environmental effects and to reduce damage to the environment *before* it occurs.

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[42] *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* (2001) 91 Cal. App.4th 1344, 1367 and *Schaeffer Land Trust v. San Jose City Council*, 215 Cal.App.3d 612, 620.
[43] CEQA Guidelines § 15151; *see also Laurel Heights I* (1998) 47 Cal.3d 376, 406.
[44] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[45] *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (citations omitted).
[46] CEQA Guidelines § 15002(a)(2)-(3); *Berkeley Keep Jets Over the Bay Comm.*, 91 Cal.App.4th at 1354.
[47] CEQA Guidelines § 15002(a)(2).
[48] CEQA Guidelines § 15092(b)(2)(A)-(B).

A. The DEIR Fails to Adequately Analyze and Mitigate Significant Impacts From Greenhouse Gas Emissions

The Project will generate GHGs during its construction and operational phases. The City'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 metric tons of CO_2e annually **AND** more than 4.6 metric tons of CO_2e per service population annually."[49] Therefore, in order for the Project's GHG impact to be considered as significant, both of these thresholds must be exceeded.

Based upon these thresholds, the DEIR concludes that the Project would result in less than significant impacts because the Project's GHG emissions would not exceed both of the applicable significant thresholds and thus "no mitigation measures are necessary for these less-than-significant impacts, and the City's SCA-F requiring a Greenhouse Gas Reduction Plan would not apply."[50] The DEIR justifies its conclusion by stating that, "[t]he Project's estimated CO_2e emissions exceed the City's annual emissions threshold, but were below the efficiency-based threshold in terms of annual emissions per service population."[51] The DEIR further states that because the Project is below the City of Oakland's efficiency-based threshold for GHG emissions, and because the City's thresholds were designed to ensure compliance with the GHG reduction goals set forth by Assembly Bill 32 ("AB32"), the Project would comply with AB32.

However, Mr. Hagemann and Ms. Jaeger found that "the DEIR's analysis of the Project's potential GHG impacts is flawed."[52] They explain that the City used incorrect parameters to calculate the Project's emissions, and that when those parameters are corrected, "the Project's GHG emissions will result in a significant impact."[53] Thus, "[a]n updated DEIR should be prepared to assess the Project's GHG emissions using the correct assumptions, and should implement additional mitigation measures, including the development of a Greenhouse Gas Reduction Plan in accordance with the City's Standard Conditions of Approval."[54]

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[49] DEIR, p. 196.
[50] *Id.*, at 197.
[51] *Id.*, at 198.
[52] SWAPE Comments, p. 11.
[53] *Id.*
[54] *Id.*

According to Mr. Hagemann and Ms. Jaeger, the primary problem with the City's GHG analysis is that the DEIR overestimates the service population generated by the Project.[55] To calculate the Project's service population, the DEIR uses a value of 2.52 persons per household.[56] Based on the Project's construction of 330 residential units, the service population was estimated to be approximately 831.6 residents.[57] Using this service population, the DEIR estimates that the Project will generate 3.8 metric tons of carbon dioxide equivalents per person per year ($MTCO_2e$/sp/year) during operation.[58] Therefore, even though the Project's annual emissions (3,099 $MTCO_2e$/year) exceed the 1,100 $MTCO_2e$/year significance threshold, the DEIR concludes that the Project does not exceed the 4.6 $MTCO_2e$/sp/year significance threshold.[59] As a result, because only one of the thresholds was exceeded, the Project was deemed to have a less than significant GHG impact.

However, Mr. Hagemann and Ms. Jaeger found that the 2.52 persons per household value relied upon in the DEIR to estimate the service population "is incorrect and greatly overestimates the number of residents the Project will generate."[60] As a result, "the significance determination made in the DEIR is incorrect, and does not adequately represent the Project's impacts on global climate change."[61] As Mr. Hagemann and Ms. Jaeger note, according to the December 9, 2014 *City of Oakland Housing Element 2015-2023*, the 2.52 persons per household value relied upon by the DEIR is in reference to the average household size in Oakland in 1990, which takes into account multi-family households, and single family households with children.[62] The DEIR describes the Project as including 21 studios, 185 one-bedroom, and 120 two-bedroom apartments, totaling to approximately 330 units.[63] Mr. Hagemann and Ms. Jaeger find that the DEIR's assumption that 2.52 people will occupy each of the studio and single bedroom apartments "is absurd, and results in a drastic overestimation of the number of people likely to occupy these apartments."[64] The City has not provided substantial evidence supporting its use of this value.

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[55] *Id.*, at 12 – 13.
[56] DEIR, p. 198.
[57] *Id.*
[58] *Id.*, at 199.
[59] *Id.*
[60] SWAPE Comments, p. 12.
[61] *Id.*
[62] *Id.*
[63] DEIR, p. 43
[64] SWAPE Comments, p. 12.

Rather, Mr. Hagemann and Ms. Jaeger find that a "more reasonable value" can be calculated using values disclosed in Table 3-40 of the *City of Oakland Housing Element 2015-2023*, which is the same document relied upon by the DEIR to derive the initial service population value of 2.52 persons per household.[65] Table 3-40 provides a breakdown of "persons per room" for all occupied rented units in the City in 2010. According to this table, 92% of occupied units have less than 1.00 persons per room, 5% have 1.01 to 1.50 persons per room, and 3% have 1.51 or more persons per room.[66] Mr. Hagemann and Ms. Jaeger took the weighted average of this data, which results in an average of 1.03 persons per room.[67] They then use this weighted average to calculate "a more realistic service population."[68] Assuming that the 21 studio and 185 one-bedroom apartments would have an occupancy rate of 1.03 persons, and the remaining 120 two-bedroom apartments would have 2.06 persons occupying them (2 bedrooms x 1.03 persons), Mr. Hagemann and Ms. Jaeger estimate a service population of approximately 459 residents.

Mr. Hagemann and Ms. Jaeger then conclude that based on the more accurate service population calculation, the Project's GHG emissions exceed ***both*** the emissions and service population thresholds. They further note that their analysis "is most likely still an underestimation of the Project's GHG emissions" because, as explained more fully in the air quality section below, the model used to determine the Project's construction and operational emissions "relies upon incorrect input parameters that result in an underestimation of Project emissions."[69] Mr. Hagemann and Ms. Jaeger's findings are summarized in the table below.

SWAPE Estimates	**Metric Tons CO_2e/year**	**Metric Tons CO_2e/sp/year**
Emissions	3,099	6.75
Thresholds	1,100	4.6
Exceedance	***Yes***	***Yes***

[65] *Id.*
[66] "City of Oakland Housing Element 2015-2023." City of Oakland, December 9, 2014, Table 3-40, *available at:* http://www.hcd.ca.gov/housing-policy-development/housing-resource-center/plan/he/housing-element-documents/oakland_5th_adopted013015.pdf, **Attachment D** (selected pages).
[67] SWAPE Comments, p. 12.
[68] *Id.*, at 13.
[69] *Id.*

Because the Project's GHG emissions exceed both of the City's thresholds, the Project would result in a significant GHG impact. Thus, the City's Standard Conditions of Approval requiring the development of a Greenhouse Gas Reduction Plan would be triggered. Furthermore, "because the Project exceeds the GHG thresholds set forth by the City of Oakland, and because the City's thresholds were designed to ensure compliance with the GHG reduction goals set forth by AB32, the Project is also inconsistent with AB32."[70]

Mr. Hagemann and Ms. Jaeger conclude that "[a]n updated analysis of the Project's GHG emissions using correct values should be included in an updated DEIR, and additional mitigation measures, including the development of a Greenhouse Gas Reduction Plan, should be identified and implemented in an effort to reduce the Project's impacts to a less-than-significant level."[71] The DEIR must be revised and recirculated to reflect these findings.

B. The DEIR Fails to Adequately Analyze and Mitigate Potentially Significant Impacts to Air Quality

The DEIR's air quality analysis and conclusions rely on emissions calculated from the *California Emissions Estimator Model* Version CalEEMod.2013.2.2 ("CalEEMod").[72] As explained by Mr. Hagemann and Ms. Jaeger, CalEEMod provides recommended default values based on site specific information, such as land use type and total lot acreage. If specific project information is known, the user can change the default values and input project-specific values, "but CEQA requires that such changes be justified by substantial evidence."[73]

After reviewing the Project's CalEEMod output files in Appendix E, Mr. Hagemann and Ms. Jaeger found that "several of the values inputted into the model were not consistent with information disclosed in the DEIR," thus underestimating the Project's air quality impacts.[74] In addition, when Mr. Hagemann and Ms. Jaeger attempted to correct those values and conduct their own assessment of the Project's impacts, they found that "the DEIR failed to provide enough information to conduct a full assessment of the Project's true impacts."[75] Thus, the DEIR's

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[70] *Id.*
[71] *Id.*
[72] CalEEMod website, *available at* http://www.caleemod.com/.
[73] SWAPE Comments, p. 4.
[74] *Id.*
[75] *Id.*

conclusions are not supported by substantial evidence and "the City must prepare a revised DEIR to adequately assess the air quality impacts that the Project will have during construction and operation."[76]

1. Architectural Coating Emissions are Underestimated

The DEIR states that "the concentration of volatile organic compounds (VOCs) in architectural coatings were reduced from 250 gram per liter (g/L) to 150 g/L based on the regulatory requirements for non-flat high-gloss coatings described in BAAQMD Regulation 8, Rule 3: Architectural Coatings."[77] However, Mr. Hagemann and Ms. Jaeger explain that this value "is inconsistent with the values inputted into the CalEEMod model."[78] For nonresidential interior and residential exterior area coating, the values in CalEEMod were actually changed from the default value of 250 g/L to 15 g/L.[79] As noted by Mr. Hagemann and Ms. Jaeger, "[t]his value is approximately 90 percent lower than the 150 g/L value stated in the DEIR."[80] Thus, by reducing the values for nonresidential interior and residential exterior area coating to 15 g/L, Mr. Hagemann and Ms. Jaeger conclude that "the DEIR greatly underestimates the Project's volatile organic compound (VOC) emissions from architectural coating activities."[81]

2. The DEIR Fails to Include Demolition of Existing Buildings

The DEIR states that approximately 60,000 square feet of existing buildings would be demolished during Project construction.[82] Mr. Hagemann and Ms. Jaeger explain that the material produced from demolition, as well as trash and additional materials produced from other construction activities, will result in a significant amount of construction waste and debris.[83] They further state that this material, if not completely or partially used elsewhere on site, will most likely be transported off-site for disposal.[84] Thus, Mr. Hagemann and Ms. Jaeger find that "in order to accurately estimate the emissions that would be released during transport of this construction material, the total amount of waste hauled off-site would need to be

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[76] *Id.*
[77] DEIR, pp. 168 – 169.
[78] SWAPE Comments, p. 4.
[79] DEIR, Appendix E, p. 138.
[80] SWAPE Comments, p. 4.
[81] *Id.*
[82] DEIR, p. 168
[83] SWAPE Comments, p. 5.
[84] *Id.*

inputted into the CalEEMod model."[85] However, the emissions estimates in the DEIR do not include the transportation of this demolished material during construction of the Project.[86]

As a result, Mr. Hagemann and Ms. Jaeger conclude that "the CalEEMod model greatly underestimates the total emissions released during the demolition phase of construction, only accounting for emissions from off-road equipment."[87] As a result, the DEIR fails to account for "the fugitive dust from material movement, specifically truck loading and unloading. . ."[88] According to Mr. Hagemann and Ms. Jaeger, "[t]his dust contributes to PM10 and PM2.5 emissions, and by omitting this information from the air analysis, the PM10 and PM2.5 emissions during Project construction are underestimated."[89] Furthermore, they note that "transportation of this material will produce additional mobile-source pollutant emissions."[90] Therefore, the total emissions during Project construction are greatly underestimated.

3. Artificially Low Percent Reduction Applied to Daily Trip Rate

The DEIR indicates that the average residential daily trip rate was reduced from the CalEEMod default value of 6.59 trips per dwelling unit to 4.01 trips per dwelling unit.[91] This adjusted trip rate is based on information disclosed in a March 3, 2015 *Memorandum: 200 4th Street – Preliminary Transportation Analysis* ("Memorandum") prepared by Fehr & Peers.[92] The Memorandum suggests that because the Project site is located approximately 0.25 miles away from the Lake Merritt BART Station, the number of automobile trips generated by the Project would decrease by approximately 43 percent. This reduction, according to the DEIR, "is based on the Bay Area Travel Survey ("BATS") 2000 which shows that the non-automobile mode share within one-half mile of a BART Station in Alameda County is about 43 percent."[93]

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[85] *Id.*
[86] DEIR, Appendix E, pp. 138 – 140.
[87] SWAPE Comments, p. 5.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] DEIR, Appendix E, p. 140
[92] Fehr & Peers, Memorandum: 200 4th Street – Preliminary Transportation Analysis, March 3, 2015, p. 2.
[93] DEIR, p. 123.

However, Mr. Hagemann and Ms. Jaeger reviewed the BATS 2000 report and were unable to verify the origin of the 43 percent reduction, and as they explain, "the DEIR fails to provide any insight as to where, within the BATS 2000 report, this percentage was taken from."[94] Indeed, Mr. Hagemann and Ms. Jaeger found in the BATS 2000 report "a much lower percent decrease in daily vehicle trips from use of alternate modes of transportation. . ."[95] Thus, they conclude that "this 43 [percent] value should not be relied upon to estimate emissions."[96]

Furthermore, Mr. Hagemann and Ms. Jaeger found that an additional mitigation measure was applied to the model, on top of the 43 percent reduction, that further decreases the number of automobile trips generated by the Project as a function of the Project's proximity to a transit stop.[97] As a result, the DEIR improperly "double counts the reduction in total vehicle miles traveled that would typically occur as a result of the Project's close proximity to a BART station."[98]

The California Air Pollution Control Officers Association's ("CAPCOA") *Quantifying Greenhouse Gas Mitigation Measures* report discusses the various equations used by CalEEMod to quantify reductions (in emissions and vehicle miles traveled) from each mitigation measure.[99] According to Mr. Hagemann's and Ms. Jaeger's reading of the CAPCOA report, they calculate that the Project's proximity to the transit stop would result in a 16.2 percent reduction in total vehicle miles traveled.[100]

Mr. Hagemann and Ms. Jaeger conclude that "[t]he City does not provide substantial evidence in the DEIR to support the use of the 43 [percent] reduction value," but rather substantial evidence supports a 16.2 percent reduction.[101] Therefore, "by applying both the CalEEMod mitigation measure (16.2 percent reduction) as well as the 43 [percent] reduction to the vehicle trip rate, the DEIR double counts the reductions that would occur as a result of the Project's close proximity to a BART station, thus greatly underestimating the Project's mobile-

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[94] SWAPE Comments, p. 5.
[95] *Id.*, at 6.
[96] *Id.*
[97] DEIR, Appendix E, p. 155.
[98] SWAPE Comments, p. 5.
[99] Quantifying Greenhouse Gas Mitigation Measures, California Air Pollution Control Officers Association (CAPCOA), August 2010, *available at:* http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf
[100] SWAPE Comments, pp 6 – 7.
[101] *Id.*

source emissions."[102] The City must revise and recirculate the DEIR to address these deficiencies and provide a corrected air quality analysis.

4. Use of Incorrect Construction Duration

The DEIR relies upon the default values provided by CalEEMod to determine the number of construction days necessary for the Project. The DEIR states that "[b]ased on the size and type of development, CalEEMod estimated that Project construction would likely last 266 working days."[103] However, Mr. Hagemann and Ms. Jaeger find that when remodeling the Project's emissions, "CalEEMod estimates that construction of this Project, based on the size and type of development, will occur over a 310 day period."[104]

Mr. Hagemann and Ms. Jaeger state that "[n]ot only does the DEIR fail to use the default construction duration provided by CalEEMod for each construction phase, the DEIR completely omits the 20 day 'Paving' construction phase, and does not provide any reason as to why this phase was omitted from the model."[105]

The DEIR does explain that the Project will not require any site preparation, and as a result, the "Site Preparation" construction phase was omitted from the CalEEMod model. However, according to Mr. Hagemann and Ms. Jaeger, the DEIR fails to provide a reason for the omission of the "Paving" phase.[106] Thus, under the default construction schedule provided by CalEEMod, the total construction duration should be equal to 310 days, not 266 days as is indicated by the DEIR.[107] Furthermore, Mr. Hagemann and Ms. Jaeger find that "by shortening the construction schedule without manually adjusting the total equipment quantities for each phase, the DEIR not only underestimates the amount of equipment needed to complete Project construction, but also underestimates the emissions released by the off-road equipment used during construction."[108] Thus, this is another example of where the DEIR has underestimated emissions. The DEIR must be revised to include the correct CalEEMod estimates and recirculated for further public review.

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[102] *Id.*, at 7.
[103] DEIR, p. 198
[104] SWAPE Comments, p. 7.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*, at 7 – 8.

5. Incorrectly Presumed the Use of Tier 4 Final Engines

The DEIR states that the Project intends for all off-road heavy diesel engines to meet the California Air Resources Board's ("CARB") "Tier 4 Final" emission standards.[109] However, Mr. Hagemann and Ms. Jaeger find that the City has failed to provide substantial evidence "to support the feasibility of obtaining an entirely Tier 4 fleet."[110] Although off-road Tier 4 equipment is available for purchase, it is not required that off-road construction fleets are comprised solely of Tier 4 Final engines. Furthermore, according to Mr. Hagemann and Ms. Jaeger, it is unrealistic to presume that all of the construction equipment utilized for the Project will have Tier 4 engines based on availability and cost.[111] As a result, Mr. Hagemann and Ms. Jaeger conclude that "this mitigation measure should not be relied upon to reduce the Project's construction emissions to below levels of significance ... Rather, the Project should pursue additional mitigation measures that are more technically feasible to implement."[112]

Mr. Hagemann and Ms. Jaeger provide background information in their comments on the United States Environmental Protection Agency's ("EPA") non-road engine emission standards and how those standards would apply to this Project.[113] Although Tier 4 is certainly a desirable level for non-road equipment, most construction equipment do not achieve Tier 4 standards and those that do are extremely expensive. Although we encourage the use of Tier 4 whenever possible to reduce Project emissions, Mr. Hagemann and Ms. Jaeger find that it would be "completely unrealistic" to assume that all 18 pieces of equipment would be Tier 4.[114] Therefore, they find that "it is more realistic to assume that the fleet will include a mix of Tier 2, 3, and 4 engines, rather than just Tier 4 Final equipment exclusively."[115]

Mr. Hagemann and Ms. Jaeger conclude that "[u]nless the Project applicant can demonstrate to the public, either through budget or through a preliminary agreement with a contractor or supplier, that they will purchase/rent exclusively Tier 4 construction equipment, the use of Tier 2 equipment should be conservatively

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[109] DEIR, p. 168
[110] SWAPE Comments, p. 8.
[111] *Id.*
[112] *Id.*
[113] *Id.*, at 8 – 9.
[114] *Id.*, at 9.
[115] *Id.*

assumed, and an updated air quality analysis should be conducted to reflect this more realistic scenario."[116]

6. Updated Analysis Indicates Increase in Pollutant Emissions

Mr. Hagemann and Ms. Jaeger provide new emissions estimate using corrected parameters and values, which shows that the DEIR greatly underestimates Project emissions for NOx, ROGs, and GHGs.[117] They further explain that their new estimate itself underestimates Project emissions because "they were unable to adjust several parameters, such as the number of hauling trips during demolition, due to a lack of data provided by the DEIR." Thus, the City has not provided substantial evidence to support its analysis, and Mr. Hagemann and Ms. Jaeger conclude, assuming a revised DEIR will provide a more accurate analysis accounting for the missing information, that "based on our independent emissions modeling and analysis we conclude that the Project may have a potentially significant air quality impact that has not been disclosed, analyzed, or adequately mitigated in the DEIR."[118] As a result, an updated DEIR should be prepared to include an air quality analysis that uses correct input parameters and feasible mitigation measures.

V. THE DEIR DOES NOT ADEQUATELY INCORPORATE COMPLIANCE WITH LAWS AS ENFORCEABLE MITIGATION

Courts have imposed several parameters for the adequacy of mitigation measures. First, the lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards capable of mitigating the project's impacts to a less than significant level.[119] Deferral is impermissible where an agency "simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report."[120] Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.[121] Third, "[m]itigation measures must

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[116] *Id.*
[117] *Id.*, at 10.
[118] *Id.*, at 14.
[119] CEQA Guidelines, § 15126.4(a)(1)(B); *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.
[120] *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.
[121] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

be fully enforceable through permit conditions, agreements, or other legally binding instruments."[122] Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.[123]

The DEIR concludes in several sections, including hazards, GHGs, groundwater, and transportation as discussed above, that the Project's compliance with laws and regulations are sufficient to mitigate potentially significant impacts to a level of insignificance. In some cases, such as groundwater, the DEIR simply concludes that impacts are less than significant by assuming compliance with laws. However, compliance with a regulation or law is not automatically an indication of the sufficiency of mitigation measures where there is substantial evidence that the project may result in significant impacts.[124] CEQA requires a lead agency to fully assess the significance of a Project's impacts in light of substantial evidence "notwithstanding compliance with the adopted regulations or requirements."[125] Furthermore, the DEIR may not simply assert "a bare conclusion ... not supported by facts or analysis."[126]

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."[127] 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."[128] Thus, the ruling supports the notion that compliance with an applicable standard outside of the CEQA process does not automatically obviate a lead agency's obligation to consider substantial evidence and analyze and mitigate potentially significant impacts.

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

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[122] CEQA Guidelines § 15126.4(a)(2).
[123] *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61,79.
[124] *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707; *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441.
[125] CEQA Guidelines § 15064.4.
[126] *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390-1391.
[127] *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.
[128] *Id.*

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."[129] The court ordered the County to prepare an EIR.

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." Furthermore, under CEQA, the City must disclose the significance of all impacts and provide separate and 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.[130] 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.[131] 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."[132] 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."[133]

Here, the City failed to provide any information explaining how compliance with laws would reduce the Project's potentially significant impacts to less than significant. The City relies on compliance with laws for reducing hazards, GHG, and groundwater impacts when there is substantial evidence that the Project will have significant impacts in those areas. The City may not rely solely on compliance with regulations or laws as reducing impacts to less than significant levels without a full analysis of impacts or enforceable mitigation. As the DEIR is currently presented, the City cannot conclude that the Project's impacts have been fully assessed and properly mitigated.

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[129] *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.
[130] *Lotus v. Department of Transportation,* 223 Cal.App.4th at 650.
[131] *Id.*, at 651.
[132] *Id.*, at 656.
[133] *Id.*

Furthermore, the DEIR improperly relies on compliance with laws as mitigation that cannot be considered separate and enforceable, but is merely part of the Project description. For example, the DEIR states that "[c]ompliance with applicable regulations and the City's SCAs would ensure that the proposed project would not create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment."[134] However, the DEIR does not appear to provide any more information regarding which laws it refers to and whether the Applicant can reasonably be expected to comply with them.

The DEIR may not merely rely on a vague promise of future compliance with applicable laws and must separately identify and analyze the significance of the Project's impacts and incorporate enforceable mitigation to reduce those significant impacts. If the City's less than significant conclusions rely on compliance with laws, then it should characterize such compliance as mitigation for the significant impact.

VI. CONCLUSION

The DEIR does not satisfy CEQA's procedural and evidentiary standards for the preparation of an EIR. The DEIR fails to provide a complete Project description and fails to adequately describe the existing environmental setting for hazards on the site. The DEIR also fails adequately disclose, analyze, and mitigate the Project's potentially significant impacts to worker and public health from site hazards, air quality, and GHG emissions. For these reasons, the City must withdraw the DEIR and prepare a revised DEIR that adequately analyzes and proposes all necessary and feasible mitigation to reduce the Project's potentially significant environmental impacts.

Sincerely,

Laura E. Horton

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Attachments

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[134] DEIR, p. 248.