

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD SUITE 1000  
SOUTH SAN FRANCISCO, CA 94080-7037

TEL (650) 509-1660

FAX (650) 509-5062

l4obczynski@adamabroadwell.com

SACRAMENTO OFFICE

320 CAPITOL MALL, SUITE 350  
SACRAMENTO, CA 95814-4721

TEL (916) 444-6201

FAX (916) 444-5209

MILA A BUCKNER  
DANIEL L CARDOZO  
CHRISTINA M CARO  
THOMAS A ENSLOW  
TANYA A GULESSER AM  
MARC D JOSEPH  
RACHAEL E KOSS  
LINDA T SOBACZYNSKI

November 14, 2017

VIA EMAIL and OVERNIGHT DELIVERY

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

Toni Taber, City Clerk  
Office of the San Jose City Clerk  
200 East Santa Clara Street  
San Jose, CA 95113  
Email: [cityclerk@sanjoseca.gov](mailto:cityclerk@sanjoseca.gov)

Thai-Chau Le, Environmental Project Manager  
Email: [Thai-chau.le@sanjoseca.gov](mailto:Thai-chau.le@sanjoseca.gov)

Re: Comments on the Initial Study/Addendum prepared for the  
Bassett Street Residential Project (Aviato) (SP17-023)

Dear Ms. Hughey, Ms. Taber, and Ms. Le:

These comments are submitted on behalf of **San Jose Residents for Responsible Development** regarding the Initial Study/Addendum for the Bassett Street Residential Project (Aviato) ("Project"), proposed by KT Urban ("Applicant"). The Project site is 0.77 acres and is comprised of three parcels on the north side of Bassett Street between Terraine Street and North San Pedro Street in downtown San Jose (APNs: 259-23-005; 259-23-006; 259-51-007). As proposed, the Applicant is seeking a Special Use Permit (SP17-023 & T17-026) from the City of San Jose ("City") to allow the construction of 302 square units in an 18-story building and up

3944-002acp

November 14, 2017

Page 2

to 10,146 square feet of retail on the 0.77 gross acre site. The proposed Project would demolish the existing buildings (totaling approximately 26,800 square feet).

The Addendum, prepared pursuant to California Environmental Quality Act ("CEQA") Guidelines section 15164, evaluates the Project's potential environmental impacts and consistency with the Brandenburg Mixed Use Project/North San Pedro Housing Sites Final Environmental Impact Report ("EIR"); the San Jose Downtown Strategy 2000 Final EIR; and the Final EIR and Supplemental Program EIR for the Envision San Jose 2040 General Plan, and addenda thereto.

We reviewed the environmental review documents with the assistance of experts Matt Hagemann and Hadley Nolan of Soil / Water / Air Protection Enterprise ("SWAPE"). Their attached technical comments are submitted in addition to the comments in this letter.<sup>1</sup> The curricula vitae of these experts are also attached as exhibits to this letter.

In sum, we identified a number of significant deficiencies in the City's analysis, as well as potentially new and more severe impacts than previously analyzed in the EIRs. Furthermore, we identified several mitigation measures not previously analyzed that would reduce potentially significant impacts. Specifically, the Addendum fails to adequately evaluate hazards related to dewatering at the construction site. It does not disclose a potentially hazardous well on the Project site. The Addendum also inadequately analyzes air quality impacts, and our experts provide substantial evidence that there are more severe air quality impacts than previously analyzed. Therefore, an Addendum is not the appropriate means to approve this Project; rather, an EIR is required to address the significant environmental effects, which are described in further detail below.

## I. STATEMENT OF INTEREST

San Jose Residents for Responsible Development ("San Jose Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development.

---

<sup>1</sup> See Letter from Matt Hagemann and Hadley Nolan to Linda Sobczynski (November 9, 2017) *Comments on the Bassett Street Residential Project (Aviata)* (hereinafter, "SWAPE Comments"), Exhibit A.

November 14, 2017

Page 3

The association includes Jeff Dreyer Sr., Paul Oller, Mo Salberg, and Alex Caraballo.

The individual members of San Jose Residents live, work, and raise their families in the City of San Jose. 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.

The organizational members of San Jose 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 their 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, San Jose Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

## II. THE CITY MAY NOT RELY ON PREVIOUS ENVIRONMENTAL ANALYSIS FOR PROJECT APPROVAL

CEQA has two basic purposes, neither of which is satisfied by the City's Addendum. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.<sup>2</sup> The EIR is the "heart" of this requirement.<sup>3</sup> 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."<sup>4</sup>

---

<sup>2</sup> 14 Cal. Code Regs., § 15002(a)(1) ("CEQA Guidelines"); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>3</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

<sup>4</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

November 14, 2017

Page 4

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."<sup>5</sup> An adequate EIR must contain facts and analysis, not just an agency's conclusions.<sup>6</sup> CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.<sup>7</sup>

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.<sup>8</sup> If an EIR identifies significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>9</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>10</sup> Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>11</sup> A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>12</sup> This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."<sup>13</sup>

---

<sup>5</sup> CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>6</sup> See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

<sup>7</sup> Pub. Resources Code, § 21100(b)(1); CEQA Guidelines § 15126.2(a).

<sup>8</sup> CEQA Guidelines, § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

<sup>9</sup> Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

<sup>10</sup> *Id.*, §§ 21002-21002.1.

<sup>11</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>12</sup> *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

<sup>13</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935. 3944-002acp

November 14, 2017

Page 5

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.<sup>14</sup> CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.<sup>15</sup> A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project "would not have a significant effect on the environment."<sup>16</sup>

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

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.<sup>17</sup>

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

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new

---

<sup>14</sup> CEQA Guidelines, §§ 15060, 15063(c).

<sup>15</sup> See, e.g., Pub. Resources Code, § 21100.

<sup>16</sup> *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code, § 21080(c).

<sup>17</sup> Pub. Resources Code, § 21166.

significant effects or a substantial increase in the severity of previously identified effects;

- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
  - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
  - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
  - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
  - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.<sup>18</sup>

Only where *none* of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further

---

<sup>18</sup> CEQA Guidelines, § 15162(a)(1)-(3).  
3944.002acp

documentation.<sup>19</sup> For Addendums specifically, which is what the City claims is applicable to the Project, CEQA allows Addendums to a previously certified EIR if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.<sup>20</sup>

Here, the City's reliance on CEQA's provisions is misplaced.<sup>21</sup> The City's Addendum does not simply provide "some changes or additions" to the prior EIRs as is allowed under CEQA Guidelines section 15162. Rather, it includes a new substantive analysis for a large development project which was not specifically analyzed in the other EIRs.

Second, as explained further below, SWAPE provides substantial evidence that the Project will result in new and more severe significant impacts than previously analyzed in prior EIRs. And SWAPE recommends new, cost-effective, and feasible mitigation measures that were not considered in the prior EIRs, but that could reduce this Project's significant impacts to a less than significant level.<sup>22</sup> SWAPE's substantial evidence, and the City's lack thereof, requires that the City prepare a subsequent or supplemental EIR to adequately address the Project's potentially significant impacts.<sup>23</sup>

A. The City is required to prepare a subsequent EIR due to new information about hazards and hazardous waste.

1. *New information about the impacts from groundwater dewatering triggers preparation of a subsequent EIR.*

---

<sup>19</sup> CEQA Guidelines, § 15162(b).

<sup>20</sup> CEQA Guidelines, § 15164; Initial Study/Addendum, p. 1 ("Pursuant to Section 15164 of the CEQA Guidelines, the City of San Jose has prepared an Addendum . . . because minor changes made to the project, as described below, do not raise important new issues about the significant impacts on the environment.").

<sup>21</sup> CEQA Guidelines, § 15164.

<sup>22</sup> IS/Addendum, p. 32 ("The project would, however, contribute cumulatively to the significant operational emissions impact identified in the Brandenburg and Downtown Strategy FEIR's.").

<sup>23</sup> CEQA Guidelines, § 15162 ("no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]"); § 15164 ("The [agency's] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.").

November 14, 2017

Page 8

The Project will require excavation that will result in extensive dewatering during construction. Yet, the Addendum, Appendix C, and prior EIRs fail to disclose the impacts that may result from this dewatering.

Under CEQA Guidelines, section 15162(a)(3), an agency must prepare an EIR if there is new information of substantial importance, which could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete and which will result in a significant effect that was not discussed in the previous EIR. A project may have a significant impact if it would violate any water quality standards or waste discharge requirement, create or contribute runoff water that would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, or otherwise substantially degrade water quality.<sup>24</sup>

Here, the City must prepare a subsequent EIR because new information about groundwater and changes in the Project reveal a potentially significant water quality impact. New information shows that groundwater is present at depths as shallow as 15 feet in depth beneath the Project site.<sup>25</sup> Changes in the proposed Project require excavation to reach a depth of 41 feet, as opposed to excavation up to 25 feet, as described in the 2003 Brandenburg EIR.<sup>26</sup> Therefore, more extensive dewatering will be required during construction.<sup>27</sup> A subsequent EIR is required because of changes in the Project<sup>28</sup> and because it was not known and could not have been known at the time the prior EIR was certified that excavation will reach depths of 41 feet for this Project.<sup>29</sup> Therefore, impacts from extensive dewatering, up to 41 feet, were not adequately analyzed.

In addition, SWAPE provides substantial evidence that the Project site may have potentially contaminated groundwater, making the impact a new or more severe significant impact.<sup>30</sup> In 2001, a consultant documented contaminated

---

<sup>24</sup> CEQA Guidelines, Appendix G (Water Quality).

<sup>25</sup> IS/Addendum, p. 61.

<sup>26</sup> CEQA Guidelines, § 15162(a)(1) ("Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.")

<sup>27</sup> IS/Addendum, p. 61.

<sup>28</sup> CEQA Guidelines, § 15162(a)(1).

<sup>29</sup> CEQA Guidelines, § 15162(a)(3).

<sup>30</sup> CEQA Guidelines, §15162(a)(1), (3)(A-B).



groundwater at 355 North San Pedro Street, which is adjacent to 199 Bassett Street.<sup>31</sup> The consultant documented benzene at concentrations of 16 parts per billion.<sup>32</sup> Pursuant to San Francisco Bay Regional Water Quality Control Board laws and regulations, this concentration of benzene is three times the allowable limit that may be discharged from dewatering efforts into stormwater drains.<sup>33</sup>

However, the 2003 EIR contains only a summary report discussing that Underground Storage Tanks (USTs) present potential contamination to soil and groundwater with no investigation into whether the groundwater was contaminated at the Project site. Yet the Addendum asserts, without providing substantial evidence, that dewatering is not anticipated to create a significant hazard to the public or the environment.

SWAPE provides expert opinion, constituting substantial evidence, that the Project's excavation to a depth of 41 feet in an area where potentially contaminated groundwater is 15 feet below ground surface may cause an unanalyzed significant impact on surface water bodies, public utilities, and the public, including construction workers, if the contamination is not adequately identified, analyzed and mitigated during dewatering activities.<sup>34</sup> The City is required to prepare an EIR to discuss this potential groundwater contamination because there is new information of substantial importance and project changes showing potentially contaminated groundwater may result in a significant environmental effect.

2. *The Addendum fails to disclose and evaluate a nearby well.*

According to documents filed with the State Water Resources Control Board, there is a well located on the Project site that has not been identified in the Phase I Environmental Assessment<sup>35</sup> and was not discussed in the Addendum.<sup>36</sup> CEQA does

---

<sup>31</sup> SWAPE Letter, p. 2.

<sup>32</sup> SWAPE Letter, p. 2.

<sup>33</sup> SWAPE Letter, p. 2.

<sup>34</sup> SWAPE Letter, p. 2.

<sup>35</sup> Addendum, Appendix C.

<sup>36</sup> SWAPE Letter, p. 3 (citing

[https://geotracker.waterboards.ca.gov/regulators/deliverable\\_documents/4051131308/MAPS\\_METRO\\_SCAN.pdf](https://geotracker.waterboards.ca.gov/regulators/deliverable_documents/4051131308/MAPS_METRO_SCAN.pdf)).

3911-002acp

not require technical perfection in an environmental review document, but rather adequacy, completeness, and a good-faith effort at full disclosure.<sup>37</sup>

The Addendum fails as an information disclosure document because it does not include information pertaining to this well, and any data generated from investigation of the well, including soil and groundwater analytical data.<sup>38</sup> Because the Addendum failed to disclose the existence of this well, it is unclear if the well is leaking or was properly abandoned and if it poses a risk during earth-moving activities. The City must prepare an EIR to disclose and evaluate the potential risk associated with this well.

**B. The City cannot rely on the Addendum for Project approval because the Project will result in new, significant air quality impacts that were not identified in the previous EIRs.**

The City of San Jose requires the 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.<sup>39</sup> This policy applies to the proposed project due to its proximity to the Union Pacific Railroad tracks and Highway 87.<sup>40</sup> Previous EIRs did not complete this analysis for the proposed Project. Consequently, the Addendum prepared a community risk assessment to evaluate emissions of diesel particulate matter ("DPM") and PM2.5 during construction activities as part of its air quality analysis.<sup>41</sup> The Addendum concluded that the community risk impact will be "new less than significant impact with mitigation incorporated (less than significant impact with mitigation)."<sup>42</sup>

Based on this conclusion, the City believes it does not need to prepare a subsequent EIR because the new information does not show a *significant* effect.<sup>43</sup> However, this conclusion — that the impact is new, but *less than significant with*

---

<sup>37</sup> CEQA Guidelines, § 15003, subd. (i) (citing *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692).

<sup>38</sup> SWAPE Letter, p. 3.

<sup>39</sup> IS/Addendum, p. 27 (citing General Plan Policy MS-11.1).

<sup>40</sup> IS/Addendum, p. 37.

<sup>41</sup> IS/Addendum, p. 35.

<sup>42</sup> IS/Addendum, p. 36.

<sup>43</sup> See CEQA Guidelines, § 15162(a)(3)(A); see, e.g., IS/Addendum, p. 1 of 3, ("... minor changes to the project ... do not raise important new issues about the significant impacts on the environment.").

*mitigation* — is unsupported by substantial evidence and cannot be used as the basis for not preparing a subsequent EIR.<sup>44</sup> The Addendum (1) incorrectly calculated the community risk impact. (As explained in further detail below, the impact is more severe than what the Addendum reports.) And, (2) the Addendum relies on unenforceable, infeasible mitigation measures, which will not be able to reduce the new, significant impact to less than significant levels. Pursuant to CEQA Guidelines sections 15164(a) and 15162(a)(3)(A), a subsequent EIR is required because a correctly calculated community risk demonstrates this new impact will be significant. The City must prepare a subsequent EIR that includes enforceable, feasible mitigation measures to reduce the new, significant health risk impact.

First, the Addendum incorrectly calculated the risk posed to nearby residential receptors as a result of exposure to DPM emissions because it only looked at Project *construction* and failed to evaluate the risk associated with exposure to emissions released during Project *operation*.<sup>45</sup> This is inconsistent with the Bay Area Air Quality Management District (“BAAQMD”) guidelines, which recognize that “operational emissions typically represent the majority of a project’s air quality impacts.”<sup>46</sup> For example, during operation, truck deliveries to this Project’s commercial land uses will generate large amounts of diesel exhaust. Long-term exposure to DPM, a known human carcinogen, and other toxic air contaminants, will result in a significant health risk impact. By failing to consider construction and operational emissions, the Addendum underestimates the community risk.

Second, the Addendum includes an infeasible and unenforceable mitigation measure, Mitigation Measure AIR-1.1,<sup>47</sup> to reduce the community risk impact to less than significant levels. Mitigation Measure AIR-1.1 calls for Tier 4 construction equipment, which have lower construction related toxic air contaminant emissions, such as DPM, than their higher emitting counterparts.<sup>48</sup> However, the City has offered no evidence that the Applicant will be able to obtain Tier 4 construction

<sup>44</sup> CEQA Guidelines, § 15164(e) (explanation supporting decision not to prepare a subsequent EIR must be supported by substantial evidence).

<sup>45</sup> SWAPE Letter, pp. 3-4.

<sup>46</sup> BAAQMD, CEQA Air Quality Guidelines (May 2010), available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Draft\\_BAAQMD\\_CEQA\\_Guidelines\\_May\\_2010\\_Final.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Draft_BAAQMD_CEQA_Guidelines_May_2010_Final.ashx); see also SWAPE Letter, p. 4.

<sup>47</sup> Appendix A refers to this Mitigation Measure as “AQ-1.”

<sup>48</sup> IS: Addendum, p. 36.

equipment as part of the mitigation measure.<sup>49</sup> Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>50</sup> A CEQA lead agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>51</sup> This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”<sup>52</sup>

As SWAPE explains, although Tier 4 equipment is available for purchase, this equipment is costlier and less available than the higher emitting equipment.<sup>53</sup> Unless the Applicant is able to demonstrate feasibility of obtaining Tier 4 equipment, this mitigation measure should not be solely relied upon to reduce emissions. Additionally, the mitigation measure includes no requirement that the entire fleet be comprised of Tier 4 equipment.<sup>54</sup> Therefore, the measure’s efficacy in reducing emissions is uncertain and cannot be relied upon to reduce the community risk impact to less than significant levels

What’s more, when SWAPE correctly calculated the Project’s air quality impacts — by taking into consideration both construction and operational emissions — it found that the Project will exceed BAAQMD’s threshold of significance with respect to local community risk and hazard impacts by far more than what the Addendum reported.<sup>55</sup> One of the factors that BAAQMD uses in determining if the community risk impact will be significant is if there will be an excess cancer risk level of more than 10 in one million.<sup>56</sup>

---

<sup>49</sup> See SWAPE Letter, pp. 8-9.

<sup>50</sup> CEQA Guidelines § 15126.4(a)(2).

<sup>51</sup> *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

<sup>52</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

<sup>53</sup> SWAPE Letter, p. 9.

<sup>54</sup> IS/Addendum, p. 35 (Tier 4 engines or equivalent are required for equipment larger than 25 horsepower).

<sup>55</sup> SWAPE Letter, p. 5; CEQA Guidelines, § 15065 (“A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.”).

<sup>56</sup> BAAQMD, CEQA Air Quality Guidelines (May 2010), p. 2-5, available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Draft\\_BAAQMD\\_CEQA\\_Guidelines\\_May\\_2010\\_Final.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Draft_BAAQMD_CEQA_Guidelines_May_2010_Final.ashx) (BAAQMD considers an excess cancer risk level of more than 10 in one million to be significant).

3944-002acp

SWAPE details its calculations in its comments. To summarize, SWAPE prepared a screening-level health risk assessment in accordance with OEHHA guidance.<sup>57</sup> SWAPE calculated the excess cancer risk to the residential receptors located closest to the Project site.<sup>58</sup> OEHHA recommends using Age Sensitivity Factors ("ASF") to account for the heightened susceptibility of young children to the carcinogenic toxicity of air pollution.<sup>59</sup> SWAPE's calculations, which are summarized in the table below, reveal that the Project's excess cancer risk for infantile, child, adult, and lifetime cancer risk all exceed the threshold of significance.<sup>60</sup> For example, the excess cancer risk for an infant is 79 in one million.<sup>61</sup>

The Maximum Exposed Individual at an Existing Residential Receptor (MEIR)					
Activity	Duration (years)	Concentration ( $\mu\text{g}/\text{m}^3$ )	Breathing Rate (L/kg-day)	ASF	Cancer Risk
Construction	1.94	0.23	1090	10	7.3E-05
Operation	0.06	0.64	1090	10	6.3E-06
<i>Infant Exposure Duration</i>	<i>2.00</i>			<i>Infant Exposure</i>	<i>7.9E-05</i>
Operation	14.00	0.64	572	3	2.3E-04
<i>Child Exposure Duration</i>	<i>14.00</i>			<i>Child Exposure</i>	<i>2.3E-04</i>
Operation	14.00	0.64	261	1	3.5E-05
<i>Adult Exposure Duration</i>	<i>14.00</i>			<i>Adult Exposure</i>	<i>3.5E-05</i>
Lifetime Exposure Duration	30.00			Lifetime Exposure	3.46E-04

Through its screening-level health risk assessment, SWAPE has provided substantial evidence that the Project would result in a new, significant health risk impact that is more severe than what is reported in the Addendum.<sup>62</sup> Consequently, the City has failed to support its finding that the Project will have a less than

<sup>57</sup> SWAPE Letter, pp. 5-8.

<sup>58</sup> SWAPE Letter, p. 4.

<sup>59</sup> SWAPE Letter, p. 7.

<sup>60</sup> SWAPE Letter, p. 7.

<sup>61</sup> SWAPE Letter, p. 7.

<sup>62</sup> SWAPE Letter, pp. 7-8.

significant effect with mitigation because it has (1) erroneously underestimated the community risk and (2) impermissibly considered unenforceable, infeasible mitigation measures that will not reduce the impact to less than significant.

Because there is a new, significant impact that was not addressed in previous EIRs, the City is required to prepare a subsequent EIR in accordance with CEQA Guidelines section 15162(a)(3)(A). In that EIR, the City must include a community risk assessment, which will consider both construction and operational emissions. The EIR should also include additional feasible, certain, enforceable, and cost-effective mitigation measures to reduce the Project's significant community risk impact to less than significant.

SWAPE recommends the following measures to reduce construction emissions including, among others:

- Requiring implementation of Diesel Control Measures, such as requiring that only ultra-low sulfur diesel fuel or a biodiesel blend, with a low sulfur content, is used;<sup>63</sup>
- Repowering or replacing older construction equipment engines with newer, cleaner engines;<sup>64</sup>
- Installing retrofit devices on existing construction equipment on the exhaust system to reduce emissions;<sup>65</sup>
- Using electric and hybrid construction equipment;<sup>66</sup> and, among others,
- Instituting a heavy-duty off-road vehicle plan (i.e., tracking vehicle inventory to see what emission control technology is installed).<sup>67</sup>

The measures to reduce operation emissions include, among others:

- Increasing pedestrian and bicycle access to reduce vehicle-miles traveled around the Project site;<sup>68</sup>

---

<sup>63</sup> SWAPE Letter, p. 11.

<sup>64</sup> SWAPE Letter, pp. 11-12.

<sup>65</sup> SWAPE Letter, pp. 12-13.

<sup>66</sup> SWAPE Letter, p. 12.

<sup>67</sup> SWAPE Letter, pp. 13-16.

<sup>68</sup> SWAPE Letter, pp. 16-17.

November 14, 2017

Page 15

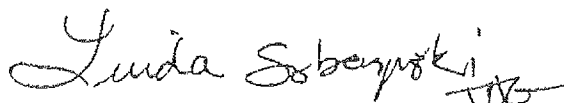
- Limiting parking supply;<sup>69</sup> and, among others,
- Promoting incentives to reduce driving.<sup>70</sup>

These measures provide a cost-effective, feasible way to reduce emissions and must be incorporated to reduce the significant community risk this Project will pose. Moreover, if the City intends to rely on Mitigation Measure AIR-1, which requires implementing Tier 4 equipment, the City must ensure that the Applicant is able to meet this requirement.

### III. Conclusion

The City may not rely on the Addendum to approve the Project. San Jose Residents provides substantial evidence that the Project's Phase I ESA fails to assess potentially significant impacts from groundwater contamination and a well. Also, the Addendum failed to assess new and more severe significant impacts on air quality and public health. For these reasons, we urge the City to prepare a revised analysis in an EIR, as required by CEQA and to identify and implement all feasible mitigation measures available to reduce the Project's significant, site-specific impacts to less than significant levels before the City considers approving the Project.

Sincerely,



Linda Sobczynski

Attachments

LTS:acp

---

<sup>69</sup> SWAPE Letter, p. 17.

<sup>70</sup> SWAPE Letter, pp. 17-19.