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September 24, 2019

**Via Email and Overnight Delivery**

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**Via Email Only:**

Noren Caliva-Lepe, [ncaliva-lepe@sunnyvale.ca.gov](mailto:ncaliva-lepe@sunnyvale.ca.gov)

**Re: Agenda Item No. 19-0988, Special Development Permit for  
1390 Borregas Avenue Mechanical Facility (File #: 2019-7071)**

Dear Zoning Administrator Kin and Ms. Caliva-Lepe:

We are writing on behalf of **Safe Fuel and Energy Resources California** (“SAFER CA”) to comment on the Zoning Administrator’s (“Administrator”) Agenda Item No. 19-0988, Special Development Permit for 1390 Borregas Avenue Mechanical Facility (File #: 2019-7071). The agenda item proposes to approve a Moffett Park Special Development Permit for the Google Mechanical Facility (“Project”) proposed by Google, LLC (“Applicant”). The Project proposes to demolish an existing industrial building and construct an all-electric thermal energy mechanical facility to provide heating and cooling services to up to 3.7 million square feet of nearby Google office/R&D buildings within Moffett Park via underground pipelines through the public right-of-way.<sup>1</sup> The Project would be the “the first central utility plant in Moffett Park” of its kind, and would consist of three buildings, four thermal storage tanks, and ancillary equipment, including underground pipelines connecting the Project to adjacent buildings.<sup>2</sup>

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<sup>1</sup> Staff Report, p. 2.

<sup>2</sup> 1390 Borregas Mechanical Facility: Schematic Design, May 10, 2019, at 2.1.0-1.4656-001acp

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The Staff Report incorrectly recommends approval of the Project in reliance on a categorical exemption from the California Environmental Quality Act (“CEQA”)<sup>3</sup> for “In-Fill Development Projects” under 14 CCR § 15332 (“infill exemption”).<sup>4</sup> However, the City’s reliance on the infill exemption is unsupported because the City has not completed the environmental analysis required by CEQA. The Staff Report’s Categorical Exemption Analysis fails comply with CEQA because it fails to accurately describe or analyze the full scope of the Project, fails to disclose or mitigate the Project’s potentially significant environmental impacts, fails to conclude that an environmental impact report (“EIR”) is required, and fails to require adequate mitigation measures to ensure that the Project’s potentially significant impacts are reduced to less than significant levels.

First, the Staff Report fails to describe the entire Project. The Staff Report and the Applicant’s supporting documents are impermissibly silent on the reasonably foreseeable future construction of the other Google facilities that will result from the Project and which the Project is admittedly designed to serve. The Staff Report and supporting documents also fail to describe or analyze the Project’s underground pipelines and associated structures that will physically connect the Project to these other buildings. The City’s failure to disclose and analyze the impacts from all of the Project’s physical structures and the nearby Google buildings to which it will connect results in an inaccurate and misleading Project description which understates the full scope of the Project. The City’s failure to disclose and analyze the impacts of the entire Project in a single CEQA document also constitutes piecemealing, which is prohibited under CEQA. The City must analyze the entire Project in an EIR, including not only the proposed Mechanical Facility, but all related physical structures and reasonably foreseeable future phases of the Project, including all Google facilities that will be connected to the Project.

Second, the Project is not exempt from CEQA because the Project does meet the requirements for an infill exemption: 1) the Project is plainly not a “Public utility building[] and service facilit[y]”<sup>5</sup> as required by the City’s Zoning Code, and therefore requires a variance or amendment to the City’s General Plan and the

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<sup>3</sup> California Environmental Quality Act, Cal. Pub. Res. Code (“PRC”) §§ 21000 et seq.; 14 Cal. Code Regs. (“CCR”) §§ 15000 et seq.

<sup>4</sup> See Staff Report, p. 5, Recommendation.

<sup>5</sup> Sunnyvale Code 19.12.170.

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Moffett Park Specific Plan to be permitted as such; 2) the Project description omits necessary and fundamental components of the Project that, if included, would make the Project's size substantially larger than the 5 acres allowed by the infill exemption; 3) there is substantial evidence demonstrating that the Project will result in potentially significant impacts on the environment, and the City lacks substantial evidence to demonstrate that these impacts would be reduced to less than significant levels; and 4) the City lacks substantial evidence demonstrating that the site can be adequately served by all required utilities and public services.

Additionally, the Project is not entitled to a CEQA exemption because it relies on mitigation measures to reduce potentially significant hazardous materials impacts from the Project site. Mitigation measures are not allowed under any CEQA exemption. Moreover, the City has done no analysis of the cumulative impacts of Google's multiple planned central utility plants in Moffett Park, including the plant proposed in the adjacent Google Caribbean Project. Therefore, the City lacks substantial evidence to conclude that the Project will not have significant cumulative impacts.

Finally, the Project is located within the Moffett Park Specific Plan area, and has not been analyzed in the Moffett Park Specific Plan EIR or any other prior CEQA document. The City must prepare a subsequent or supplemental EIR for the Project because there is substantial evidence demonstrating that (a) substantial changes are proposed in the Project which will require major revisions of the Moffett Park Specific Plan EIR; (b) substantial changes have occurred with respect to the circumstances under which the Project is being undertaken which will require major revisions in the Moffett Park Specific Plan EIR; and (c) new information, which was not known and could not have been known at the time the Moffett Park Specific Plan EIR was certified as complete, demonstrates that the Project is likely to have new or more severe environmental impacts than previously analyzed in the Moffett Park Specific Plan EIR.<sup>6</sup>

As a result of these substantial deficiencies in the City's CEQA analysis, the Project cannot be approved. The Administrator should adopt Staff's recommended Alternative 3 action, and deny all approvals sought in File No. 2019-7071 on the grounds that the Project is not exempt from CEQA. The Administrator should also remand the Project to Staff to prepare a legally adequate EIR that analyzes the

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<sup>6</sup> PRC § 21166(a)-(c); 14 CCR § 15162(a)(1)-(3).  
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entire Project. In order to comply with CEQA, the Mechanical Facility must be fully considered and analyzed in conjunction with all reasonably foreseeable development projects in the Moffett Park area that will be connected to the Project in a single EIR.

These comments were prepared with the assistance of hazardous materials expert Matt Hagemann, P.G., C.Hg. from Soil / Water / Air Protection Enterprise (“SWAPE”), air quality expert Phyllis Fox, Ph.D., PE, and noise expert Derek Watry. Their respective technical comments and curriculum vitae are attached hereto as Exhibit A, B, and C and are fully incorporated herein.<sup>7</sup>

## I. STATEMENT OF INTEREST

SAFER CA advocates for safe processes during construction and operation of California’s utility facilities to protect the health, safety, standard of life and economic interests of its members. For this reason, SAFER CA has a strong interest in enforcing environmental laws, such as CEQA, which require the disclosure of potential environmental impacts of, and ensure safe operations and processes for, California’s utility projects. Failure to adequately address the environmental impacts of water, energy, and fuel supply poses a substantial threat to the environment, worker health, surrounding communities and the local economy.

SAFER CA supports the sustainable development of utility projects in California. However, poorly planned projects can adversely impact the economic wellbeing of people who perform construction and maintenance work on the utility facilities themselves, and the surrounding communities. Plant shutdowns caused by infrastructure breakdowns and insufficiently mitigated hazardous conditions have caused prolonged work stoppages. Such nuisance conditions and catastrophic events impact local communities and the natural environment and can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live in the area. The participants in SAFER CA are also concerned about projects that carry serious environmental risks and public service infrastructure demands without providing countervailing employment and economic benefits to local workers and communities.

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<sup>7</sup> See generally Exhibit A: SWAPE Comments, Exhibit B: Fox Comments, Exhibit C: Watry Comments.  
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The members represented by the participants in SAFER CA live, work, recreate and raise their families in the City of Sunnyvale. Accordingly, these people would be directly affected by the Project's adverse environmental impacts. The members of SAFER CA's participating labor organizations may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

## II. LEGAL STANDARD

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.<sup>8</sup> The EIR is the "heart" of this requirement,<sup>9</sup> 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 points of no return."<sup>10</sup> To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."<sup>11</sup> An adequate EIR must contain facts and analysis, not just an agency's conclusions.<sup>12</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>13</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures to address all potentially significant impacts identified in the agency's CEQA analysis.<sup>14</sup> Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon an EIR or other CEA document to meet this obligation.

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<sup>8</sup> Cal. Code Regs., tit. 14, § 15002, subd. (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>9</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

<sup>10</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>11</sup> CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>12</sup> *See Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

<sup>13</sup> CEQA Guidelines, § 15002, subd. (a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th, at p. 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

<sup>14</sup> Pub. Resources Code, §§ 21002-21002.1.

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Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>15</sup> A CEQA lead agency is precluded from making the required CEQA findings to approve a project unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. For this reason, an agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>16</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>17</sup>

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>18</sup> CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.<sup>19</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>20</sup>

CEQA also provides that certain in-fill development Projects are categorically exempt from CEQA.<sup>21</sup> In-fill projects, however, are not exempt from CEQA, if they are inconsistent with local land use plans, or where approval of the project would result in any significant effects relating to traffic, noise, air quality, or water quality.<sup>22</sup> In addition, no categorical exemption may be applied to any project in which there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.<sup>23</sup>

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<sup>15</sup> CEQA Guidelines, § 15126.4, subd. (a)(2).

<sup>16</sup> *Kings County Farm Bureau 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>17</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

<sup>18</sup> CEQA Guidelines, §§ 15060, 15063, subd. (c).

<sup>19</sup> See, e.g., Pub. Resources Code, § 21100.

<sup>20</sup> *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

<sup>21</sup> CEQA Guidelines § 15332.

<sup>22</sup> CEQA Guidelines § 15332(d).

<sup>23</sup> CEQA Guidelines § 15300.2(c).

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Finally, 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.<sup>24</sup> First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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:

- (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>28</sup>

### **III. THE PROJECT DESCRIPTION IS INADEQUATE AND MISLEADING AND DEMONSTRATES IMPERMISSIBLE PIECEMEALING OF THE PROJECT**

CEQA Guidelines section 15378 defines “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the

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<sup>24</sup> See CEQA Guidelines, 15168, subd. (c); S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.16 (Mar. 2018).

<sup>25</sup> CEQA Guidelines, § 15168, subd. (c)(1).

<sup>26</sup> CEQA Guidelines, § 15168, subd. (c)(1).

<sup>27</sup> CEQA Guidelines, § 15168, subd. (c)(2).

<sup>28</sup> Pub. Resources Code, § 21166.

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environment.”<sup>29</sup> “The term “project” refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval.”<sup>30</sup> Courts have explained that “[a] complete project description of a project has to address not only the immediate environmental consequences of going forward with the project, but also all “*reasonably foreseeable* consequence[s] of the initial project.”<sup>31</sup> “If a . . . [CEQA document]. . . does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decision-making cannot occur under CEQA and the final EIR is inadequate as a matter of law.”<sup>32</sup> The courts apply CEQA’s broad definition of “project” to cases involving exemption determinations.<sup>33</sup>

The project description in the Project Application and Staff Report provide almost no information on the scope of the Project, nor does it describe the Project with a level of granularity on which definitive conclusions on potential environmental impacts could be made. Nonetheless, documents provided by the City demonstrate that the Project is much larger than the Applicant’s project description indicates. The City’s attempt to treat the Project as a singular approval of a Google power plant, unrelated to the other Google facilities that it will admittedly serve, constitutes impermissible piecemealing of the Project in order to avoid CEQA review.

**A. The Project Description Omits Crucial Elements of the Project and Thereby Inaccurately Shrinks the Project’s Scope**

In its project description letter, the Applicant describes the Project as three buildings: a heating building (housing electric/switchgear elements and heat pumps); a cooling building (housing chillers, cooling towers, and a diesel generator)<sup>34</sup>; and an ancillary building housing a control room and multipurpose

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<sup>29</sup> 14 Cal.Code Regs, tit. 14, §15378 (“CEQA Guidelines”).

<sup>30</sup> CEQA Guidelines, 15378 subd. (c).

<sup>31</sup> *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, emphasis added; see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-50.

<sup>32</sup> *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.

<sup>33</sup> *County of Ventura v. City of Moorpark, Broad Beach Geologic Hazard Abatement District* (2018) 24 Cal.App.5th 377, 382.

<sup>34</sup> Geotechnical Report, Section 1.3, p. 2.  
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space, located on a 82,285 ft<sup>2</sup> lot for housing the equipment, four thermal water storage tanks (one hot water tank and three cold water tanks).<sup>35</sup> The Applicant then briefly describes the size of the buildings, the aesthetics of the site after completion, and states that the facility “will serve as an educational amenity to visitors and Google employees.”<sup>36</sup> No reasonable understanding of the details and scope of the Project can be understood from this description. The City relied on the Applicant’s incomplete project description in its Categorical Exemption Analysis.

As explained by Dr. Fox and Mr. Watry, the brief Project description provided by the Applicant omits major components of the Project, including the following:

- Explanation of how the individual components interact to provide heating and cooling to adjacent buildings and the function of each component.
- Detailed construction schedule that identifies all equipment, their horsepower, hours of use, and engine tier;
- Description of cooling tower design, cycles of concentration, circulating water treatment method(s) and flowrate, circulating water quality, amount and quality of cooling tower blowdown, and blowdown disposal/treatment method(s);
- Diesel generator specification sheet and proposed emission controls, if any (e.g., DPF or SCR);
- Peak and total annual electricity demand in MWh/yr;
- Design of and MW output of solar panels;
- Battery composition (e.g., lithium-ion) and vendor specification sheet;
- Battery facility layout;
- Total water demand and water quality for cooling towers, irrigation, potable, and any other unidentified uses;
- Water treatment methods and residuals disposal;
- Wastewater disposal method(s) and location;

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<sup>35</sup> Geotechnical Report, Sec. 1.4, p. 2; Proposed 1390 Borregas Ave Mechanical Facility: Project Description Letter, May 7, 2019; Environmental Information Form, Item 14.

<sup>36</sup> Project Description Letter.

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- Noise calculations supporting conclusion that “noise levels at the site boundaries are expected to be significantly quieter than required by code”;<sup>37</sup>
- Manufacturer-provided equipment sound power levels;<sup>38</sup>
- Manufacturer-provided electricity demand for all equipment;
- A P&ID diagram that identifies all connectors, valves, pumps, and other equipment that may leak vapors into the atmosphere.<sup>39</sup>

Crucially, the Application also included almost no details about piping or any other utilities (location, length, depth, roadway crossings, etc.) that are necessary to facilitate the delivery of “heating and cooling services to nearby Google-controlled office buildings,” which is the stated purpose of the Project.<sup>40</sup> The underground pipelines that will connect the Mechanical Facility to adjacent Google buildings are basic components of the Project. They will provide a direct, physical connection between the Mechanical Facility structures and multiple other facilities owned by the Applicant, all of which will operate under the Applicant’s singular control. As such, the pipelines are part of the Project, and must be described and analyzed in the City’s CEQA document.

Neither the Staff Report, nor the Project documents provided by the Applicant, provide a clear description of the Project’s underground pipelines or associated structures. Nor do they identify or describe the “nearby Google buildings” that the Project will connect to. In fact, the Applicant seems reluctant to disclose to the City *any* potential final destination for the massive quantities of heating and cooling water and the products of the mechanical equipment housed at the Project. The omission of this basic information from the Project description renders the Project description incomplete, misleads the public as to the true scope of the Project, and resulted in a failure by the City to disclose the nature and severity of the Project’s environmental effects.<sup>41</sup>

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<sup>37</sup> Noise Code Evaluation Update, May 3, 2019, pdf 6.

<sup>38</sup> Noise Code Evaluation Update, May 3, 2019, pdf 6.

<sup>39</sup> Exhibit B at 5–6.

<sup>40</sup> The only reference to service lines connecting the Mechanical Facility to Google office buildings is a brief acknowledgement in Google’s response to PRC comments. *But see* Stanford Energy System Innovations, [http://www.urecon.com/documents/pdfs/white\\_papers/SESI.pdf](http://www.urecon.com/documents/pdfs/white_papers/SESI.pdf) (describing the extent of piping necessary to implement a central utility plant).

<sup>41</sup> *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

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Fortunately, Project documents provided by the City demonstrate that the Applicant does not intend for the Project to be constructed or operated in isolation. For example, the Applicant's Geotechnical Report acknowledges that the Project will be constructed in phases. The Report explains that the Project is a central utility plant that will provide all-electric heating and cooling by sending hot and cold water via underground pipes<sup>42</sup> to approximately 3.7 million square feet of future phased development on Google properties in Moffett Park.<sup>43</sup> Additionally, the Applicant's Operational Waste Management Strategy explains that, at the time the Project Application was submitted, the Applicant already anticipated that the Project would serve the first five buildings to come online before the pending Moffett Park Specific Plan amendments are adopted.<sup>44</sup> The Strategy further explains that, following the release of the amended Specific Plan, an additional five buildings would be supported by the Project.<sup>45</sup> Thus, the "reasonably foreseeable consequences" of the Project include the environmental impacts associated with the construction, operation, and physical connection of the Project's on-site facilities to the additional Google buildings that the Project is intended to serve.

Shrinking the scope of a project in order to avoid CEQA review violates CEQA's basic mandate that a "project" must be described as the "whole of the action," including not only the initial activity which is being approved, but all reasonably foreseeable components of the project. This includes phases which may be subject to multiple discretionary approvals by governmental agencies.<sup>46</sup> The City's proposed Categorical Exemption determination fails to describe or analyze the majority of the Project and cannot be approved. The City must prepare an EIR which describes and analyzes the entire Project.

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<sup>42</sup> Environmental Information Form, 10b, #9.

<sup>43</sup> Geotechnical Report, p. 1: "Based on our discussions with the project team and review of the information provided, we understand the proposed 1390 Borregas Mechanical Facility (Project) will serve the surrounding areas, including **future** office buildings." (**emphasis added**); Biological Resources Report, p. 1; Use Permit/Special Development Permit Justifications ("The all-electric mechanical facility replaces individual thermal equipment located at each **future building...**"). **Emphasis** added.

<sup>44</sup> Google Central Utilities Plant, Operational Waste Management Strategy, ARUP, 50% Detailed Design, May 1, 2019 (Operational Waste Management Strategy), p. 2.

<sup>45</sup> Google Central Utilities Plant, Operational Waste Management Strategy, ARUP, 50% Detailed Design, May 1, 2019 (Operational Waste Management Strategy), p. 2.

<sup>46</sup> CEQA Guidelines, 15378 subd. (c).

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## B. CEQA Prohibits the Piecemealing of Projects

CEQA prohibits a project proponent from seeking approval of a large project in a piecemeal fashion in order to take advantage of environmental exemptions or lesser CEQA review for smaller projects.<sup>47</sup> The law mandates “that environmental considerations do not become submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment - which cumulatively may have disastrous consequences.”<sup>48</sup> As Courts have stated: “[...]the CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, *covering the entire project, from start to finish.*”<sup>49</sup>

Specifically, the description of a project must describe a larger future project and analyze its effects if (1) the larger project is a reasonably foreseeable consequence of the initial project, and (2) the future project will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.<sup>50</sup> This rule applies even if (1) the Lead Agency has not yet formally approved the larger future project, and (2) it is impossible to predict with precision the environmental effects of less-than-definite future plans, as long as these effects can be discussed at least in general terms.<sup>51</sup> Difficulty in describing the effects of less-than-definite future plans does not excuse an agency from CEQA compliance, especially since CEQA provides mechanisms, such as Program EIRs and tiering of EIRs, to facilitate environmental analysis of larger future projects.<sup>52</sup>

Furthermore, “[t]iering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental impacts of the project and does not justify deferring such analysis to a later tier EIR or negative

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<sup>47</sup> *Arviv Enterprises, Inc. v. South Valley Area Planning Com.*, 101 Cal. App. 4th 1336, 1340 (2002).

<sup>48</sup> *Bozung v. LAFCO*, 13 Cal.3d 263, 283-84 (1975); *City of Santee v. County of San Diego*, 214 Cal.App.3d 1438, 1452 (1989); *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo*, 172 Cal.App.3d 151, 165 (1985).

<sup>49</sup> *Natural Resources Defense Council v. City of Los Angeles*, 103 Cal.App.4th 268 (2002), (emphasis added).

<sup>50</sup> *Laurel Heights Improvement Assn. v. Regents of Univ. of California*, 47 Cal. 3d 376, 396 (1988), as modified on denial of reh'g (Jan. 26, 1989).

<sup>51</sup> *Id.* at 398-99.

<sup>52</sup> *Id.* at 399, n.8.

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declaration.”<sup>53</sup> If a program-level EIR has been released, it is nonetheless still not appropriate to piecemeal later tiers in order to avoid environmental review.

**C. Expansion of the Project is a Reasonably Foreseeable Consequence of Construction and Must be Analyzed in a Single EIR**

In *Laurel Heights*, the California Supreme Court grappled with a project that proposed moving a university’s research facility to a residential neighborhood.<sup>54</sup> The building that would serve as the research facility was three times larger than what was needed for the research facility and use of the remaining building space was to become available to the university within five years of the project’s completion.<sup>55</sup> It was known at the time of the trial that the university had plans to occupy more of the building and had reasonably specific plans for what it intended to do with the remaining space.<sup>56</sup> The court found that the future development was reasonably foreseeable and the university had to include environmental analysis of the anticipated future uses of the site.<sup>57</sup>

Similarly here, the Project is part of the Applicant’s overall development strategy for Moffett Park, and is not being constructed in isolation. It is being constructed so as to “provide heating and cooling services to nearby Google-controlled office buildings.” Any new Applicant-owned office building will have to construct pipes underground to bring the byproducts from the Project to the office building. In its response to the City’s questions about the scope of the Project, the Applicant repeatedly avoided disclosing information about future projects in the area or indicating which future projects might be ultimately connected to the Project.

However, the record is clear that the Applicant has quite specific plans for the nearby land they own, including at least four other projects in various stages of

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<sup>53</sup> Cal.Code Regs., tit. 14, § 15152, subd. (b); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 431, 150 P.3d 709, 720 (2007), as modified (Apr. 18, 2007).

<sup>54</sup> *Laurel Heights*, 47 Cal. 3d at 388.

<sup>55</sup> *Id.* at 393

<sup>56</sup> *Id.* at 395

<sup>57</sup> *Id.* at 399.

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planning and development within Moffett Park.<sup>58</sup> In particular, directly across the street from the Project, the City is preparing a Draft EIR for the Google Caribbean Campus Project (“Caribbean Project”), which will “demolish the existing 13 buildings located on the project site, existing surface parking lots, and removing of vegetation and trees on the approximately 40.5-acre site....In their place, [the Applicant] proposes to build two new 5-story office buildings totaling 1,041,890 square feet.” Notably, the Notice of Preparation for the Caribbean Project explains that Caribbean Project would also contain a central utility plant that the instant Project “includes flexibility to connect to...in [the] future.”<sup>59</sup>

As the court in *Laurel Heights* found, “this is not the type of situation where it is unclear as to whether a parcel of land will be developed or as to whether activity will commence.”<sup>60</sup> The Applicant’s plans for future development are clear – the Project is intended to provide heating and cooling to other Google facilities. In fact, the Applicant has explicitly considered plans to incorporate the Project into neighboring construction projects, implicitly acknowledging that the Project serves no practical function operating in isolation.<sup>61</sup> Thus, the Project necessarily involves the future permitting and construction of other Google facilities. By failing to analyze all of these facilities in a single EIR, the City has piecemealed the Project as the university did in *Laurel Heights*. The City must prepare an EIR for the entire Project which fully describes, analyzes and mitigates the impacts of the Mechanical Facility in conjunction with the Applicant’s related Moffett Park developments, including all related physical structures, such as Project piping, additional heating and cooling equipment, etc.

#### **IV. THE PROJECT DOES NOT QUALIFY FOR THE INFILL EXEMPTION**

The City improperly determined that the Project qualifies for the infill exemption under CEQA. CEQA is “an integral part of any public agency’s decision making process.”<sup>62</sup> It was enacted to require public agencies and decision makers to

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<sup>58</sup> See Letter from Emily L. Murray to Rebecca Moon, Esq., Re: CEQA Compliance for Google Projects in Moffett Park, April 10, 2019.

<sup>59</sup> PRC Comments, June 5, 2019, at PDF 6.

<sup>60</sup> *Laurel Heights*, 47 Cal. 3d at 395.

<sup>61</sup> PRC Comments, June 5, 2019, at PDF 6 (Project will have capability to connect to Caribbean Project).

<sup>62</sup> Pub. Resources Code § 21006.

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document and consider the environmental implications of their actions before formal decisions are made.<sup>63</sup> CEQA requires an agency to conduct adequate environmental review prior to taking any discretionary action that may significantly affect the environment unless an exemption applies.<sup>64</sup> Thus, exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.<sup>65</sup>

### **A. The Infill Exemption**

14 CCR § 15332 provides an exemption from CEQA for “benign infill projects that are consistent with the General Plan and Zoning requirements” of a municipality and that satisfy the following criteria:<sup>66</sup>

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

In addition to satisfying the five criteria above, a project must not fall under one of the exceptions to a categorical exemption. For the purposes of this letter, two of these exceptions are noteworthy:<sup>67</sup>

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<sup>63</sup> *Id.*, §§ 21000, 21001.

<sup>64</sup> *Id.*, § 21100(a); *see also* CEQA Guidelines § 15004(a).

<sup>65</sup> *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.

<sup>66</sup> CEQA Guidelines § 15332 (under discussion section).

<sup>67</sup> CEQA Guidelines § 15300.2

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(b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.

(c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

Finally, the infill exemption is not available for any project that requires mitigation measures to reduce potential environmental impacts to less than significant, because a project that “may have a significant effect on the environment cannot be categorically exempt.”<sup>68</sup> Thus, to rely on mitigation measures during an exemption determination is to make a “premature” and “unauthorized” environmental evaluation.<sup>69</sup>

## **B. Standard of Review for the Infill Exemption**

The infill exemption requires a lead agency provide “substantial evidence to support [their] finding that the Project will not have a significant effect.”<sup>70</sup> “Substantial evidence” means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.<sup>71</sup> If a court locates substantial evidence in the record to support the City’s conclusion, the City’s decision will be upheld.<sup>72</sup>

In contrast, the standard of review for exceptions to the infill exemption generally requires that a challenger provide a fair argument that the project *may* have a significant effect on the environment. In that instance, an agency will simply inquire whether, as a matter of law, the record contains credible evidence to support an argument that there may be a significant effect, but the agency would not weigh

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<sup>68</sup> *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102.

<sup>69</sup> *Id.* at 1108.

<sup>70</sup> *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

<sup>71</sup> CEQA Guidelines § 15384.

<sup>72</sup> *Bankers Hill Hillcrest*, 139 Cal.App.4th at 269.

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the evidence or resolve any conflict.<sup>73</sup> The determination of whether a project presents “unusual circumstances” pursuant to CEQA Guidelines, § 15300.2, subd. (c) is reviewed under a 2-prong standard. First, the determination of whether a particular project presents circumstances that are unusual for projects in the exempt class is reviewed under the substantial evidence standard. Second, the agency’s finding as to whether unusual circumstances give rise to “a reasonable possibility that the activity will have a significant effect on the environment” is reviewed under the fair argument standard.<sup>74</sup>

The record demonstrates that neither the City nor the Applicant have provided substantial evidence that the Project qualifies for the infill exemption. By contrast, there is substantial evidence demonstrating that unusual circumstances are present which preclude reliance on the infill exemption, and there is substantial evidence supporting a fair argument that the Project will result in significant, unmitigated environmental effects that require preparation of an EIR. . Finally, we show that the Project, requires the implementation of mitigation measures to prevent significant effects on the environment, and thus, the Project cannot qualify for a categorical exemption.

**C. The City Lacks Substantial Evidence to Conclude that the Project Satisfies the Infill Exemption Criteria**

**1. The Project is not a Public Utility Building and Service Facility**

A project claiming the infill exemption must be “consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.”<sup>75</sup> As justification for satisfaction of this element, the Staff Report claims that the Project falls under the “Public utility building and service facilities” category within the Sunnyvale Zoning Code and claims the definition for that category applies to the Project.<sup>76</sup> This assumption is incorrect and unsupported on two counts.

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<sup>73</sup> *Bankers Hill Hillcrest*, 139 Cal.App.4th at 263.

<sup>74</sup> *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114, as modified (May 27, 2015).

<sup>75</sup> CEQA Guidelines § 15332(a)

<sup>76</sup> Letter from James T. Burroughs, Re: 1390 Borregas Avenue Central Utility Plan, Cat. 32 Exemption Letter, May 28, 2019, at 2 (hereinafter “CEQA Exemption Letter”).  
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*a) The Applicant is not a Public Entity*

The “Public utility building and service facilities” category falls under the broader Public Facility distinction for the purposes of the Sunnyvale Zoning Code,<sup>77</sup> which the Sunnyvale General Plan describes as applying to “public and quasi-public services such as parks, schools, places of assembly, child-care facilities, civic facilities, and public works facilities such as solid waste, landfill, or other similar facilities to be located throughout the city.”<sup>78</sup> The Code explains that Sunnyvale’s “public buildings are not commercial enterprises, but are solely meant to provide the best possible services to Sunnyvale residents, businesses and visitors.”<sup>79</sup> They represent the “official face of a City”<sup>80</sup> and are subject to public accountability in their decision-making. A quasi-public service would likely refer to the services provided by “a private corporation that is backed by a government agency that has a public requirement to provide certain services,” like many of California’s private electric or water utilities.<sup>81</sup>

The Applicant is a “commercial enterprise,” and is therefore not a public or even quasi-public service provider, as defined by the Zoning Code.<sup>82</sup> The stated purpose of the Project “is to provide heating and cooling services to nearby Google-controlled office buildings.”<sup>83</sup> These are public services which are commonly provided by public utilities. The Zoning Code does not authorize private commercial enterprises to provide these services, nor does the Code authorize them to take place in private buildings. The services proposed by the Project will be provided by the Applicant, to serve the Applicant’s employees in future buildings owned and controlled by the Applicant and will not be made available for general public use. Thus, the general plan and zoning designation claimed by the Applicant is not applicable to this Project, because it is reserved for City use, or use by other public or quasi-public uses. The use proposed by the Project is therefore inconsistent with the Zoning Code.

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<sup>77</sup> Sunnyvale Code 19.29.050

<sup>78</sup> Sunnyvale General Plan Ch. 3, p. 3-91.

<sup>79</sup> Sunnyvale General Plan Ch. 4, p. 4-14.

<sup>80</sup> Sunnyvale General Plan Ch. 4, p. 4-14.

<sup>81</sup> See Quasi-Public Corporation definition, available at <https://www.upcounsel.com/quasi-public-corporation>

<sup>82</sup> See 10b Environmental Information Form-Responses, pdf 3 (“The 1390 Borregas Mechanical Facility...is not a public utility”).

<sup>83</sup> CEQA Exemption letter at 1.

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- b) *The Project is not contemplated as a Utility Building and Service Facility in the Zoning Code or the Moffett Park Specific Plan EIR*

The Project is inconsistent with the plain language of the Sunnyvale Zoning Code which defines Public Utility Buildings and Service Facilities as “buildings or facilities above ground, such as communications equipment buildings, water pumping plants, and water storage facilities, and similar facilities.”<sup>84</sup> The Staff Report nevertheless contends that the Project is consistent with this definition. The City’s primary argument for the satisfaction of this element of the infill exemption is that “the proposed Mechanical Facility meets [the definition for Public Utility Buildings and Service Facilities] as an above-ground facility that is intended to provide heating and cooling services to nearby Google-controlled office buildings.”<sup>85</sup> The Staff Report emphasizes the “above ground facilities” portion of the definition, but glosses over the examples used in the definition to provide context for *what* above-ground facilities are included in the definition.

Contrary to the City’s contentions, the Project is also not a “communication equipment building,” nor is it a “water pumping plant” or “water storage facility,” as defined by the City’s Zoning Code and as analyzed in the Moffett Park Specific Plan. The type of water storage and pumping analyzed for environmental impacts in the City’s Moffett Park Specific Plan EIR was focused on water that could be distributed as potable or non-potable water for non-specific residential, commercial, and industrial purposes.<sup>86</sup> By contrast, the Project’s water storage and pumping facilities are specifically designed to send hot and cold water via underground pipes for heating and cooling services to nearby office buildings.<sup>87</sup> The Specific Plan EIR did not analyze or discuss this type of water storage, transmission, or use. Moreover, the other “utility building and service facility” purposes contemplated by the Specific Plan include: wastewater and sewage; electricity; natural gas; telephone services; and data transmission. None of these descriptions apply to the Project.

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<sup>84</sup> Sunnyvale Code 19.12.170.

<sup>85</sup> CEQA Exemption Letter at 2.

<sup>86</sup> See Moffett Park Specific Plan EIR, 2003, 3.13-1–3.13-5 (covering the City’s “water distribution system” and “water demand management”).

<sup>87</sup> Environmental Information Form, 10b, #9.

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Thus, in order for the Applicant to qualify as a “Public utility building and service facilit[y],” a variance or amendment to the General Plan would be required. This demonstrates that the Project is inconsistent with the Sunnyvale General Plan, Zoning Code, and the Moffett Park Specific Plan. As such, the Project fails to satisfy this basic element of the Class 32 exemption and does not qualify for an infill exemption.

## **2. The Project is Substantially Larger than the Infill Exception Allows**

The infill exemption requires a proposed project to occur “within city limits on a project site of *no more than five acres* substantially surrounded by urban uses.”<sup>88</sup> The City claims the Project satisfies this element because the “project site...is 1.9 acres large and is surrounded on three sides by existing light industrial/commercial-type building structures and on the fourth side by East Caribbean Drive.”<sup>89</sup> However, the 1.9 acres described in the Staff Report includes only the acreage of the parcel on which the three buildings and four water towers will be constructed.<sup>90</sup> It fails to include any underground pipelines or associated structures that will be constructed between the Project site and the other Google buildings it is designed to serve.

As we explained above, it is clear that the Project will not only include the construction of the above ground facilities and landscaping. The Project will also entail facilitating “heating and cooling services to nearby Google-controlled office buildings” through piping underneath Caspian Drive and Borregas Ave.<sup>91</sup> The Staff Report explains that the Project will require “underground pipes through the public right-of-way” in order to provide energy to up to 3.7 million square feet of buildings (85 acres).<sup>92</sup> However, the City failed to include either the pipelines or the receiving buildings in its description of the Project’s acreage. Thus, the Project’s physical structures will extend far beyond the 1.9 acres described in the Staff Report and Project Application.

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<sup>88</sup> CEQA Guidelines § 15332(b) (emphasis added).

<sup>89</sup> CEQA Exemption Letter at 2.

<sup>90</sup> Project Description Letter.

<sup>91</sup> PRC Comments Responses, PDF pg. 5.

<sup>92</sup> Staff Report, p. 2; see also Geotechnical Report, p. 1.  
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Without the underground pipes physically connecting the Project to nearby facilities, the Project would serve no practical function. Thus, the Project's underground pipes are a *necessary* part of the Project and cannot be ignored when considering its scope. The reasonably foreseeable scope of the Project is therefore up to 85 acres, which far exceeds the five-acre maximum required to qualify for the infill exemption, rendering the exemption inapplicable.

### 3. The Project is Inconsistent with Zoning Regulations.

To qualify for an infill exemption, a project must be consistent with “all applicable general plan policies as well as with applicable zoning designation and regulations.”<sup>93</sup> The Project fails to meet this requirement because it is facially inconsistent with City Zoning Codes designed to reduce the adverse impacts associated with the “heat island effect” of parking lot areas within the City.

The City's Parking Lot Design Standards require that a minimum of 50% of parking lot areas, including paved areas that serve parking lots, be shaded within 15 years of tree plantings.<sup>94</sup> The purpose of this Zoning Code requirement is to reduce the heat island effect of paving.<sup>95</sup> The Staff Report explains that the Project includes just 32% parking lot shading – less than the minimum required by the Zoning Code. The Applicant claims that it is impossible for the Project to comply with the Parking Lot Design Standards because (1) shared driveway access along the eastern property line limits ability to plant trees on both sides of drive aisle, and (2) trees not permitted within the utility easement along the southern property line.<sup>96</sup> The Staff Report acknowledges that this issue renders the Project inconsistent with this mandatory Zoning Code requirement: “The project complies with most development standards, *with the exception of parking lot shading*.”<sup>97</sup> The Project is therefore admittedly inconsistent with the Zoning Code, rendering the infill exemption inapplicable.

Rather than change the Project design to increase the number of trees on the Project site's parking lots in order to comply with the Zoning Code, the Applicant has requested an exemption from Section 19.46.120(a). The Project's

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<sup>93</sup> 14 CCR § 15332(a).

<sup>94</sup> Zoning Code, § 19.46.120(a) (Parking lot design – Shading Requirements); Staff Report, p. 4.

<sup>95</sup> Staff Report, p. 4.

<sup>96</sup> Staff Report, p. 4.

<sup>97</sup> Staff Report, p. 2 (emphasis added).

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inconsistency with the Zoning Code therefore remains a significant impact that requires mitigation under CEQA. The Applicant has agreed to mitigate this impact by applying a “cool pavement material” to the parking spaces and drive aisle, which reflects solar heat away from the ground and further reduces the heat island effect.<sup>98</sup> As discussed below, reliance on mitigation measures to reduce a project’s potentially significant effects renders the Project ineligible for any categorical exemption.<sup>99</sup>

Finally, the Staff Report contends that the requested Zoning Code exemption is an acceptable “deviation” from the Code’s parking lot shading requirements because the mitigated impact of the heat island effect will be negligible with application of the cool pavement.<sup>100</sup> This conclusion is incorrect and unsupported because the only parking “deviations” authorized under the Zoning Code apply to *parking space* requirements, and not to parking lot *shading* requirements.<sup>101</sup> Thus, there is no “deviation” authorized by the Zoning Code for the Project’s Zoning Code inconsistency from inadequate parking lot shade. This renders the Project inconsistent with applicable zoning regulations, and ineligible for the infill exemption.

**D. The City Lacks Substantial Evidence to Support Its Conclusion that the Project Will Have No Significant Environmental Effects**

In order to qualify for the infill exemption, the project may not “result in any significant effects relating to traffic, noise, air quality, or water quality.”<sup>102</sup> Exemption determinations must be supported by substantial evidence in the record demonstrating that the exempt project will have no significant environmental effects. Dr. Fox and Mr. Watry explain that the impact analyses provided for the Project rely on incorrect and incomplete input data that failed to analyze the full extent of the Project’s air quality and noise impacts. As a result, the City lacks

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<sup>98</sup> Staff Report, p. 4.

<sup>99</sup> *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102.

<sup>100</sup> Staff Report, p. 4.

<sup>101</sup> Zoning Code § 19.90.030(a)(8) (“In approving a special development permit, the director, planning commission or city council may allow deviations to standards for... (8) Parking space requirements (e.g. number of spaces, percent of compact, aisle width)”).

<sup>102</sup> CEQA Guidelines § 15332(d)

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substantial evidence to support its conclusion that the Project will have no significant environmental effects.

## 1. Air Emissions

The Applicant prepared an Air Quality Analysis to support the City's exemption determination. The Air Quality Analysis concludes that the Project will have no significant air quality impacts. The City adopted the conclusions of the Air Quality Analysis in its Categorical Exemption Analysis. Dr. Fox reviewed the Project Application materials and Air Quality Analysis and concludes that the "analysis significantly underestimates construction and operation emissions," primarily because "many components of Project construction and operation, such as underground pipelines connecting the Project to adjacent buildings, soil modifications to address geotechnical concerns, and emissions from Project operation, are omitted."<sup>103</sup>

### *a. Construction emissions omit major portions of the Project*

The calculation of emissions for the Project were estimated with the CalEEMod model using "default assumptions for a project of this type and size."<sup>104</sup> However, as Dr. Fox points out, there are no similar facilities included in the CalEEMod database, so default assumptions are not a reasonable basis for estimating construction emissions.<sup>105</sup> Additionally, while standard practice for using CalEEMod is to provide supporting construction plans, Dr. Fox explains that "the City's file only includes partial CalEEMod output and is mostly based on default assumptions rather than Project-specific assumptions."<sup>106</sup> Further, the City failed to provide any of the specific inputs that were entered into CalEEMod to generate the emissions estimate that the Air Quality Analysis relies on for its impact assessment. The missing information includes "a detailed listing of all construction equipment that would be used, their horsepower, and hours of usage." Without this information, Dr. Fox explains that "the provided model output cannot be evaluated,"<sup>107</sup> and the City cannot satisfy its burden to provide substantial evidence to support an exemption.

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<sup>103</sup> Exhibit B at 6–7.

<sup>104</sup> Air Quality Analysis, PDF pg. 5

<sup>105</sup> Exhibit B at 9.

<sup>106</sup> Exhibit B at 9.

<sup>107</sup> Exhibit B at 9.

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The CalEEMod default assumptions are all the more insufficient because, as Dr. Fox explains, the analysis of construction emissions leaves out essential parts of the construction process, including removal of existing underground utilities, fill removal and placement off-site, trenching to lay utilities to future adjacent buildings, and the type and ‘tier’ of construction equipment.<sup>108</sup> The Air Quality Analysis also underestimates the building area of the Project’s facilities and the foundation design likely required for construction.<sup>109</sup> With this quantity of fundamental information missing from the City’s analysis of the Project’s construction emissions, the City lacks substantial evidence for the Zoning Administrator to conclude that the Project will not have significant air quality impacts.

*b. Construction emissions were significantly underestimated due to an inaccurate construction schedule*

Dr. Fox explains that the CalEEMod analysis completed for construction emissions is wholly inconsistent with the Project’s construction schedule, leading the analysis to significantly underestimate construction emissions.

**Comparison of CalEEMod Inputs with Project Schedule**

Activity	CalEEMod (days)	Schedule (days)
Demolition	20	25
Site Preparation	2	... <sup>110</sup>
Grading	4	110
Building Construction	200	540
Paving	10	... <sup>111</sup>
Architectural Coating	10	... <sup>112</sup>
<b>Total</b>	<b>246</b>	<b>675</b>

<sup>108</sup> Exhibit B at 12–14.

<sup>109</sup> Exhibit B at 14.

<sup>110</sup> Included in grading.

<sup>111</sup> Included in building construction.

<sup>112</sup> Included in building construction.



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Air quality analyses that are this fail to incorporate accurate input numbers cannot be relied upon as substantial evidence, because they are not based on substantial evidence in the record.<sup>113</sup>

- i. Many operational emissions were either completely omitted or significantly underestimated*

The Air Quality Analysis concludes that “there will be no emissions which impact air quality in normal operation.”<sup>114</sup> However, Dr. Fox explains that the Project’s cooling towers, diesel supply and storage, wastewater treatment, and diesel generators all emit GHGs and/or criteria pollutants that were either not included or were significantly underestimated in the Project’s Air Quality Analysis.

- ii. Operational emissions were calculated using an incorrect baseline*

The Air Quality Analysis uses an incorrect baseline to subtract from the projected operational emissions. CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.<sup>115</sup> Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. When a project is purportedly exempt from CEQA, the proper environmental baseline is the physical environmental condition of the project site as it existed at the time the applicant filed their application for the lead agency’s permit.<sup>116</sup> For this Project, the first application was submitted on January 30, 2019. At that time, the building was vacant and non-operational.<sup>117</sup> Thus, the Project’s environmental baseline and baseline emissions are zero.<sup>118</sup>

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<sup>113</sup> *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1371, as modified on denial of reh'g (Sept. 26, 2001).

<sup>114</sup> Environmental Information Form, #42.

<sup>115</sup> CEQA Guidelines § 15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

<sup>116</sup> See *Bottini v. City of San Diego* (2018) 27 Cal.App.5th 281, \*at 24, available at <https://www.gmsr.com/wp-content/uploads/2019/01/scw-D071670.pdf>.

<sup>117</sup> Environmental Information Form, Item 10b, #8.

<sup>118</sup> Exhibit B at 19.

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*iii. Key operational emissions were omitted from the City's analysis*

In her analysis, Dr. Fox explains the Application omitted operational emissions from the use of the cooling towers and diesel supply and storage tanks. With respect to the Project's cooling towers, she explains that, "[i]n general, cooling towers emit particulate matter (PM<sub>2.5</sub>, PM<sub>10</sub>), volatile organic compounds (VOCs), chlorine (added to control biological growth), and other chemicals, depending upon the chemical composition of the circulating water. When the circulating water is evaporated, for example, the total dissolved solids in the circulating water is emitted as PM<sub>10</sub>."<sup>119</sup> While the BAAQMD's CEQA guidelines are silent on how to evaluate the significance of this type of particulate matter emission, analysis of these emissions can be done "by estimating the emissions and using an air dispersion model to estimate ambient concentrations. The ambient concentrations are then compared to federal and state ambient air quality standards."<sup>120</sup> A violation of an air quality standard or the contribution to an existing violation is considered to be significant."<sup>121</sup>

However, the Air Quality Analysis includes no analysis of emissions from the cooling towers. In fact, "[t]he City's files contain no information on the type of cooling tower(s),<sup>122</sup> the circulating water flow rate, the chemical composition of the cooling tower water supply or circulating water, or biocides that will be used to control bacteria,<sup>123</sup> all information necessary to estimate cooling tower emissions."<sup>124</sup> If the Application were to have included this information, Dr. Fox concludes that the cooling towers would emit PM<sub>10</sub> emissions ranging from 760 lb/yr or 2 lb/day to 11 ton/yr and 60 lb/day, the latter of which considered significant under the applicable Bay Area Air Quality Management District significance threshold. Dr. Fox's analysis also demonstrates that the Project has the potential to

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<sup>119</sup> Exhibit B at 14.

<sup>120</sup> See, for example, Laurelwood Data Center Initial Study and Proposed Mitigation Negative Declaration, August 28, 2019; available at: <https://efiling.energy.ca.gov/GetDocument.aspx?tn=229584&DocumentContentId=61007> and <http://santaclaraca.gov/home/showdocument?id=64868>.

<sup>121</sup> Exhibit B at 8–9.

<sup>122</sup> There are two main types, natural draft and induced draft.

<sup>123</sup> Chardon Laboratories, What Types of Biocide Work Best?; available at:

<https://www.chardonlabs.com/resources/cleaning-cooling-towers-with-biocides/>.

<sup>124</sup> Exhibit B at 24.

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cause toxic Legionella bacteria to be emitted as a component of the PM10 emitted by the wet cooling technology.<sup>125</sup>

Additionally, the Air Quality Analysis completely omits emissions from diesel supply and storage. Specifically, “[t]he City’s files do not include any design information for the diesel storage] tank, required to estimate emissions, including its volume, vents, and fugitive components between the tank and the generator, which typically includes flanges and a pump that would release emissions.”<sup>126</sup> Further, the Air Quality Analysis omitted NOx emissions from diesel delivery and VOC releases as fuel from the generator’s spill catch basin evaporates or during hose connects and disconnects and from any tank vents and seals and connections between the tanks and the generators.<sup>127</sup> These omissions render the City’s analysis of operational emissions incomplete. The City’s conclusion that the Project will have less than significant operational air quality impacts is similarly unsupported.

*iv. Key operational emissions were significantly underestimated*

Dr. Fox explains that emissions from the diesel generators, supplying water, and for supplying energy to operate the cooling towers were underestimated. First, Dr. Fox explains that the emergency generator emissions are only for routine testing and maintenance of the generator, but do not include any analysis of if the generators supply power in an emergency. She notes that, “[a]s the purpose of these generators is to supply power during emergencies when power from SVCE is not available, it is reasonable to anticipate that emergencies will occur and that the generators will be used to supply any missing SVCE power.”<sup>128</sup> In fact, the BAAMQD has indicated that 100 hours of emergency operation “represents a reasonable worst-case assumption regarding the amount of time during any given year that a facility could have to operate without outside power.”<sup>129</sup> Had the City

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<sup>125</sup> Exhibit B at 24–26. Legionella bacteria can cause Legionnaires' disease, a severe form of pneumonia, and Pontiac fever, an illness resembling the flu. See <https://www.mayoclinic.org/diseases-conditions/legionnaires-disease/symptoms-causes/syc-20351747> (last visited, 9/23/19).

<sup>126</sup> Exhibit B at 22.

<sup>127</sup> Exhibit B at 22–23.

<sup>128</sup> Exhibit B at 19.

<sup>129</sup> Exhibit B at 20.

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analyzed the emissions from the diesel generators, they would have found the NOx emissions to be above the significance threshold, requiring mitigation.<sup>130</sup>

Second, Dr. Fox explains that the “CalEEMod analysis assumed an indoor water use of 40 million gallons per year (Mgal/yr) and no outdoor water use,” however, “[t]he City’s files further disclose that 600,226 gal/yr of water will be used for landscaping.”<sup>131</sup> The City also indicates that the source of much of the water to be used by the Project is not currently known, and thus, “it is not possible to make an accurate estimate of air quality and other impacts from supplying, treating, and disposing of the water.”<sup>132</sup> Thus, the Air Quality Analysis contains no analysis of emissions related to water transport.

Finally, Dr. Fox explains that the Air Quality Analysis potentially underestimates the energy required to supply energy to the cooling towers, as they assumed the energy demand for conventional cooling towers, and the likely cooling towers for the Project will require much more energy due to the use of ambient air for cooling.<sup>133</sup>

All of these deficiencies in the City’s analysis contribute to a general underestimation of the Project’s air quality impacts, and therefore cannot constitute substantial evidence for the purposes of granting an exemption from CEQA.

## 2. Noise

The City failed to provide substantial evidence demonstrating that impacts from noise will be less than significant. As explained by Mr. Watry, the noise report supplied by the Applicant (and adopted by the City) fails to provide any information about “the particular mechanical equipment” that will be used for the Project, nor “the basic information required to perform noise calculations.”<sup>134</sup> Mr. Watry notes that “[w]ithout any indication of the equipment or the sound power levels, it is not possible to independently verify that the noise calculations were done correctly.”<sup>135</sup> As Mr. Watry explains, “[i]t is routine to include this information in noise studies

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<sup>130</sup> Exhibit B at 20.

<sup>131</sup> Exhibit B at 23.

<sup>132</sup> Exhibit B at 23.

<sup>133</sup> Exhibit B at 27–28.

<sup>134</sup> Exhibit C at 2.

<sup>135</sup> Exhibit C at 2.

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intended to support permit applications and/or CEQA analyses.”<sup>136</sup> The omission of these key facts from the Project’s noise analysis renders the analysis and its conclusions unsupported. The omission of this critical information also prevents the public from understanding the “analytic bridge” between the Project description and the City’s conclusion that the Project’s noise would be less than significant, in violation of CEQA.<sup>137</sup>

With respect to generator noise, Mr. Watry correctly points out that the noise report implies “that the generator will, in fact, produce noise levels ‘greater than the applicable operational noise limit set forth’” in the Sunnyvale Code. However, “as written, the Noise Study contains no quantitative analysis of the Project’s actual or estimated noise levels, no discussion of existing baseline noise levels surrounding the Project site, no analysis of whether those noise levels could pose a potentially significant noise impact to local sensitive receptors, and no mitigation measures are proposed that would prohibit or prognosticate the use of an unmuffled, extremely loud generator.”<sup>138</sup>

With respect to construction noise, Mr. Watry explains that the Applicant’s noise study “fails completely to discuss or analyze the Project’s construction noise.”<sup>139</sup> Without “disclosure of pertinent construction information including duration and estimated noise levels” the noise study does not provide enough information to assess the nature or severity of the Project’s construction noise impacts, and fails to constitute substantial evidence for the purposes of CEQA review.

### **3. The City Lacks Substantial Evidence to Support its Conclusion that the Project Site Will be Adequately Served by all Required Utilities and Public Services**

The infill exemption requires that the “site can be adequately served by all required utilities and public services.”<sup>140</sup> The City claims that the Project satisfies this criterion because “[t]he Project Site is already served by all required

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<sup>136</sup> Exhibit C at 2.

<sup>137</sup> *Topanga Ass’n for a Scenic Comty. v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733.

<sup>138</sup> Exhibit C at 3.

<sup>139</sup> Exhibit C at 3.

<sup>140</sup> 14 CCR § 15332(e).

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utilities and public services and will continue to be so served after completion of the proposed Mechanical Facility.” However, neither the Applicant nor the City explains whether or how the infrastructure developed to support the site’s prior use, i.e. an office building, could support the energy/water needs of a central utility plant that necessarily requires additional utility resources, and potentially additional utility infrastructure, to enable it to serve its purpose of generating adequate heating and cooling to serve other buildings. For example, the Project will require the storage and replacement of likely millions of gallons of water to fill the water storage tanks.<sup>141</sup> The City’s Categorical Exemption Analysis fails to include any discussion of existing water resources, or any analysis of whether local water purveyors have the capacity to serve the Project’s water needs.

Thus, neither the Applicant nor the City have provided enough information to demonstrate how the Mechanical Facility would be “adequately served” by the existing utilities and public services.<sup>142</sup> The City’s conclusion that the Project will be adequately served is therefore not supported by substantial evidence.

## **V. THE PROJECT FALLS WITHIN THE EXCEPTIONS TO CATEGORICAL EXEMPTIONS**

In its consideration of the exceptions to categorical exemptions under CEQA § 15300.2, the City states that “none of the ‘exceptions’...are relevant or applicable” to the Project. This conclusory analysis is insufficient to determine whether one of the exceptions applies. By contrast, there is substantial evidence supporting a fair argument that the Project will have significant environmental effects that have not been adequately disclosed or mitigated.

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<sup>141</sup> In the case of Stanford’s Central Utility Plant, the cold-water tanks held five million gallons and the hot-water tank held two million gallons.

[http://www.urecon.com/documents/pdfs/white\\_papers/SESI.pdf](http://www.urecon.com/documents/pdfs/white_papers/SESI.pdf)

<sup>142</sup> See Governor’s Office of Planning and Research, <http://opr.ca.gov/planning/land-use/infill-development/#targetText=Infill%20Development,not%20exclusively%20in%20urban%20areas> (describing one of the primary benefits of infill development to be to “reduce costs to build and maintain expensive infrastructure”).

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**A. The Project may have Significant Effects on the Environment due to the Unusual Nature of the Project**

Given the information provided by the City, there is a fair argument that the exception §15300.2(c) applies. That section states:

A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

Thus, to invoke this exception, it must be shown that 1) there is a reasonable possibility that the Project will have a significant effect on the environment, and 2) that significant effect is due to unusual circumstances stemming from the Project. Unusual circumstances may be established “without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance.”<sup>143</sup>

With respect to the Project, as Dr. Fox and Mr. Watry explain, there is a reasonable possibility for significant air quality and noise impacts from its construction and operation, including emissions from the cooling towers, diesel generators, and construction of necessary infrastructure to implement the project.<sup>144</sup> Many of these effects are the result of unusual circumstances that do not typically apply to infill development projects. For example, Dr. Fox notes an absence of analysis with regard to the presence of a UPS battery system in the Project, which has the potential for fires or explosions if caution and mitigation is not undertaken.<sup>145</sup> Typically, “infill development project” applies to residential, commercial, industrial, public facility, and/or mixed-use projects on unused and underutilized lands within existing development patterns.<sup>146</sup> Even if the Mechanical Facility were to fall within one of these categories, the complex nature of the Project and the level of disturbance to nearby infrastructure would be unusual for an infill

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<sup>143</sup> *Berkeley Hillside Preservation v. City of Berkeley* (2015) Maj. Op. at 21.

<sup>144</sup> See generally Exhibit B; Exhibit C at 2–3.

<sup>145</sup> Exhibit B at 30–32.

<sup>146</sup> Governor’s Office of Planning and Research, <http://opr.ca.gov/planning/land-use/infill-development/#targetText=Infill%20Development,not%20exclusively%20in%20urban%20areas>  
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development project replacing only a single story office building, which is emphasized by the fact that this is “the first central utility plant in Moffett Park.”<sup>147</sup>

**1. There are Unusual Circumstances Due to Residual Soil Contamination Beneath the Project Site.**

A 2019 Phase I Environmental Site Assessment Update (“Phase I”) prepared for the Project site identifies soil vapor concentrations above RWQCB Environmental Screening Levels for PCE and vinyl chloride, both known carcinogens according to the US EPA.<sup>148</sup> The Phase I also states that one of the three buildings will be potentially impacted by vapor intrusion (the heating building).

SWAPE explains that “[t]he presence of PCE and vinyl chloride in the subsurface pose potential inhalation health risks to construction workers.”<sup>149</sup> This environmental impact may be significant because it will exacerbate existing conditions and “PCE and vinyl chloride will...present inhalation risks to future plant workers if the membrane mitigation is inadequate.”<sup>150</sup> Further, SWAPE explains that the “contamination of the subsurface at the Project site” is an unusual circumstance for infill projects, one that is likely to result in significant environmental effects because the presence of PCE and vinyl chloride in the subsurface pose potential inhalation health risks to construction workers and others who come in close proximity to the contaminants.<sup>151</sup>

**B. The Project May Have Significant Cumulative Impacts When Considered with Other Planned Central Utility Plants in Moffett Park**

The infill exemption is inapplicable when a project has significant cumulative impacts:

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<sup>147</sup> 1390 Borregas Mechanical Facility: Schematic Design, May 10, 2019, at 2.1.0-1.

<sup>148</sup> Exhibit A, SWAPE Comments, p. 1.

<sup>149</sup> Exhibit A at 2.

<sup>150</sup> Exhibit A at 2.

<sup>151</sup> Exhibit A at 1.

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All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.<sup>152</sup>

Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.<sup>153</sup> The City failed to analyze the cumulative impacts of the Project in conjunction with other Moffett Park utility projects planned by the Applicant. Dr. Fox explains in her letter that the Project is one of potentially three central utility plants currently planned within one block of one another. The Caribbean Project, which is directly across Borregas avenue from the Project, has at least one on-site central utility plant, with the potential for a second one.<sup>154</sup> The projects designated as 100 and 200 Caribbean Way, for example, will be served by a dedicated 70,200 ft<sup>2</sup> central utility plant,<sup>155</sup> which is larger than the Project at 22,127 ft<sup>2</sup>.<sup>156</sup> Thus, there are up to three concurrently planned central Google utility projects pending before the City. These projects may have significant cumulative impacts on air quality, public health, and other areas that require preparation of an EIR.

These are projects of exactly the same type and location, and as we have shown above, individually have the potential for significant impacts in air quality. The City includes no analysis of the cumulative impacts from the Project and similar projects nearby, and thus has provided no substantial evidence that this exception does not apply.

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<sup>152</sup> CEQA Guidelines § 15300.2(b).

<sup>153</sup> CEQA Guidelines § 15355.

<sup>154</sup> Vesting Tentative Map, Caribbean Campus, 100/200 West Caribbean Drive, PDF pg. 4 and 5. The CUP is north of the Parking Structure, in the upper left hand corner of the figures, at the intersection of Caribbean Drive and Mathilda Avenue.

<sup>155</sup> Letter from Peter McDonnell, Vice President, Sares Regis @ Google, to Ryan Kuchenig, City of Sunnyvale, Department of Community Development, Re: Planning Project #2107-8042 – Revised Project Description, September 12, 2018.

<sup>156</sup> Exhibit B at 27–28.

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## **VI. THE PROJECT'S RELIANCE ON MITIGATION MEASURES RENDERS THE INFILL EXEMPTION INAPPLICABLE**

A Project may not rely on mitigation measures to qualify for a CEQA categorical exemption.<sup>157</sup> Mitigation measures are conditions on the construction and operation of a project designed to reduce environmental impacts existing at the project site at the time of an application's submission.<sup>158</sup> If a project has the potential to have a significant effect on the environment, the lead agency must prepare an EIR which incorporates feasible mitigation measures to reduce impacts to less than significant levels.<sup>159</sup> It is the possibility of a significant effect, not a determination of the actual effect, which would be the subject of a negative declaration or an EIR.<sup>160</sup>

As discussed above, the Updated Phase I ESA relied upon by the City acknowledges the VOC-impacted soil, soil vapor, and/or groundwater that may be encountered during future construction. As a part of the Updated Phase I ESA, the Applicant's environmental analysis provided numerous mitigation measures to prevent and/or respond to environmental issues during construction that may cause harm to construction workers and the public.

The ESA recommends: "selected waterproofing product be a dual-purpose product that is also protective against chemical vapor intrusion"<sup>161</sup>; general risk management protocols; a health and safety plan; screening of excavated soil; site control in contaminated areas; utility trenches; excavation dewatering; management of unanticipated contamination of hazardous debris; and soil disposal procedures. In addition, SWAPE explains that the presence of PCE and vinyl chloride in the Project site's subsurface "warrants notification of the County of Santa Clara Department of Environmental Health (DEH) Site Cleanup Program... because rather than just mitigate one of three buildings with a barrier, as prosed to Google by their consultant, the Project site might warrant further investigation, under DEH oversight, mitigation of the other buildings, and perhaps cleanup."<sup>162</sup>

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<sup>157</sup> *Salmon Protection and Watershed Network v. County of Marin*, 125 Cal.App.4th (2004) 1098, 1107.

<sup>158</sup> See CEQA Guidelines § 15125(a).

<sup>159</sup> *Salmon Protection and Watershed Network v. County of Marin*, 125 Cal.App.4th (2004) 1098, 1107.

<sup>160</sup> *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App. 4th 1165, 1199–1200.

<sup>161</sup> Updated Phase I ESA, May 31, 2019, at 9.

<sup>162</sup> Exhibit A at 2.

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SWAPE also recommends a “Phase II soil investigation which specifically identifies the location and concentration of contaminants that are likely to be disturbed during Project construction.”<sup>163</sup>

These recommendations are clearly mitigation measures mitigation stemming from the potential for a significant environmental effect and which require mitigation to sufficiently protect construction workers, and other persons travelling to and from the Project site, from environmental impacts.

Additionally, as discussed above, the Applicant’s agreement to install “cool pavement material” to the Project’s parking lot is intended to reduce the heat island effect caused by the Project’s failure to provide adequate tree shading. This is mitigation designed to reduce a potentially significant environmental impact to less than significant levels.

The City’s reliance on mitigation measures to reduce the Project’s significant environmental effects renders the infill exemption inapplicable. Moreover, the validity and efficacy of these measures are required to be the subjects of CEQA review. An EIR must be prepared in order to fully disclose and analyze the Project’s potentially significant impacts that require mitigation, to evaluate the efficacy of any proposed mitigation, and to impose binding mitigation measures to reduce those impacts to less than significant levels.

## **VII. THE CITY FAILED TO ANALYZE THE PROJECT’S ENERGY IMPACTS**

Appendix F of the CEQA Guidelines requires lead agencies to analyze a project’s energy impacts and to discuss mitigation measures for significant environmental impacts, including “measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.”<sup>164</sup> If a project’s energy impacts are potentially significant, CEQA requires the adoption of energy conservation measures, including applicable measures set forth in Appendix F:

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<sup>163</sup> Exhibit A at 2.

<sup>164</sup> *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 262, citing *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 930; PRC § 21100(b)(3).  
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- (1) Potential measures to reduce wasteful, inefficient and unnecessary consumption of energy during construction, operation, maintenance and/or removal [including] . . . why certain measures were incorporated in the project and why other measures were dismissed.
- (2) The potential of siting, orientation, and design to minimize energy consumption, including transportation energy, increase water conservation and reduce solid-waste.
- (3) The potential for reducing peak energy demand.
- (4) Alternate fuels (particularly renewable ones) or energy systems.
- (5) Energy conservation which could result from recycling efforts.<sup>165</sup>

The purpose of the Project is to construct a power plant to generate heating and cooling services for other buildings in Moffett Park. The Project will require the use of electrical and/or natural gas energy to produce and circulate the hot and cold water required for these operations. The City's Categorical Exemption Analysis fails to describe the Project's energy use at all, and the Applicant's supporting studies fail to discuss the Project's potential increase in electrical and natural gas usage over baseline levels, whether the Project would result in wasteful, inefficient, or unnecessary energy consumption, or whether the use of alternate fuels would be feasible.<sup>166</sup> This violates CEQA's requirement that the lead agency quantify and disclose the extent of a project's energy impacts.<sup>167</sup>

For example, Dr. Fox explains that a substantial amount of energy is likely to be required to operate the Project's cooling towers.<sup>168</sup> However, the City's environmental studies fail to disclose the type of cooling towers that will be used for the Project. As Dr. Fox explains, there may be a substantial variation in the amount of energy required to operate the cooling towers depending on the type of tower the Applicant constructs:

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<sup>165</sup> CEQA Guidelines, Appendix F; 14 Cal. Code Regs., § 15126.4(a)(1)(C).

<sup>166</sup> The Project includes some solar panels that will be attached to a canopy structure over the ancillary building. Staff Report, p. 3. However, neither the Staff Report nor the Project's supporting studies disclose the total amount of energy that will be used for Project operations, the extent to which the solar panels will reduce that energy consumption, or whether additional alternative or renewable energy sources were analyzed.

<sup>167</sup> *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210-211.

<sup>168</sup> Exhibit B at 28.

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Energy is required to evaporate the water in a cooling tower. An adiabatic cooling system uses ambient air for cooling. These towers operate well only when ambient temperatures are cold. *They use much more energy than conventional towers during hot seasons.* Spray cooling, as in a conventional tower, only kicks in when the ambient air temperature is too high to use cooled air.<sup>169</sup>

Without this basic information about Project features, it is impossible to determine the amount of energy that will be required to support the Project, or whether the Project's energy consumption would be wasteful or require mitigation. An EIR must be prepared to fully disclose and analyze the Project's energy impacts.

#### **VIII. THE CITY MUST PREPARE AN EIR TO ANALYZE THE POTENTIAL ENVIRONMENTAL IMPACTS THAT WERE NOT ANALYZED IN THE MOFFET PARK SPECIFIC PLAN EIR**

Although the City is not relying upon the environmental analysis in the Moffett Park Specific Plant EIR to justify its approval of the Project, the City would nonetheless not be able to rely upon this analysis due to the unique nature of the Project and the lack of analysis of the Project's specific environmental impacts in the previous EIR. Where a program EIR has been prepared that can 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.<sup>170</sup> First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.<sup>171</sup> 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.<sup>172</sup>

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

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<sup>169</sup> Exhibit B at 28 (emphasis added).

<sup>170</sup> See CEQA Guidelines, 15168, subd. (c); S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.16 (Mar. 2018).

<sup>171</sup> CEQA Guidelines, § 15168, subd. (c)(1).

<sup>172</sup> CEQA Guidelines, § 15168, subd. (c)(1).

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that could not have been considered in the program EIR.<sup>173</sup> More specifically, pursuant CEQA Guidelines section 15162, subsequent or supplemental environmental review is required when 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 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

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<sup>173</sup> CEQA Guidelines, § 15168, subd. (c)(2).  
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mitigation measure or alternative.<sup>174</sup>

The terms “supplement” and “subsequent” EIR are not interchangeable and this distinction implicates the public review process. “A supplement to an EIR is a document that contains additions or changes needed to make the previous EIR adequate ... In contrast ... a subsequent EIR revises the previous EIR, rather than simply supplements it.”<sup>175</sup> With subsequent review the “revised EIR must receive the same circulation and review as the original EIR.”<sup>176</sup> Here, the Project satisfies all three criteria in CEQA Guidelines § 15162(a) and the City must prepare and circulate a *subsequent* EIR for public notice and comment. By failing to do so, the County has failed to comply with CEQA.

First, the Project falls within CEQA guidelines section 15162(a)(1) and (2). It is the first of its kind in the Moffett Park Specific Plan area and is fundamentally different than the utility projects contemplated by the prior EIR.<sup>177</sup> Therefore, the environmental impact analysis completed by the City in any prior CEQA document prepared for the area is insufficient, as a substantial change would need to be made to the character of utility projects previously contemplated in the Moffett Park Specific Plan. In particular, we have provided substantial evidence that the Project has the potential for significant air quality and noise impacts related to the construction and operation of the Project, and for potentially significant hazardous materials impacts from disturbing contaminated soil beneath the Project site. These impacts would be unique within the Specific Plan because they are caused by the specific features of the Project.<sup>178</sup> Without completing additional environmental analysis, the Project cannot satisfy the requirements for disclosure and analysis under CEQA and must complete a subsequent EIR.

Next, the Project will have multiple significant effects not discussed in the Moffett Park Specific Plan EIR.<sup>179</sup> Aside from the new environmental effects due to

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<sup>174</sup> CEQA Guidelines, § 15162, subd. (a)(1)-(3); see also Pub. Resources Code, § 21166.

<sup>175</sup> S. Koskte & M. Zischke, Practice Under the Environmental Quality Act 2d., § 19.4, p. 19-8 (Mar. 2018).

<sup>176</sup> S. Koskte & M. Zischke, Practice Under the Environmental Quality Act 2d., § 19.4, p. 19-8, (Mar. 2018), emphasis added; see also CEQA Guidelines, §§ 15162, 15163.

<sup>177</sup> 1390 Borregas Mechanical Facility: Schematic Design, May 10, 2019, at 2.1.0-1.

<sup>178</sup> See generally Exhibit B; Exhibit C at 2–3; see also Moffett Park Specific Plan EIR, 2003, 3.13-1–3.13-5 (covering the City’s “water distribution system” and “water demand management”).

<sup>179</sup> See CEQA Guidelines § 15162(a)(3)(A).

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the different character of a utility project we've described above, the Moffett Park Specific Plan does not account for the type of battery storage environmental effects that Dr. Fox outlines in her comments.<sup>180</sup> As Dr. Fox explains, the Project's battery storage could result in a number of significant impacts including fire, explosion, and the release of toxic chemicals, depending on the type of battery used.<sup>181</sup> This is new information that was not analyzed in the Moffett Park Specific Plan EIR. Nevertheless, the City's files are silent on the type and function of the batteries and impacts that could result from them. Without information pertaining to the type of batteries used by the Project and an analysis of their impacts, the Project cannot satisfy CEQA. Because of these new issues, the Project also falls within section 15162(a)(3)(A).

Thus, the City cannot argue that the Project's environmental impacts have been covered by the Moffett Park Specific Plan EIR, and a subsequent EIR must be prepared.

## **IX. CONCLUSION**

The Project does not qualify for a CEQA exemption: its Project Description incorrectly shrinks its scope and impermissibly piecemeals the reasonably foreseeable related construction; it is inconsistent with the Moffett Park Specific Plan and the Sunnyvale General Plan and Zoning Code; and has the potential to result in significant environmental impacts that the City has failed to disclose and mitigate, in violation of CEQA.

For the foregoing reasons, we respectfully request that the City of Sunnyvale Zoning Administrator deny the Special Development Permit and design approval for the Google Mechanical Facility, and remand the Project to Staff prepare an EIR which analyzes the entire Project, including all physical structures that will connect to the Project buildings, and all other reasonably foreseeable future development in the Project vicinity. The City must also ensure that the Project is consistent with all other applicable laws, regulations and policies.

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<sup>180</sup> Exhibit B at 30–32.

<sup>181</sup> Fox Comments, p. 30.



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Thank you for your consideration of these comments. Please place them in the record of proceedings for the Project.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. Messing".

Aaron M. Messing  
Associate

AMM:acp

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