

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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

TEL: (916) 444-6201
FAX: (916) 444-6209

cmccarthy@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660
FAX: (650) 589-5062

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
KYLE C. JONES
MARC D. JOSEPH
RACHAEL E. KOSS
NIRIT LOTAN
MILES F. MAURINO
COLLIN S. MCCARTHY

LAURA DEL CASTILLO
Of Counsel

November 7, 2018

Via Email and Hand Delivery

Margaret Kavanaugh-Lynch
Development Services Manager
City of El Cerrito
Community Development Dept.
Email: mkavanaugh-lynch@ci.el-cerrito.ca.us

Sean Moss
Senior Planner
City of El Cerrito
Community Development Dept.
Email: smoss@ci.el-cerrito.ca.us

Re: Comments on Polaris Apartments (formerly Baxter Creek Apartments) Project, 11965 San Pablo Avenue (PL17-0028)

Dear Ms. Kavanaugh-Lynch and Mr. Moss:

We are writing on behalf of **El Cerrito Residents for Responsible Development** (“El Cerrito Residents”) in regard to the Polaris Apartments Project (formerly Baxter Creek Apartments) (“Project”) proposed by Charles Oewel, 11965 San Pablo LLC (“Applicant”). The Project would include demolition of one existing structure and parking lot and construction of a new 123,914 square foot, 8-story, 85-foot-tall multi-family residential building with a total of 144 dwelling units and 77 parking spaces in an underground garage. The Project would be located at 11965 San Pablo Avenue in the City of El Cerrito. The Applicant is seeking Design Review Board Tier II approval for the Project.

We have reviewed the City’s CEQA Environmental Checklist, the San Pablo Avenue Specific Plan Environmental Impact Report, and related Project documents

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and determined that the City has failed to comply with the California Environmental Quality Act (“CEQA”) by failing to prepare a subsequent or supplemental Environmental Impact Report (“EIR”) for the Project. Rather than preparing an EIR for this Project, the City has incorrectly assumed that the Project’s impacts have been already adequately evaluated in the San Pablo Avenue Specific Plan Program EIR (“Specific Plan EIR”) and thus are exempt from further CEQA review. This is incorrect for two reasons. First, the Specific Plan EIR expressly deferred evaluation of the Project’s construction health risk impacts from toxic air contaminants (“TACs”) to project-specific review. As a result, this potential impact was never evaluated in the Specific Plan EIR. Because substantial evidence exists that this impact may be significant, a supplemental environmental review document prepared and circulated for public review and comment. Second, the CEQA Environmental Checklist identifies new information regarding the Project’s potential to expose construction workers and nearby residents to contaminated soils. Rather than evaluating this potential impact in a supplemental EIR, the City improperly assumes, with no supporting evidence, that this contamination has already been remediated. Finally, the City must evaluate the potentially significant visual and aesthetic impacts the Project will have on the Ohlone/Richmond Greenbelt.

The City must prepare an EIR to disclose and evaluate each of these issues before it may approve the Project. Where potential impacts are identified, the City must address these impacts through the imposition of feasible mitigation measures.

These comments were prepared with the assistance of technical experts Matthew Hagemann and Hadley Nolan of Soil Water Air Protection Enterprise. SWAPE’s technical comments and curriculum vitae are attached as Attachment 1 and submitted to the City in addition to the comments contained herein.¹

I. Statement of Interest

El Cerrito Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety standards and environmental impacts associated with Project

¹ Attachment 1: Letter from Matthew Hagemann and Hadley Nolan, SWAPE, to Collin S. McCarthy, Adams Broadwell Joseph & Cardozo re: Comments on the Baxter Creek Apartments Project (Nov. 7, 2018) (“SWAPE Comments”).

development. El Cerrito Residents includes the International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and families; and other individuals that live and/or work in the City of El Cerrito and Contra Costa County, including El Cerrito resident Nicholas Albon.

Individual members of El Cerrito Residents and the affiliated labor organizations live, work, recreate and raise their families in the City of El Cerrito and Contra Costa County. These members would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. El Cerrito 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 causing building moratoriums or restrictions, making it more difficult and more expensive for business and industry to expand in the region, and making it less desirable for businesses to locate and people to live there.

II. The City Must Prepare A Subsequent or Supplemental EIR to Disclose and Analyze the Project's Significant Impacts

CEQA has two basic purposes, neither of which the City has satisfied in this case. 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.² The EIR is the "heart" of this requirement,³ and 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

² 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.

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

points of no return.”⁴ To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”⁵ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.⁶

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.⁷ If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.⁸ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.⁹ 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.¹⁰ 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.¹¹ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹²

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

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

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

⁷ 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.

⁸ PRC, §§ 21002.1(a), 21100(b)(3).

⁹ *Id.*, §§ 21002-21002.1.

¹⁰ CEQA Guidelines § 15126.4(a)(2).

¹¹ *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).

¹² *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

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.¹³ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁴ 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."¹⁵

In situations such as the one here, where a program EIR has been prepared that could apply to a later project, CEQA requires the lead agency to conduct a two-step process to examine the later project to determine whether additional environmental review is required.¹⁶ First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.¹⁷ If the agency finds the activity would have environmental effects that were not examined in the program EIR, it must then prepare an initial study to determine whether to prepare an EIR or negative declaration to address those effects.¹⁸

Second, if the agency determines the project is covered by the program EIR, it must then consider whether any new or more significant environmental effects could occur due to changes in circumstances or project scope, or new information that could not have been considered in the program EIR.¹⁹ More specifically, pursuant to Public Resources Code section 21166, subsequent or supplemental environmental review is required when one or more of the following events occur:

¹³ CEQA Guidelines §§ 15060, 15063(c).

¹⁴ *See, e.g.*, PRC, § 21100.

¹⁵ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

¹⁶ *See* CEQA Guidelines 15168(c); S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.16 (Mar. 2018).

¹⁷ CEQA Guidelines § 15168(c)(1).

¹⁸ *Id.*

¹⁹ CEQA Guidelines § 15168(c)(2).

- (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.²⁰

CEQA Guidelines section 15162 elaborates on this requirement and explains that the lead agency must determine, based on substantial evidence in light of the whole record, if one or more of the following events has occurred:

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

²⁰ PRC, § 21166.

- (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.²¹

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 documentation.²² The City's decision not prepare a subsequent or supplemental EIR must be supported by substantial evidence.²³

Here, by failing to prepare and circulate a subsequent or supplemental environmental review document, the City has failed to comply with CEQA. First, because the Specific Plan EIR expressly deferred the evaluation of construction health risk impacts from TAC emissions, this impact was never examined in the program EIR (and could not have been examined). There is substantial evidence Project construction emissions will result in significant health risk impacts from exposure to TAC emissions. As a result, the City has failed to comply with its obligations to prepare and circulate for review an EIR disclosing and analyzing the Project's significant health risk impacts. New information resulting from project-analysis, which was not known and could not have known at the time the Specific Plan EIR was certified, shows the Project will result in significant health risk impacts.

Second, there is substantial evidence that Project construction activities may expose construction workers and nearby residents to pesticide-contaminated soils at the Project site. Again, this impact was never examined in the Specific Plan EIR. Indeed, it could not have been as the Phase I ESA and Project application occurred after certification of the EIR.

²¹ CEQA Guidelines § 15162(a)(1)-(3).

²² CEQA Guidelines § 15162(b).

²³ CEQA Guidelines §§ 15162 (a), 15164(e), and 15168(c)(4).

CEQA requires that the City prepare a subsequent or supplemental EIR to disclose and analyze each of these impacts, and the City may not approve the Project until that EIR is circulated for public review and comment.

III. THE CITY MUST PREPARE AN EIR TO DISCLOSE AND ANALYZE POTENTIALLY SIGNIFICANT HEALTH RISK IMPACTS RESULTING FROM PROJECT CONSTRUCTION

a. The SPA Specific Plan Program EIR Did Not Analyze Air Quality Impacts from Emissions of Toxic Air Contaminants at the Project-Level

The City is required to prepare and circulate for public review and comment an EIR for the Project because the Specific Plan EIR did not examine the health risk impacts of toxic air contaminant emissions at the project-level and there is substantial evidence impacts may be significant.²⁴ As explained above, CEQA Guidelines section 15168 governs the use of program EIRs with later activities. Section 15168, subsection (c), provides that “[s]ubsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.”²⁵ “If a later activity *would have effects that were not examined in the program EIR*, a new initial study would need to be prepared leading to either an EIR or a Negative Declaration.”²⁶

In 2014, the City certified a program EIR for the San Pablo Avenue Specific Plan.²⁷ In the Specific Plan EIR, the City acknowledged that health risks associated with construction-related emissions of TACs are a potentially significant impact. The Specific Plan EIR generally discussed the risks of construction TAC emissions

²⁴ See Draft Environmental Impact Report San Pablo Avenue Specific Plan (June 2014), City of El Cerrito, State Clearinghouse #201404025, at pp. 5-13 – 5-31, available at <http://www.el-cerrito.org/396/San-Pablo-Avenue-Specific-Plan> (“Specific Plan DEIR”); CEQA Guidelines § 15168(d)(3).

²⁵ CEQA Guidelines § 15168(c).

²⁶ CEQA Guidelines § 15168(c).

²⁷ Final Environmental Impact Report San Pablo Avenue Specific Plan (Aug. 2014), State Clearinghouse #201404025, available at <http://www.el-cerrito.org/396/San-Pablo-Avenue-Specific-Plan>.

and the potential for impacts to occur, however, in Impact 5-2, “Impacts of Toxic Air Contaminants (TACs) On Sensitive Receptors,” the EIR expressly stated that “[c]ancer risk and PM_{2.5} exposure *would have to be analyzed through project-level analysis* to identify the potential for significant impacts and measures to reduce those impacts to less-than-significant.” Recognizing that such analysis could not be performed at the program level, the City adopted Mitigation Measure 5-2 which expressly requires that construction health risk assessments be performed on a project-by-project basis for projects in the Specific Plan area:

Mitigation 5-2. Require project-level construction health risk assessment. *Construction health risk assessment shall be required on a project-by-project basis*, either through screening or refined modeling, to identify impacts and, if necessary, include performance standards and industry-recognized measures to reduce exposure. Reduction in health risk can be accomplished through, though is not limited to, the following measures:

- Construction equipment selection;
- Use of alternative fuels and engine retrofits;
- Modified construction schedule; and
- Implementation of BAAQMD Basic and/or Additional Construction Mitigation Measures for control of fugitive dust.

As the City’s own discussion of the issue demonstrates, construction health risk impacts from individual development projects in the Specific Plan area were not, and could not have been, examined in the Specific Plan EIR. Under CEQA Guidelines section 15168(d), the City may use the Program EIR to simplify preparing environmental documents on later parts of the program, to include preparing a focused EIR on new effects which had not been considered before. However, where the program EIR expressly states that a particular effect was not examined, the City cannot find that the project will have no new effects not examined in the program EIR. Furthermore, as discussed further below, SWAPE’s expert comments provide substantial evidence Project construction emissions may result in a significant public health impact. Accordingly, the City must prepare an EIR.

b. New Information Has Become Available Since the Certification of the San Pablo Avenue Specific Plan Programmatic EIR Showing Construction Health Risks from TAC Emissions Are Significant

Even assuming, *arguendo*, that the City's general discussion of TAC emissions from construction activities and associated impacts in the Specific Plan EIR constitutes a sufficient examination of health risk impacts to bring the Project within the scope of the program EIR, new information concerning the Project's significant impacts from construction nonetheless requires that the City prepare a supplemental EIR in this case.²⁸ When evaluating whether additional review is required later activity covered by a program EIR, CEQA requires the lead agency to consider whether any of the events in CEQA Guidelines Section 15162 have occurred.²⁹ Guidelines Section 15162 states, in relevant part:

(a) When an EIR has been certified . . . for a project, 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 or more of the following:

...

(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;

Here, because the City did not (and could not) prepare a construction health risk assessment for the Project at the time the Specific Plan EIR was prepared, any information relating to the Project's specific impacts in this area is by definition new information, which was not known and could not have been known. Moreover,

²⁸ See PRC § 21166; CEQA Guidelines §§ 15162, 15168.

²⁹ CEQA Guidelines § 15168(c)(2).

as SWAPE's analysis shows, there is substantial evidence that project construction will have significant health risk effects on nearby receptors, which is information of substantial importance.³⁰ While this information was not discussed in the EIR, to the extent Specific Plan EIR recognized construction TAC emissions as a potentially significant effect, SWAPE's analysis demonstrates these impacts will be substantially more severe than shown in the Specific Plan EIR.

i. The City's conclusion that the project would result in no new impacts related to short-term exposure to TACs than analyzed in the Specific Plan EIR is not supported by substantial evidence

With regard to the issue of short term TAC exposure, the City's CEQA Checklist prepared for the Project asserts that "with implementation of BAAQMD-recommended measures to control particulate matter emissions during construction, Mitigation Measure 5-1 would ensure that project construction emissions would fall below BAAQMD's significance threshold as described in the Specific Plan EIR. Therefore, sensitive receptors would not be exposed to substantial pollutant concentrations during project construction. The project would result in no new or more severe impacts related to short-term exposure to TACs than analyzed in the Specific Plan EIR, and further analysis is not required."³¹

The City's conclusion that that the Project would result in no new impacts related to short-term exposure to TACs than analyzed in the Specific Plan EIR is not supported by substantial evidence. The Specific Plan EIR does not analyze impacts related to short-term TAC exposure resulting from this Project. While the Specific Plan EIR identifies construction related TAC emissions as a potential impact, it expressly defers analysis and mitigation of this impact to subsequent project-specific review.³²

The City's reliance on Mitigation Measure 5-1 also fails to support its conclusion. Mitigation Measure 5-1 requires the Applicant to incorporate additional measures to reduce diesel particulate matter and PM2.5, to include providing a plan that heavy-duty vehicles will achieve certain percent reductions in NOx and

³⁰ See SWAPE Comments at pp. 3-8.

³¹ CEQA Checklist at p. 19.

³² Specific Plan DEIR at pp. 5-15 – 5-27.

particulate emissions. It does not, however, address localized TAC impacts. Until project emissions are quantified and a health risk assessment performed, the City has no basis to conclude the construction equipment requirements in MM 5-1 would reduce localized TAC impacts to a less than significant level. Similarly, while MM5-2 states that “performance standards and industry recognized measures” shall be required “to reduce to exposure,” this alone fails to ensure that impacts will be mitigated to a less than significant level. MM5-2 does not identify any specific performance standards or measures that must be implemented. Instead, it merely lists potential options that could be used. MM5-1 and MM5-2 thus do not provide substantial evidence that construction TAC impacts would be reduced to a less than significant level.

ii. There is Substantial Evidence Health Impacts from Project Construction Emissions May Be Significant

As part of its attached comments, SWAPE prepared a screening-level construction HRA based on the Project size, type, and location.³³ Using Google Earth, SWAPE determined the nearest residential receptor to the Project site is located approximately 450 feet from the site.³⁴ Consistent with Office of Environmental Health Hazards Assessment guidance, SWAPE’s HRA was prepared assuming exposure begins during the 3rd trimester of pregnancy, and that once the baby is born it is exposed to the construction emissions over the course of the 20-month construction period.³⁵ SWAPE’s analysis concludes that the excess cancer posed to such receptors (i.e., beginning at the third trimester and into infancy) is **approximately 44 in one million, and thus exceeds the BAAQMD threshold of 10 in one million.**³⁶

³³ SWAPE Comments at pp. 3-8.

³⁴ SWAPE Comments at p. 5.

³⁵ SWAPE Comments at p. 6.

³⁶ SWAPE Comments at p. 7.

This risk increases dramatically when existing TAC conditions in the area are taken into account.³⁷ Nearby sources of significant TAC emissions include Interstate 80 and the Home Depot diesel generator.³⁸ When these additional existing sources are taken into account, the actual excess cancer risk posed to infants during the 20-month construction duration is approximately 54.01 in one million, which is significantly higher than the cancer risk posed from construction of the Project alone.³⁹

As SWAPE's analysis demonstrates, the City's determination that the project would result in no new impacts related to short-term exposure to TACs is not supported by substantial evidence. Moreover, SWAPE's comments provide substantial evidence that the Project will have new significant impacts as a result of construction TAC emissions which were not known at the time Specific Plan EIR was adopted. The City must prepare an EIR to disclose and analyze this significant health risk impact and identify and require all feasible mitigation.

iii. The City's conclusion that the project would result in no more severe impacts related to short-term exposure to TACs than analyzed in the Specific Plan EIR is not supported by substantial evidence

While the Specific Plan EIR plainly shows that the Project's construction impacts from TAC emissions were not examined as a part of the program EIR process, the Specific Plan EIR did acknowledge construction TAC emissions may have potentially significant impacts on nearby receptors. However, even if construction emissions were previously identified as a potentially significant impact in the Specific Plan EIR, SWAPE's analysis of Project construction emissions and health risk impacts constitutes new information that the effects previously examined will be substantially more severe than shown in the Specific Plan EIR. Under CEQA Guidelines section 15162, the City must prepare an EIR where there is 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, that significant effects previously examined will be substantially more severe than shown in the previous EIR.

³⁷ SWAPE Comments at pp. 7-9.

³⁸ CEQA Checklist, Appendix A, 11965 San Pablo Ave. TAC Assessment, at p. 6.

³⁹ SWAPE Comments at p. 9.

iv. The Project Is Not Exempt from Further CEQA Review Under CEQA Guidelines Section 15182

The City's staff report notes that the CEQA Checklist was prepared to evaluate the Project's consistency with the Specific Plan EIR, "pursuant to CEQA Guidelines 15168 and 15182."⁴⁰ CEQA Guidelines section 15182 provides an exemption from further CEQA review where a public agency has prepared an EIR on a specific plan and the project under review is a residential project undertaken pursuant to and in conformity with the specific plan.⁴¹ Subsection (c) sets forth the primary limitation on the use of the section 15182 exemption and states:

This section is subject to the limitation that if after the adoption of the specific plan, an event described in Section 15162 should occur, this exemption shall not apply until the city or county which adopted the specific plan completes a subsequent EIR or a supplement to an EIR on the specific plan.

As outlined in sections III(b)(i)-(iii) above, events described in CEQA Guidelines Section 15162 have occurred since the adoption of the Specific Plan EIR which require a subsequent or supplemental EIR be prepared. First, new information of substantial importance shows that the Project may result in significant health risks to nearby receptors due to TAC emissions. This information was not, and could have been, known at the time the Specific Plan EIR was certified and was therefore never examined in the Specific Plan EIR. Second, even if the Specific Plan EIR's discussion of the potential construction health risk impacts applied to the Project, new information of substantial importance shows that impact will be substantially more severe than previously disclosed. Because two events described in CEQA Guidelines section 15162 have occurred, the Project is not exempt from further CEQA review under Guidelines section 15182. The City may not rely on Section 15182 until a subsequent or supplemental EIR is prepared.

⁴⁰ City of El Cerrito, Design Review Board Tier II Staff Report (Nov. 7, 2018) Polaris Apartments, at p. 1.

⁴¹ CEQA Guidelines § 15182.

c. The City Failed to Comply With Mitigation Measure 5-2

In addition to the errors in the City's analysis which require preparation of a supplemental EIR to disclose and analyze the Project's construction emissions, even more basically, the City has failed to comply with the Specific Plan EIR Mitigation Measure 5-2. Mitigation Measure 5-2 requires that the City prepare a construction health risk assessment for the Project, either through screening or refined modeling, to identify impacts, and if necessary, include performance standards and industry recognized measures to reduce exposure. Inexplicably, however, the City failed to perform a construction HRA, and instead improperly defers analysis of the Project's construction impacts by proposing as a condition of approval a requirement that a construction HRA be performed prior to the issuance of a building permit.⁴²

When relying on a program EIR for the approval of subsequent activities, CEQA requires that the lead agency incorporate feasible mitigation measures developed in the program EIR into subsequent actions.⁴³ In this case, the Specific Plan EIR determined that construction emissions of TACs could result in a potentially significant cancer risk and adopted Mitigation Measure 5-2 to support its conclusion that impacts would be less than significant with mitigation.⁴⁴ By failing to perform a construction HRA as required by Mitigation Measure 5-2, the City's determination that the Project would not expose sensitive receptors to substantial pollutant concentrations during project construction is not supported by substantial evidence.

In this case, the City's own analysis of community health risk impacts demonstrates that Mitigation Measure 5-2 requires preparation of construction HRA prior to project approval. Like Mitigation Measure 5-2, Mitigation Measure 5-3 provides that certain future development projects under the Specific Plan "shall require site-specific analysis to determine the level of TAC and PM2.5 exposure" ⁴⁵ In other words, both Mitigation Measure 5-2 and 5-3 use the same language and provide that project-level analysis "shall be required." There is no basis for the City's decision to defer preparation of a construction HRA until after Project approval.

⁴² See City of El Cerrito, Design Review Board Tier II Staff Report (Nov. 7, 2018) Polaris Apartments, Attachment 1, at p. 4 (Draft resolution, condition of approval #13).

⁴³ CEQA Guidelines § 15168(c)(3).

⁴⁴ Specific Plan DEIR at pp. 5-24 – 5-25.

⁴⁵ Specific Plan DEIR at p. 5-29.

IV. THE DETERMINATION THAT THE PROJECT WILL HAVE NO HAZARD OR HAZARDOUS MATERIALS IMPACTS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The CEQA Checklist concludes that the Specific Plan EIR adequately evaluated impacts from hazards and hazardous materials that would occur with implementation of the Project and that no new or more severe impacts would occur with implementation of the Project.⁴⁶ The City's determination is not supported by substantial evidence.

As discussed further in the attached SWAPE Comments, the Phase I Environmental Site Assessment ("Phase I ESA") prepared for the project site acknowledged that, due to the long-term use of the site as part of a nursery operation, soil at the property may have been impacted by pesticides and herbicides.⁴⁷ Without performing any soil sampling to determine the presence of pesticides or herbicides, however, the authors of the Phase I ESA speculate that "it is likely that the issue of potential residual pesticide concentration in shallow soils at the site would have been resolved during the building of the Taco Bell restaurant"⁴⁸ Mere speculation that residual soil contaminants were cleaned up prior to previous activities on the site is not sufficient to support a finding that no impacts from soil contamination would occur as a result of Project activities. Speculation and unsubstantiated opinion do not constitute substantial evidence under CEQA.⁴⁹

SWAPE's expert comments provide substantial evidence that construction workers, nearby residents and future occupants may be exposed to pesticide-containing soils and dust and that Project construction activities will exacerbate this risk.⁵⁰ Because the presence of contaminants at the Project site and the potential for those contaminants to be disturbed in Project construction was not evaluated or disclosed in the Specific Plan EIR, CEQA requires evaluation of this potential impact in a project-specific EIR.

⁴⁶ CEQA Checklist at p. 35.

⁴⁷ SWAPE Comments at p. 2

⁴⁸ SWAPE Comments at p. 2 (citing Phase I ESA, p. 2)

⁴⁹ CEQA Guidelines § 15064(f)(5) (Speculation and unsubstantiated opinion shall not constitute substantial evidence).

⁵⁰ SWAPE Comments at pp. 1-3.

a. The Presence of Hazardous Contaminants at the Project Site Was Not Evaluated in the Specific Plan EIR

Because it is a high level plan, the Specific Plan EIR provides just a high-level discussion of soil contamination and remediation practices generally, not an examination of potential contamination issues on each individual project site from any type of potential future project. The Specific Plan EIR stated that “[e]ach project applicant in the plan area would be required to comply with all applicable, existing jurisdictional City-, regional- and State-mandated site assessment, remediation, removal, and disposal requirements for soil, surface water, and or groundwater contamination.”⁵¹ The Specific Plan EIR then outlined the typical procedures for evaluating soil contamination and concluded that “implementation of these required, standard procedures would result in a less-than-significant impact associated with potential soil and surface/groundwater contamination.”⁵²

The Specific Plan EIR thus merely addresses contamination that is assessed and remediated pursuant to City or State oversight. The EIR does not address potential contamination that has not been previously disclose or identified or that has not been assessed and remediated pursuant to City or State oversight. Here, the City identifies potential contamination on the site that was not disclosed or evaluated in the Specific Plan EIR and fails to identify any remediation or clean-up activities that were performed with City or State oversight.

Under CEQA Guidelines section 15168(d), the City may use the Program EIR to simplify preparing environmental documents on later parts of the program, to include preparing a focused EIR on new effects which had not been considered before. However, where the program EIR plainly shows that a particular effect of future activities was not examined, the City cannot properly find that the Project will have no new effects not examined in the program EIR where the City’s own analysis shows a potential for harmful soil contaminants to exist on the Project site. SWAPE’s comments provide expert testimony that the Project may create significant health and safety risks as a result of the potential soil contamination. The City must disclose and evaluate this impact in a supplemental CEQA document.

⁵¹ Specific Plan DEIR at p. 10-10.

⁵² Specific Plan DEIR at p. 10-10.

b. New Information Has Become Available Since the Certification of the San Pablo Avenue Specific Plan Programmatic EIR Showing Hazard Impacts from Project Construction May Be Significant

Even if the Specific Plan EIR's discussion of possible soil contamination and worker exposure from future activities constitutes an examination of hazard impacts for future activities within the program, the potential for Project construction activities to expose construction workers and nearby residents to residual pesticide contamination identified in the Phase I ESA constitutes new information of substantial importance that was not known at the time the Program EIR was certified. Pursuant to CEQA Guidelines section 15162, a subsequent or supplemental EIR is required when 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, shows the project will have one or more significant effects not discussed in the previous EIR or negative declaration.

In this case, the information regarding the potential to expose construction workers and residents to contaminated soil at the Project site constitutes new information. This information was brought to light through the Phase I ESA prepared in 2017 and the Project application. While the City may have been aware of the Project site's history of agricultural uses at the time the Specific Plan EIR was certified, it was not known at that time construction of the Project would require large scale disturbance of soils at the Project site. It was also not known that a project which includes large areas of unpaved open space and a public play area would be developed at the site, potentially bringing future occupants and visitors into direct contact with recently-disturbed, contaminated soil.

As explained further in the attached SWAPE comments, this new information that Project activities may expose construction workers and residents to soils impacted by pesticides and herbicides from long history of agricultural use is of substantial importance.⁵³ SWAPE explains:

⁵³ SWAPE Comments at pp. 1-3.

Because agriculture was practiced on the Project site prior to 1972, pesticides, including dichloro-diphenyl-trichloroethane (DDT), may be present in Project site soils from the application of pesticides. Organochlorine pesticides, such as DDT, 1,1-Dichloro-2,2-bis(p-chlorophenyl)-ethylene (DDE), and Chlordane, were used from the 1940s until they were banned in the 1972.⁵⁴ Despite being banned for almost 50 years, these compounds can persist in soil for hundreds of years.⁵⁵

Exposure to DDT can result in headaches, nausea, and convulsions. The U.S. EPA identifies DDT and DDE as probable human carcinogens. Chlordane has also been classified as a probable human carcinogen by the U.S. EPA.⁵⁶

In light of the new information of substantial importance that Project construction and subsequent use may expose construction workers, residents, future occupants, and visitors to soils containing DDT or other harmful pesticides, the City must prepare an EIR to disclose and analyze the Project's potentially significant hazard impacts. The speculation in the Phase I ESA that soil contamination was previously cleaned up is without basis and does not provide substantial evidence that no impacts would occur.

V. THE CITY MUST EVALUATE THE PROJECT'S IMPACTS ON THE EXISTING VISUAL CHARACTER AND QUALITY OF THE SITE AND SURROUNDINGS

While the CEQA Checklist and Specific Plan EIR examine potential impacts on scenic views such as the Golden Gate Bridge from public rights away and nearby homes, the City has failed to adequately evaluate the Project's potential impacts on the existing visual character or quality of the Project site's surroundings, namely the Ohlone/Richmond Greenway. The CEQA Checklist omits any discussion of this impact area but ultimately concludes that the Project would be consistent with policies related to visual character and design and that all aesthetic impacts were adequately evaluated in the EIR. However, the Project design was not known at the time the Specific Plan EIR was prepared, and single conclusory statement that the

⁵⁴ SWAPE Comments at p. 2 (citing U.S. EPA, DDT – A Brief History and Status, <https://www.epa.gov/ingredients-used-pesticide-products/ddt-brief-history-and-status>).

⁵⁵ SWAPE Comments at p. 2 (citing Agency for Toxic Substances and Disease Registry, Public Health Statement for DDT, DDE, and DDD, <https://www.atsdr.cdc.gov/phs/phs.asp?id=79&tid=20>).

⁵⁶ SWAPE Comments at p. 3.

Project would be “consistent with policies” is insufficient to conclude that impacts would be less than significant. The Project’s large massing and close proximity to the aerial BART tracks will effectively enclose the nearby section of the Greenbelt, resulting in a tunneling effect between BART and the Project’s 85-foot tall structure.

According to the project description, the Project will include one 8-story, 85-foot-tall residential building. The Project directly abuts the Ohlone/Richmond Greenway, which runs between the building’s southern elevation wall and the Bay Area Rapid Transit (BART) track. The Project’s southern wall is a large flat, 85-foot tall surface with no openings. The aerial BART track is just feet away from the Project site on the other side of the trail.

Due to the large scaling of the building, the Project will significantly darken the Greenway and decrease visibility along the trail, creating an effective tunnel along this section of the Greenway. The Project’s design is in conflict with a number of City policies including those articulated in the City’s General Plan and Ohlone Greenway Master Plan. Specifically, the General Plan Land Use Policy LU5.6 provides that new development abutting the Ohlone Greenway must be evaluated with respect to how the development enhances the aesthetics and ambiance of the Greenway. Furthermore, the Ohlone Greenway Master Plan expresses the City’s intent to develop the Greenway in manor that promotes visibility and improves safety and security.⁵⁷ Creating a closed off tunnel with low visibility between the Project structure and BART tracks neither enhances the aesthetics or ambiance of the Greenway nor promotes safety and security to users of the Greenway.

The City should further evaluate the Project design and incorporate feasible measures to lessen adverse impacts to the Greenway, promote visibility and safety for users.

VI. CONCLUSION


The City’s reliance on a Specific Plan EIR for the evaluation of impacts that were neither disclosed or analyzed in that document and that were expressly deferred to project-specific review violates CEQA. A supplemental EIR must be

⁵⁷ See Ohlone Greenway Master Plan – El Cerrito, California, Design Guidelines, at p. 26, <https://el-cerrito.org/478/Ohlone-Greenway-Master-Plan>.

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prepared prior to approval of this Project in order to ensure that the Project's impacts are fully disclosed and are mitigated to the extent feasible. El Cerrito Residents urges the Design Review Board to withhold approval of the Project and direct City staff to prepare an EIR to fully disclose and analyze the Project's health risk, hazard, and aesthetic impacts.

Sincerely,



Collin S. McCarthy

CSM:lj1