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November 26, 2018

Via Email and Overnight Mail

Jeff Roche, Senior Planner
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Community Development Department
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Re: Comments on the Draft Environmental Impact Report – 555 East Evelyn Avenue Residential Project

Dear Mr. Roche:

We are writing on behalf of Mountain View Residents for Responsible Development (“Mountain View Residents”) to provide comments on the Draft Environmental Impact Report (“DEIR”) prepared by the City of Mountain View (“City”) for the 555 East Evelyn Avenue Residential Project (“Project”). Prometheus Real Estate Group, Inc. (“Applicant”) is proposing to demolish an existing 1.9-acre mini-storage facility to construct a 471-unit apartment complex with a 0.68-acre public park. The apartments would be distributed between two separate buildings that would vary between three and five stories. The western building would be 267,994 square feet in size and would contain 225 units. The eastern building would be 289,090 square feet in size and would contain 246 units. The Project also includes two levels of below-grade parking with 668 parking spaces. The Project site is approximately 5.89 acres in size and includes three parcels (APNs 161-15-016, -004, -005) located at 555 East Evelyn Avenue.

The Applicant is requesting the following approvals for the Project: a General Plan Amendment to amend the site designation from General Industrial and Medium Density Residential to High Density Residential; a Zoning Ordinance Text Amendment and Zoning Map Amendment from P-30 Precise Plan (Sylvan-Dale) and R3.2-2 (Multiple-Family) to R-4 (High Density); a Planned Community and Development Review Permit; a Vesting Tentative Map; a Lot Tie Agreement; and a Heritage Tree Removal Permit for the removal of 16 Heritage trees.

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Based on our review of the DEIR and related Project documents, we have determined that the DEIR does not comply with the requirements of the California Environmental Quality Act (“CEQA”). First, the City underestimates the Project’s construction and operational emissions of criteria pollutants and toxic air contaminants (“TACs”) and thus lacks substantial evidence to support its conclusion that air quality impacts would be less than significant. Second, the City failed to properly disclose and analyze the Project’s potential public health impacts to nearby sensitive receptors from exposure to emissions of TACs, which substantial evidence shows will be significant. Third, the City failed to adequately demonstrate the Project will comply with the City’s Greenhouse Gas Reduction Plan and, therefore, lacks substantial evidence to support its conclusion that GHG impacts would be less than significant. Fourth, the DEIR’s analysis of the Project’s energy use fails to comply with CEQA. Fifth, the DEIR fails to adequately disclose, analyze, and mitigate impacts to future the public from hazardous soil vapors. For each of these reasons, the City may not approve the Project until a revised DEIR is prepared and re-circulated for public review and comment.

These comments were prepared with the assistance of technical experts Matt Hagemann and Hadley Nolan of Soil Water Air Protection Enterprise (“SWAPE”).¹ SWAPE’s comments and curriculum vitae are attached hereto as Attachment 1, are fully incorporated in these comments and are submitted to the City in addition to the comments in this letter. Accordingly, the City must address and respond to the technical experts’ comments separately.²

I. STATEMENT OF INTEREST

Mountain View Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public health and environmental impacts associated with the Project. Mountain View Residents includes the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483,

¹ See Attachment 1: Letter from Matt Hagemann & Hadley Nolan, SWAPE, to Collin S. McCarthy, Adams Broadwell Joseph & Cardozo re: Comments on the 555 East Evelyn Residential Project (Nov. 23, 2018) (“SWAPE Comments”).

² Mountain View Residents reserves the right to supplement these comments at later hearings and proceedings related to this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.
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and their members and families, and other individuals that live and/or work in the City of Mountain View and Santa Clara County.

Individual members of Mountain View Residents and its member labor organizations live, work, recreate and raise their families in the City of Mountain View and Santa Clara County. They would be directly affected by the Project's adverse environmental and public health impacts. Individual members may also work on the Project itself and, therefore, will be first in line to be exposed to any health and safety hazards that exist onsite. Mountain View Residents have a strong interest in enforcing 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 City of Mountain View and Santa Clara County, and by making it less desirable for businesses to locate and people to live there.

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR, except in limited circumstances.³ The EIR is the very heart of CEQA.⁴ "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."⁵

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.⁶⁷ CEQA's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. In this respect, an EIR "protects not only the environment but also informed self-government."⁸ The EIR has been described as "an environmental 'alarm bell' whose

³ See, e.g., Pub. Resources Code ("PRC") § 21100.

⁴ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

⁵ *Comtys. for a Better Env' v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("*CBE v. CRA*").

⁶ 14 Cal. Code Regs. ("CEQA Guidelines"), § 15002, subd. (a)(1).

⁷ See, e.g., PRC § 21100.

⁸ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

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purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁹

In furtherance of CEQA’s purpose as an informational tool, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹⁰ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.¹¹ In addition, an adequate EIR must contain the facts and analysis necessary to support its conclusions.¹²

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.¹³ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to identify ways that environmental damage can be avoided or significantly reduced. To that end, if an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize those impacts.¹⁴ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹⁵ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”¹⁶ As the courts have explained, “a

⁹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹⁰ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹¹ PRC § 21100, subd. (b)(1); CEQA Guidelines § 15126.2, subd. (a).

¹² See *Citizens of Goleta Valley* 52 Cal.3d at 568.

¹³ CEQA Guidelines § 15002, subds. (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.

¹⁴ PRC §§ 21002.1, subd. (a), 21100, subd. (b)(3).

¹⁵ PRC §§ 21002-21002.1.

¹⁶ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

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prejudicial abuse of discretion” occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.”¹⁷

III. The DEIR’s Conclusion that Air Quality Impacts Would be Less Than Significant Is Not Supported by Substantial Evidence

An EIR must fully disclose all potentially significant impacts of the project under consideration. Furthermore, when making a determination as to the significance of project impacts, the lead agency’s determination must be supported by accurate scientific and factual data for each impact.¹⁸ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.¹⁹

A. The Input Parameters Used in the DEIR’s Emissions Model Are Not Supported by Substantial Evidence

The DEIR states that the Project’s construction and operational emissions were calculated using the California Emissions Estimator Model Version CalEEMod.2016.3.2 (“CalEEMod”).²⁰ When modeling a project’s emissions, CalEEMod provides the user with recommended default values based on information such as land use type, meteorological data, project type, and typical equipment associated with the project type.²¹ The user may then replace default values when more site-specific information is available; however, any changes to CalEEMod defaults must be supported by substantial evidence.²² Once the model is run, CalEEMod generates “output files” for each model that reveal the parameters used in the model.

¹⁷ *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

¹⁸ CEQA Guidelines § 15064(b).

¹⁹ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

²⁰ DEIR, Appendix C at p. 7.

²¹ SWAPE Comments at p. 1.

²² *Id.* (citing CalEEMod User Guide, p. 2, 9, http://www.aqmd.gov/docs/default-source/caleemod/01_user-39-s-guide2016-3-2_15november2017.pdf?sfvrsn=4).

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SWAPE reviewed the CalEEMod output files for the Project included in DEIR Appendix C.²³ In reviewing the CalEEMod output files, SWAPE found several of the input parameters used to calculate the Project's emissions are inconsistent with information provided in the DEIR. As SWAPE's comments explain, these changes are not supported by substantial evidence and resulted in an underestimation of the Project's emissions.²⁴

First, the Project's CalEEMod output files show that the square footage of the proposed residential land use was substantially underestimated in the air model.²⁵ The Project description states that the western building would be 267,994 square feet in size and the eastern building would be 289,090 square feet – a total of 557,084 square feet for the entire residential land use.²⁶ In reviewing the CalEEMod output files, however, SWAPE found that the air model was prepared assuming a residential land use size of only 471,000 square feet, 86,084 square feet less than the actual Project size.²⁷ This discrepancy is significant because the land use type and size are used by CalEEMod to determine emission factors that go into the model's calculations.²⁸ For example, SWAPE explains that “the square footage of a land use is used for certain calculations such as determining the wall space to be painted (i.e., VOC emissions from architectural coatings) and volume that is heated or cooled (i.e., energy impacts).”²⁹ Thus, because the residential land use in the air model is smaller than the actual Project size, the construction and operational emissions are underestimated.³⁰

Second, SWAPE found that the usage hours for several pieces of construction equipment was manually reduced in the model, and are inconsistent with the daily usage hours provided by the Applicant.³¹ DEIR Appendix C includes a table listing the construction equipment to be used in the Project and the anticipated daily usage hours for all pieces of equipment.³² However, SWAPE found that rather than

²³ *Id.* at pp. 2-6.

²⁴ *See id.* at pp. 2-6.

²⁵ *Id.* at p. 2.

²⁶ DEIR at p. 4.

²⁷ SWAPE Comments at p. 2.

²⁸ *Id.* at p. 2.

²⁹ *Id.* at p. 2.

³⁰ *Id.* at p. 2.

³¹ *Id.* at pp. 3-6.

³² DEIR, Appendix C, Attachment 3 (construction equipment and usage spreadsheet).
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inputting the listed hours per day in the CalEEMod model as the CalEEMod User's Guide instructs, the Project emissions model was prepared using an undefined average number of usage hours that are significantly lower than the "Hours/day" values provided in the construction equipment table.³³ SWAPE concludes, "[b]y utilizing artificially reduced usage hours for most of the pieces of construction equipment, the air model underestimates the Project's construction-related emissions and should not be relied upon to determine Project significance."³⁴

Because the emissions calculations included in the DEIR were prepared using assumptions that are inconsistent with the Project information provided in the DEIR, and consequently underestimate Project emissions, the City may not rely on these unsupported emissions calculations to determine the significance of the Project's air quality and public health impacts. The City lacks substantial evidence for the conclusions in the DEIR that air quality and public health impacts would be less than significant. Project emissions must be recalculated using data that is consistent with the Project description.

B. The DEIR's Conclusion that Public Health Impacts on Nearby Receptors Would Be Less Than Significant Is Not Supported by Substantial Evidence

The City evaluated the Project's public health impacts on nearby receptors by preparing a health risk assessment ("HRA") that evaluates diesel particulate matter emissions from Project construction activities.³⁵ Relying on that HRA, the DEIR concludes that, with implementation of mitigation measure MM AQ-3, the Project's TAC emissions would result in a less than significant impact on nearby sensitive receptors.³⁶ The City did not prepare an HRA to evaluate the impacts of the Project's operational emissions on those sensitive receptors. Instead, the DEIR includes a community health risk assessment of the impacts of existing sources of TAC emissions on future Project occupants, not including emissions from operation of the Project itself.³⁷

³³ SWAPE Comments at pp. 3-6.

³⁴ *Id.* at p. 6.

³⁵ DEIR, Appendix C, at pp. 19-22.

³⁶ DEIR at p. 41.

³⁷ *See id.* at pp. 44-45; DEIR, Appendix C, at pp. 11-18.

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As explained more fully in the attached SWAPE comments, the City's conclusion that the Project's health risk impacts on nearby sensitive receptors would be less than significant is not supported by substantial evidence for several reasons.³⁸

First, as discussed in section III(A) above, the City's HRA was prepared using a flawed CalEEMod emissions model which underestimated Project emissions.³⁹ Because Project construction emissions are underestimated, and those emissions numbers are used to prepare the construction HRA, the HRA also underestimates the construction-related health risk to nearby sensitive receptors.⁴⁰

Second, the DEIR's construction HRA was not prepared in accordance with relevant agency guidance for the preparation of health risk assessments, namely the Office of Environmental Health Hazards Assessment ("OEHHA") and the Bay Area Air Quality Management District ("BAAQMD"). As SWAPE explains, the City's construction HRA fails to account for the cancer risk posed to 3rd trimester gestations that will be exposed to construction-related emissions during Project construction activities.⁴¹ However, the OEHHA guidelines explicitly state that in order to conduct a proper cancer risk assessment, inhalation dose must be calculated beginning in the 3rd trimester of pregnancy.⁴² BAAQMD guidelines also expressly provide that all HRAs shall be conducted following the procedures set forth by OEHHA.⁴³ Thus, the HRA should have employed OEHHA guidance in order to accurately assess Project impacts to all sensitive receptors. By failing to do so, the HRA is inconsistent with the guidance set forth by OEHHA and the air district with jurisdiction over the Project, BAAQMD.

Finally, SWAPE explains that the DEIR's omission of a quantified HRA for the Project's *operational* emissions is inconsistent with the most recent guidance published by OEHHA, therefore, the City's conclusion that public health risks to nearby receptors would be less than significant unsupported.⁴⁴ OEHHA's 2015 guidelines describe the types of projects that warrant preparation of a health risk

³⁸ SWAPE Comments at pp. 6-13.

³⁹ *Id.* at pp. 1-6.

⁴⁰ *See id.* at p. 6.

⁴¹ *Id.* at pp. 6-8.

⁴² *Id.* at p. 8.

⁴³ *Id.*

⁴⁴ *Id.* at p. 9.

assessment.⁴⁵ The Guidelines recommend that exposure from projects lasting more than 6 months should be evaluated for the duration of the project.⁴⁶

Here, once the Project is operational, it will generate vehicle trips, which generate additional exhaust emissions, and will therefore continue to expose nearby receptors to emissions of TACs for the duration of the Project.⁴⁷ These emissions will be in addition to the emission sources in the Project area identified in the community health risk assessment. Exposure to traffic-related emissions has been implicated with a variety of cancer as well as non-cancer health risks including acute and chronic respiratory disease, including reduced lung function and increased asthma hospitalizations and heart attacks, as well as premature death in elderly individuals with heart disease.⁴⁸ While an expected duration was not provided in this case, it can reasonably be assumed the Project will operate for at least 30 years – much longer than the 6-month minimum in the OEHHA guidelines. For this reason, SWAPE concludes that the health risks from Project operations should have also been evaluated in the HRA.⁴⁹

C. Substantial Evidence Shows that the Project May Result in a Significant Cancer Risk from the Project Exposing People to Toxic Air Contaminants

In an effort to demonstrate the potential risk posed by the Project to nearby sensitive receptors, SWAPE prepared a screening-level operational health risk assessment.⁵⁰ The results of SWAPE's HRA provide substantial evidence that the Project's operational emissions of diesel particulate matter may result in a significant health risk impact that was not disclosed in the DEIR.

SWAPE used the AERSCREEN model for its screening level HRA.⁵¹ AERSCREEN is a screening-level dispersion model recommended by OEHHA and the California Air Pollution Control Officers Association guidance as the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ CARB, *Air Quality and Land Use Handbook: A community Health Perspective* (April 2005) at pp. 8-10.

⁴⁹ SWAPE Comments at p. 10.

⁵⁰ *Id.* at pp. 10-13.

⁵¹ *Id.* at pp. 10-11.

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appropriate dispersion model for level 2 health risk screening assessments.⁵² The operational emissions estimates used in SWAPE's health risk screening assessment are based on SWAPE's updated CalEEMod air model for the Project, which corrected the inaccuracies in the City's model outlined in Section III(A) above.⁵³ Consistent with the recommendations set forth by OEHHA, SWAPE used a residential exposure duration of 30 years, starting from the last .25 years of the infant stage of life, immediately after the 24-month construction period is completed.⁵⁴ SWAPE's assumptions and formulas are explained more fully in the attached letter.⁵⁵

SWAPE's health risk analysis found that the excess cancer risk to adults, children, and infants at a sensitive receptor located approximately 25 meters away in the adjacent residential apartments, over the course of Project operation, are approximately 8.5, 76, and 8.6 in one million, respectively.⁵⁶ The total (i.e., lifetime) excess operational cancer risk over the course of Project operation (28.25 years) is approximately 93 in one million.⁵⁷ As SWAPE's analysis demonstrates, the child and lifetime cancer risk from Project operations alone greatly exceeds the BAAQMD threshold of 10 in one million.⁵⁸

Furthermore, as SWAPE explains, OEHHA guidance provides that when calculating the total cancer risk associated with a project, the excess cancer risk is calculated separately for each age group and phase then summed.⁵⁹ Thus, per OEHHA guidance, combined construction and operational excess cancer risk should be evaluated to make a determination of significance at a sensitive receptor location.⁶⁰ Even assuming the DEIR's estimated construction cancer risk estimate of 3.5 in one million is correct, the combined cancer risk for construction and operation of the proposed Project would be approximately 96.5 in one million.⁶¹ Thus, SWAPE concludes, "it can be assumed that with updated construction HRA calculations, the

⁵² *Id.* at p. 11.

⁵³ *Id.* at pp. 6, 10.

⁵⁴ *Id.* at p. 10.

⁵⁵ *Id.* at pp. 10-13.

⁵⁶ *Id.* at p. 12.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

Project's lifetime cancer risk estimate would far exceed the BAAQMD's significance threshold of 10 in one million."⁶²

As SWAPE notes, screening level health risk assessments are known to be more conservative and are aimed at health protection.⁶³ However, the purpose of a screening-level health risk assessment is to determine whether a more refined HRA needs to be conducted. SWAPE's analysis demonstrates that the more refined HRA needs to be conducted in this case in order to properly disclose, analyze, and mitigate the Project's potentially significant public health impacts. The City must perform this analysis and re-circulate the DEIR for public review and comment.

IV. The City's Greenhouse Gas Reduction Plan Requires That a Transportation Demand Management Plan be Prepared

The DEIR concludes that GHG impacts would be less than significant because the Project would include several measures consistent with the BAAQMD's 2017 Clean Air Plan and the City's Greenhouse Gas Reduction Plan ("GGRP"). According to the DEIR, "the proposed project would implement relevant measures from the 2017 CAP and the City's GGRP; therefore, it would not conflict an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of GHGs."⁶⁴ As SWAPE explains, however, the DEIR fails to adequately demonstrate compliance with the City's GGRP, namely the requirement to prepare a transportation demand management plan at the time of Project review.⁶⁵ Instead, the DEIR indicates a transportation demand management plan will be developed and implemented at a later date, deferring formulation of a specific TDM plan. Because a TDM has not been submitted, the City lacks substantial evidence for the determination that the Project is consistent with the GGRP and that impacts would be less than significant.

Mandatory Measure T-1.1 of the GGRP includes a requirement that certain development projects implement a Transportation Demand Management plan ("TDM"). In order to ensure that the City's GGRP measures translate into on-the-ground results, the GGRP provides that projects subject to this requirement must

⁶² *Id.*

⁶³ *See id.* at pp. 12-13.

⁶⁴ DEIR at p. 79.

⁶⁵ SWAPE Comments at pp. 13-14.

“describe how each measure would be integrated into the development in its application materials and environmental documentation.”⁶⁶ Additionally, the City’s GGRP Measure T-1.1 explicitly requires that projects develop transportation demand management plans at the time of environmental review. The GGRP states that “at the time of project review, all subject development will submit to the City a qualified Transportation Demand Management Plan that demonstrates compliance with the required TDM performance standard.”⁶⁷

Here, the DEIR does not include a transportation demand management plan or indicate that such a plan has been submitted for the Project. Rather, the DEIR indicates a TDM plan will be implemented by the Project and outlines a number of potential measures that could be incorporated in that future plan. Because development of the plan is deferred, however, it is unclear how the Project Applicant will achieve compliance with the GGRP’s Mandatory Measure T-1.1, or whether the measure will be implemented at all. The public and decisionmakers are also denied an opportunity to review and comment on the Project’s transportation demand management plan and ensure the plan is sufficiently rigorous to reduce GHG emissions in conformance with the City’s reduction goals.

In addition to the City’s own GGRP requirements, CEQA requires that when performing a qualitative analysis of Project’s consistency with measures aimed at reducing GHG emissions, the lead agency must bridge the analytical gap between compliance with applicable programs and the ultimate conclusion regarding project impacts.⁶⁸ Specifically, in the context of GHG analysis, the CEQA Guidelines provide that the lead agency must identify requirements of the plans or programs that are applicable to a project, and explain how implementing those requirements would ensure the project’s incremental contribution to GHG impacts would be less than significant.⁶⁹

In this case, while the City has taken the first step of identifying the requirements of the GGRP that are applicable to the Project, it has failed to demonstrate how the Project will actually comply with those requirements, other

⁶⁶ City of Mountain View Greenhouse Gas Reduction Plan at p. 5-4 (Aug. 2012), *available at* <https://www.mountainview.gov/civicax/filebank/blobdload.aspx?blobid=10700>,

⁶⁷ *Id.* at p. 4-25.

⁶⁸ See *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506; *see also* CEQA Guidelines, § 15091.

⁶⁹ See CEQA Guidelines, §§ 15183.5; 15064(h)(3).
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than stating it will. The DEIR's analysis of consistency with the GGRP fails to satisfy the requirements of CEQA and the GGRP itself. The City must require submittal of a definite and enforceable transportation demand management plan and must include that plan in a recirculated DEIR for public review and comment.

V. The DEIR's Energy Use Analysis Fails to Comply with the Law, Is Unsupported by Substantial Evidence and Underestimates the Project's Impacts from Energy Use

The City's energy use impact analysis in the DEIR fails to comply with CEQA in several ways.

First, the City failed to compare the Project's energy use to energy use associated with the existing environmental setting – a vacant lot and mini storage facility. Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.⁷⁰ 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 this case, the City repeatedly states in the DEIR that the Project's energy use is only a small percentage of the overall or projected energy use in the region or state, rather than greater, equal to or less than energy use from the existing setting. For example, the DEIR states:

- [T]he proposed project's increase in annual electricity use, would not result in a significant increase in demand on electrical energy resources in relation to projected supply statewide.⁷¹
- Based on the relatively small increase in natural gas demand from the project (4,069,180 kBtu per year), and compared to the growth trends in natural gas supply and the existing available supply in California, the

⁷⁰ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 952.

⁷¹ DEIR at p. 67.

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proposed project would not result in a significant increase in natural gas demand relative to projected supply.⁷²

- Project trips would increase gasoline use at the site by approximately 291,213 gallons of gasoline per year. This increase is small, however, when compared to the annual statewide sales of 15 billion gallons.⁷³

The City's comparison of the Project's energy usage to the projected energy use or capacity of the entire State of California is uninformative to the public, improperly minimizes the Project's energy use impacts, and fails to comply with CEQA's requirement to evaluate impacts against the existing baseline. CEQA requires the City to acknowledge, disclose and mitigate the increased energy use compared to the energy use in the existing environmental setting, which in this case is a largely vacant lot with a mini storage facility that the City acknowledges does not consume energy.⁷⁴

Second, the City failed to compare the Project energy use to CEQA's thresholds for measuring wasteful, uneconomic, inefficient or unnecessary consumption of energy in Appendix F and to the more recent threshold set forth in Governor Brown's Executive Order B-55-18. Under CEQA, wasteful, uneconomic, inefficient or unnecessary consumption of energy means exceeding a threshold of significance in the energy use impact areas identified in Appendix F. This includes asking whether the Project's energy requirements by amount and fuel type during construction, operation, maintenance and/or removal and from materials are significant; whether the Project will comply with existing energy standards; whether the Project will have a significant effect on energy resources; and whether the Project will have significant transportation energy use requirements, among other questions. For each of these questions, CEQA Guidelines Appendix F asks whether the project decreases overall per capita energy consumption, decreases reliance on fossil fuels, and increases reliance on renewable energy sources. Appendix F explains that these are the means to ensure wise and efficient use of energy. If a project does not decrease overall per capita energy consumption, decrease reliance on fossil fuels, and increase reliance on renewable energy sources,

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.* at p. 63.

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then the Project does not ensure wise and efficient use of energy and, therefore, results in a wasteful, inefficient and unnecessary consumption of energy.

Furthermore, the DEIR contains no analysis of whether the Project's energy use is carbon neutral consistent with Governor Brown's Executive Order B-55-18. The question is, for example, whether the project's energy requirements by amount and fuel type during construction, operation, maintenance and/or removal and transportation is carbon neutral. This analysis of carbon neutrality is consistent with Appendix F's explanation of the means to ensure wise and efficient use of energy. The DEIR here contains no such analyses.

Third, the City argues construction activities would not use fuel or energy in a wasteful manner because of the added expenses associated with renting construction equipment, as well as mitigation measures requiring the use of equipment with reduced emissions.⁷⁵ However, the City never discloses the anticipated energy usage for Project construction in the first place, or how much the mitigation measures are expected to reduce energy demand. As the Courts have stated, "CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount."⁷⁶

Fourth, the City failed to evaluate whether renewable energy resources might be available or appropriate and should be incorporated into the Project, as required by CEQA.⁷⁷ The DEIR acknowledges that "[e]fficiency and production capabilities would help meet increased electricity demand in the future, such as improving energy efficiency in existing and future buildings, establishing energy efficiency targets, inclusion of microgrids and zero-net energy buildings, and integrating renewable technologies."⁷⁸ However, rather than evaluating whether renewable energy resources or the technologies listed can or should be incorporated in the Project, the DEIR effectively concludes the Project's electricity demand would not be significant because *other* projects will be more efficient in the future.⁷⁹ The City's analysis is a far cry from evaluating whether renewable energy resources

⁷⁵ *Id.* at p. 66.

⁷⁶ *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210

⁷⁷ *Id.* at p. 211.

⁷⁸ DEIR at pp. 66-67.

⁷⁹ See CEQA Guidelines, Appendix F ("[CEQA] requires that EIRs include a discussion of the potential energy impacts of proposed projects, *with particular emphasis on avoiding or reducing inefficiency, wasteful and unnecessary consumption of energy.*" (Emphasis added).

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should be incorporated into the Project and does not ensure that the Project's energy use would be wise and efficient.

In sum, the City's analysis of the Project's energy usage fails to comply with the requirements of CEQA. The City's conclusion that the Project's energy usage would be less than significant is not supported by substantial evidence. Comparing the energy usage of a single residential Project to statewide energy consumption and concluding usage would be insignificant is an apples-to-oranges comparison which prevents the public from meaningfully evaluating the Project's energy usage and the opportunity for greater energy savings.

VI. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate Impacts from Hazardous Soil Vapors

The City's hazards impact analysis in the DEIR fails to comply with CEQA in several ways.

A. The DEIR Fails to Properly Disclose and Analyze Impacts from Soil Vapors on Public Health

In the DEIR Hazards and Hazardous Materials section, under the heading "3.9.4 Issues Not Covered Under CEQA," the City erroneously asserts that the potential for the public, including future residents, to be effected by inhalation of contaminated soil vapors is not a Project impact that the City must analyze under CEQA.⁸⁰ Citing the California Supreme Court's decision in *California Building Industry Association v. Bay Area Air Quality Management District*, the City argues in the DEIR that CEQA does not require agencies to analyze and determine the significance of impacts of existing environmental conditions on a project's future users.⁸¹ The DEIR implies that impacts from hazardous soil vapors are within this category of impacts not covered by CEQA.

Contrary to the City's claim, the Supreme Court's opinion in *CBIA v. BAAQMD* demonstrates that the potential impacts of contaminated soil vapors on future Project users is squarely within the scope of CEQA and must be evaluated in

⁸⁰ See DEIR at p. 92.

⁸¹ *Id.*

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the DEIR.⁸² As the Court explained in that case, while CEQA generally does not require an analysis of how existing environmental conditions will impact a Project's future users, CEQA *does* call upon agencies to evaluate a project's "potentially significant *exacerbating* effects on existing environmental hazards – effects that arise because the project brings 'development and people into the area affected.'"⁸³ The analysis of a project's potential to exacerbate existing conditions is a consequence of CEQA's core requirement that agencies evaluate a project's impact on the environment."⁸⁴

The Court's illustration of this principle in *CBIA* is particularly relevant here:

Suppose that an agency wants to locate a project next to the site of a long-abandoned gas station. For years, that station pumped gasoline containing methyl tertiary-butyl ether (MTBE), an additive—now banned by California—that can seep into soil and groundwater. Without any additional development in the area, the MTBE might well remain locked in place, an existing condition whose risks—most notably the contamination of the drinking water supply—are limited to the gas station site and its immediate environs. But by virtue of its proposed location, the project threatens to disperse the settled MTBE and thus exacerbate the existing contamination. The agency would have to evaluate the existing condition—here, the presence of MTBE in the soil—as part of its environmental review. Because this type of inquiry still focuses on the *project's impacts on the environment*—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project's future users or residents is entirely consistent with this focus and with CEQA as a whole.⁸⁵

Like the above illustration, construction of the Project here has the potential to disturb contaminated soils at the Project site. While the potential effects of the contaminated soil may go unrealized in the absence of the Project, by virtue of the Project's location and type, the Project threatens to disperse the contaminants and expose the public, including future occupants, to hazardous substances, whether

⁸² *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal. 4th 369, 388-390.

⁸³ *Id.* at p. 388.

⁸⁴ *Id.* at p. 389.

⁸⁵ *Id.*

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through the underground parking structure or residential units. Indeed, the DEIR implicitly recognizes this risk through its discussion of the potential for soil vapor impacts and the incorporation of a condition of approval requiring the Applicant to prepare a vapor intrusion mitigation strategy.

Due to the Project's potential to exacerbate the effects of existing contamination at the Project and, as a result, potentially expose the public, including future residents, to hazardous soil vapors, CEQA requires that the City disclose this impact, determine the significance of the impact, and, if necessary, identify and incorporate all feasible mitigation.

B. The City Improperly Defers Mitigation of Soil Vapor Impacts, and the City's Condition of Approval is Inconsistent with General Plan Policy INC 18.1

In addition to the City's incorrect assertion that the potential impact of hazardous substances in the Project site soil on the public, including future residents, is not an impact covered by CEQA, the City's conclusion that the Project would be consistent with General Plan Policy INC 18.1 is not supported by substantial evidence.

General Plan Policy INC 18.1 states projects must be designed to "Protect human and environmental health from environmental contamination." The City argues that the Project would be consistent with General Plan Policy INC 18.1 because the City added a condition of approval requiring the applicant to develop a Vapor Intrusion Mitigation System.⁸⁶ According to the DEIR, the following condition of approval will be implemented as part of the Project:

VAPOR INTRUSION MITIGATION SYSTEM: The project applicant shall obtain from the Water Board a letter confirming that the 2014 RAP is still valid and/or the project applicant shall update the RAP to current standards, including updated standards related to indoor TCE exposure. The project applicant shall incorporate Vapor Intrusion Mitigation System drawings and specifications into the City building permit plans. Following completion of construction, the project applicant shall prepare a Vapor Mitigation Completion report documenting installation of the vapor control measures

⁸⁶ See DEIR at p. 92.
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and specifying monitoring requirements for the system. These documents should be provided to the RWQCB for review and approval prior to City issuance of occupancy permits for the project. In addition, the project applicant and/or subsequent site owners and occupants shall provide access for future indoor air and soil vapor monitoring activities and shall not interfere with the implementation of remedies selected by the RWQCB and responsible parties. These requirements shall be specified in Covenants, Conditions and Restrictions that shall run with the property.⁸⁷

This condition of approval, however, fails to provide any details of what the VIMS must include, lacks objective performance standards for evaluating the effectiveness of the VIMS, and fails to specify what actions must be taken in the event monitoring reveals adverse impacts. Rather, it defers development of a mitigation system to a later date, after the public environmental review process. Moreover, under the language of the condition, it is sufficient that any vapor mitigation system is installed so long as post-installation documentation is provided to the RWQCB, and some undefined monitoring occurs.

The City's conclusion that the Project would be consistent with the requirements of General Plan Policy INC 18.1 because of the VIMS requirement is not supported by substantial evidence. Even if the City were correct that this is an issue area not covered by CEQA, for the same reasons agencies may not defer development of mitigation measures for a project's potentially significant impacts,⁸⁸ the City cannot conclude that the proposed VIMS condition of approval would ensure future users of the Project will be protected from contamination, as required by General Plan Policy INC 18.1.⁸⁹ There is no requirement that the VIMS achieve any particular outcome, nor that particular steps be taken in the event monitoring reveals a hazard. The proposed approach also leaves the development of the plan to the Applicant and RWQCB, without specific direction, and prevents the public and decisionmakers from participating in review of the mitigation system and its effectiveness.

⁸⁷ *Id.* at pp. 92-93.

⁸⁸ See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th, 70, 89-96.

⁸⁹ Mountain View 2030 General Plan, Policy INC 18.1 Contamination prevention. Protect human and environmental health from environmental contamination.

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The City must revise the condition of approval ensure implementation of a VIMS that will protect the public, including future users of the Project, from the Project's exacerbation of hazardous soil vapors. As currently proposed, the condition of approval fails to achieve this goal, and is therefore inconsistent with the requirements of the City's General Plan pertaining to human health and contamination.⁹⁰

VII. Conclusion

For all of the forgoing reasons, the City must prepare and recirculate a revised DEIR in order to adequately disclose, analyze, and mitigate Project impacts to air quality, public health, and GHGs, and to properly disclose and evaluate the impacts of hazardous soil contaminants on the public, including future residents, before considering the entitlements for the proposed Project.

Thank you for your consideration of these comments.

Sincerely,



Collin S. McCarthy

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⁹⁰ See Mountain View 2030 General Plan at p. 136, available at <https://www.mountainview.gov/civicax/filebank/blobdload.aspx?blobid=10702.3779-005acp>