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May 10, 2019

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Re: **The Citadel Outlets Expansion & 10-Acre Development Project**  
**Draft EIR, SCH No. 2016091024**

Dear Mr. Bobadilla, Mr. Acosta:

We are writing on behalf of the **Coalition for Responsible Equitable Economic Development Los Angeles ("CREED LA")** concerning the Draft Environmental Impact Report ("Draft EIR" or "DEIR") SCH No. 2016091024, for the Citadel Outlets Expansion & 10-Acre Development Project ("Project"). The Project is proposed by Citadel Holdings Group, LLC and the Wash-Tel Commerce, LLC ("Applicant") and the lead agency for the purpose of environmental review is the City of Commerce ("City"). The 44-acre project site is located along the northerly side of Telegraph Road between Hoefner Avenue on the west, continuing east to Washington Boulevard in Commerce, California.<sup>1</sup>

The proposed Project would expand the existing Citadel shopping center by *over a million square feet* on a 44-acre project site.<sup>2</sup> The Project would add four new

<sup>1</sup> See generally, DEIR, pp. 11-17, 44-56.

<sup>2</sup> The geographic scope of the Project is larger than the DEIR title suggests, which describes the Project as a "10-Acre Development Project." However, the Project site is 44 acres; according to p. 43

retail buildings,<sup>3</sup> five restaurants/ restaurant areas,<sup>4</sup> and thousands of new parking spaces.<sup>5</sup> The Project *also* includes three, multi-level commercial buildings;<sup>6</sup> a combined warehouse / industrial building;<sup>7</sup> three hotels with a total of 770 guest rooms (the 96-room Loft Hotel and 174-room Travelers Hotel, both in Area 1, and an unnamed, 500-room hotel in Area 2);<sup>8</sup> a “Movie / Entertainment complex with a fast food court;”<sup>9</sup> a two-level, 23,000 sq./foot building for “Adventure Experiential Retail;”<sup>10</sup> and on-site monorail, to move employees and guests throughout the site.<sup>11</sup> The Project requires demolition of existing buildings. Commensurate with the Project’s size and scope demolition, construction and operation will occur in overlapping phases over six years, from 2020 to 2026.<sup>12</sup>

We have reviewed the Draft EIR and supporting documents with the assistance of air quality and hazards experts Matt Hagemann and Kaitlyn Heck of Soil/Water/Air Protection Enterprise (“SWAPE Report”) Derek Watry of the acoustic, noise, and vibration consulting firm Wilson Ihrig (“Watry Report”), and transportation expert and traffic engineer Dan Smith (“Smith Engineering Report”). SWAPE’s, Mr. Watry’s and Smith Engineering’s comments and curriculum vitae are attached hereto as **Exhibits A<sup>13</sup>, B<sup>14</sup> and C<sup>15</sup>** respectively and are fully

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of the DEIR “the affected area encompasses a total land area of approximately 44 acres”. The DEIR then describes the affected acreage within each Area.

<sup>3</sup> Buildings 20, 21, 22, 23. (DEIR, p. 56).

<sup>4</sup> The “Food/Retail Building” in Area 1; the Gaspar Food Pad in Area 2 and; restaurant / fast food pads 1 - 4 in Area 3. (DEIR, p. 56).

<sup>5</sup> Two new four-level (750 spaces) and six-level parking structures (680 spaces) and expansion of existing parking structure (238 spaces) in Area 1; a 700 parking space structure in Area 2 and; surface parking in Area 3 (DEIR, p. 56).

<sup>6</sup> DEIR, p. 56.

<sup>7</sup> DEIR, p. 56.

<sup>8</sup> DEIR, pp. 56, 15 (a “358,000 square feet of hotel uses, totaling 770 rooms”).

<sup>9</sup> DEIR, 15.

<sup>10</sup> DEIR, p. 16 (describing the recreation / commercial building in Area 2).

<sup>11</sup> See generally, DEIR, pp. 11-17, 44-56; Exhibit 2-8, p. 50 (map of Area 1, illustrating proposed uses); Exhibit 2-9, p. 52, (map of Area 2, illustrating proposed uses); Exhibit 2-10, p. 55 (map of Area 3, illustrating proposed uses).

<sup>12</sup> DEIR, pp. 57-58 (describing construction phasing).

<sup>13</sup> **Exhibit A:** A letter from SWAPE to Sara Dudley re: Comments on the Citadel Expansion & 10-Acre Development Project SWAPE Report, May 6, 2019 (“**SWAPE Report**”)

<sup>14</sup> **Exhibit B:** A letter from Derek Watry to Sara F. Dudley re: City of Commerce – Citadel Outlets Expansion Draft EIR (SCH#: 2016091024), May 7, 2019 (“**Watry Report**”)

<sup>15</sup> **Exhibit C:** A letter from Dan Smith to Nirit Lotan re: Citadel Outlets Expansion & 10-Acre Development Project (SCH # 2016091024) May 7, 2019 (“**Smith Engineering Report**”)

incorporated herein and submitted to the City herewith. the City must separately respond to the technical comments of the experts, in addition to these comments.

**I. THE DEIR IS WHOLLY INADEQUATE AND VIOLATES CEQA, A REVISED EIR MUST BE PREPARED AND RECIRCULATED**

Having reviewed the Draft EIR materials and related project documents, we have determined that the Draft EIR violates the California Environmental Quality Act, Public Resources Code, section 21000 et seq. ("CEQA") and its implementing guidelines, California Code of Regulations, title 14, section 15000 et seq. ("CEQA Guidelines").

When a Draft EIR does not fulfill CEQA's requirements, the agency must prepare and recirculate a new Draft EIR that corrects these deficiencies.<sup>16</sup> The draft recirculated EIR must be noticed and released for public review and comment.<sup>17</sup>

Section 15088.5 of the CEQA Guidelines sets the rule as to when recirculation is required:

(a)(4) The draft EIR was **so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.** (*Mountain Lion Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1043)

...

(e) A decision not to recirculate an EIR must be supported by substantial evidence in the administrative record.<sup>18</sup>

CEQA's approbation of a conclusory analysis is particularly relevant here. In interpreting this mandate, the Supreme Court has stated, "[t]o facilitate CEQA's informational role, **the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions.**"<sup>19</sup> In reviewing an agency's

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<sup>16</sup> See generally CEQA Guidelines, § 15088.5 (recirculation).

<sup>17</sup> CEQA Guidelines, § 15088.5(d).

<sup>18</sup> CEQA Guidelines, § 15088.5 (emphasis added).

<sup>19</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404–405 (emphasis added); see also, *Concerned Citizens of 405 Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841–842 (conclusory statements fail to crystallize issues).

environmental decision making, the courts look to see if the agency's findings **"bridge the analytic gap between the raw evidence and ultimate decision"** and focus "upon the relationships between evidence and findings and between findings and ultimate action."<sup>20</sup>

Review of the DEIR shows that it falls squarely within the definition of a document that is so fundamentally inadequate that it precludes any meaningful public review and must be thoroughly revised and then recirculated. This is true for just about any aspect of the DEIR, as the City failed to fulfil its duties under CEQA in both substance and procedure. The City failed to provide the most basic data required for proper analysis, failed to show the connection between the data it did provide and the conclusions it purported to draw from it and failed to fulfil its most basic duties under CEQA such as the duty to formulate feasible and effective mitigation measures to mitigate significant impacts caused by the Project.

As described in more details in this letter, the City has failed to comply with CEQA in the following ways:

1. The City failed to make all documents referenced or relied upon in the Draft EIR available to the public as required under CEQA.
2. The DEIR fails to accurately disclose, analyze, and mitigate the Project's significant impacts to air quality and public health. Therefore, the City lacks substantial evidence to support the findings required to adopt a statement of overriding considerations concerning the Project's significant and unavoidable air quality emissions.
3. The DEIR fails to accurately disclose, analyze, and mitigate Project's significant impacts to global climate change from greenhouse gas emissions ("GHG"). Therefore, the City lacks substantial evidence to support the findings required to adopt a statement of overriding considerations concerning the Project's significant and unavoidable impacts to global climate change.

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<sup>20</sup> *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (emphasis added).

4. The DEIR fails to accurately disclose and evaluate the extent of the Project's significant impacts to hydrology and utilities, regarding the Project's water supply.
5. The DEIR fails to accurately disclose, analyze, and mitigate the Project's significant impacts to noise, particularly during Project construction.
6. The DEIR fails to accurately disclose, analyze, and mitigate the Project's significant transportation impacts.
7. The DEIR fails to accurately disclose and evaluate the Project's impacts to population and housing.
8. The DEIR fails to accurately disclose, analyze, and mitigate the Project's growth-inducing impacts.
9. The DEIR fails to consider a reasonable range of alternatives.

In addition to the CEQA violations in the specific resources areas listed above, the DEIR fails to provide the level of detail required under CEQA from a project-level EIR:

The CEQA Guidelines provide that the "degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR."<sup>21</sup> A project-level EIR is one that analyzes, discloses, and mitigates the "environmental impacts of a specific development project."<sup>22</sup> This is a project-level EIR for a construction development project. The level of specificity of an "EIR on a construction project will necessarily be more detailed in the specific effects of the project than will be an EIR on the adoption of [long-range, conceptual plans] because the effects" of a specific development project "can be predicted with greater accuracy."<sup>23</sup>

As a project-level EIR, the DEIR is the only EIR that will be prepared for the Citadel expansion project. As such, it must contain the highest level of specificity

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<sup>21</sup> CEQA Guidelines, § 15146.

<sup>22</sup> CEQA Guidelines, § 15161.

<sup>23</sup> CEQA Guidelines, § 15146(a); see also CEQA Guidelines, § 15161 (describing a project-level EIR).

concerning the analysis of impacts, mitigation measures, and alternatives as compared to any other type of environmental review document.<sup>24</sup>

Despite this heavy burden, the DEIR consistently fails to analyze impacts against applicable thresholds of significance, avoids analysis of construction impacts, fails to conduct necessary studies and provide supporting documentation and justifies this lack of information by deeming impacts “speculative,” and contains only nine mitigation measures. All other impacts are deemed either less-than-significant, as having no impact or as significant and unavoidable. This level of disclosure, analysis, and mitigation is inconsistent with project-level review, particularly for a development of this magnitude. The DEIR must be revised and recirculated, with a level of detail commensurate with a project-level EIR.

The City must withdraw the Draft EIR and circulate a revised Draft EIR for public review and comment which analyzes, discloses, and mitigates the Project’s significant impacts, and considers a reasonable of alternatives.

## II. STATEMENT OF INTEREST

CREED LA is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. The coalition includes the Sheet Metal Workers Local 105, International Brotherhood of Electrical Workers Local 11, Southern California Pipe Trades District Council 16, and District Council of Iron Workers of the State of California, along with their members, their families, and other individuals who live and work in the City of Commerce and the area.

Individual members of CREED LA include Ernesto Sanchez, Hugo Hernandez, David Pimenov, Robert Arias, Victor Cisneros, Carlos Fletes, Narciso Mora, Carlos Mendivil, Brittany Garcia, Rodolfo Caldero, James Moreno and Efrain Medina. These members live, work, recreate and raise their families in the City and surrounding areas. Accordingly, they would be directly affected by the Project’s environmental and health and safety impacts. Individual members may

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<sup>24</sup> CEQA Guidelines, § 15146 (degree of specificity required in an EIR); *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 741–742.

also work on the Project itself. They would be first in line to be exposed to any health and safety hazards that exist onsite.

In addition, CREED LA has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

### **III. THE CITY MUST EXTEND THE COMMENT PERIOD DUE TO ITS FAILURE TO PROVIDE AND MAKE READILY ACCESSIBLE DOCUMENTS REFERENCED AND RELIED UPON IN THE DRAFT EIR**

The City must extend the public review and comment period on the Draft EIR for the Project by at least 45 days from the date that the City makes all documents referenced or relied upon in the Draft EIR available and readily accessible to the public. The City has long been aware of this obligation but has consistently failed to comply.

Public Resources Code, section 21092, subdivision (b)(1), sets the rule on what is required here, stating that “all documents referenced in the draft environmental impact report or negative declaration” and those “incorporated by reference” must be “available for review” and readily accessible during the entire comment period.<sup>25</sup>

The City initially released the Draft EIR for the Project on or about February 19, 2019. CREED LA submitted a letter on March 14, 2019 (“March 2019 Letter”) advising the City that the DEIR must be withdrawn and recirculated for failure to comply with Public Resources Code, section 21092. As the March 2019 Letter detailed, the City did not make available *any* documents referenced or relied upon in Draft EIR or *any* of the document’s appendices.

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<sup>25</sup> Pub. Resources Code, § 21092(b)(1); CEQA Guidelines, § 15087.

The City responded by withdrawing the initial Draft EIR. On or about March 27, 2019, the City issued this Draft EIR and its appendices on the City's website.<sup>26</sup> However, these actions do not address the City's failure to provide access to the documents required under CEQA.

On March 28, 2019, CREED LA submitted a request for immediate public access to all documents referenced and relied upon in the Draft EIR. The City's response to our letter was inadequate and it continues to violate CEQA's public access requirements in several ways. As a result, the City must extend the public review and comment period on the Draft EIR for the Project by at least 45 days from the date that the City makes all documents referenced or relied upon in the Draft EIR available and readily accessible to the public.

First, the City has not made available the Project's Water Supply Assessment ("WSA") despite its legal obligation to do so and numerous specific requests.<sup>27</sup> The City explicitly states in the DEIR that a WSA was prepared for the Project.<sup>28</sup> Moreover, a WSA is a legally-mandated analysis of a Project's projected water usage and supply.<sup>29</sup> An agency must prepare a WSA when, as here, a Project will employ over 1,000 individuals or create 500 or more temporary guest rooms.<sup>30</sup> Failing to provide this critical document for public review and comment is a violation of CEQA.

Second, in response to our request the City provided a list of websites cited in the DEIR. Many of these links are inactive or do not correspond to the information cited. (See list below).

- Footnotes 41, 42 and 140 cite to the website for the California Department of Transportation's page for Official Designated Scenic Highways at [www.dot.ca.gov](http://www.dot.ca.gov). This is a general website and does not contain the information referenced (list of officially designated scenic highways).

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<sup>26</sup> Note that the cover page for the Draft EIR dates the document as "March 15, 2019" but the document was not released to the public at that time.

<sup>27</sup> DEIR, p. 211 (WSA prepared for the Project).

<sup>28</sup> DEIR, p. 211 (WSA prepared for the Project).

<sup>29</sup> CEQA Guidelines, § 15155; Wat. Code, § 10910 et seq.

<sup>30</sup> CEQA Guidelines, § 15155; DEIR, pp. 56, 211 (project components demonstrating that this is a water demand project and stating that a WSA was prepared).

- Footnotes 52, 58, 60, 67, and 68 cite to the website for the South Coast Air Quality Management District, *CEQA Air Quality Handbook* at <http://www.aqmd.gov/home/rulescompliance/ceqa/air-quality-analysis-handbook#>. This link is no longer active. A message on the site states, “The information that you are looking for has moved. Please note that the SCAQMD website has been redesigned and our pages have been reorganized.”
- Footnote 77 cites to the Office of Governor Edmund G. Brown Jr, *New California Goal Aims to Reduce Emissions 40 Percent Below 1990 Levels by 2030* at <http://gov.ca.gov/news.php?id=18938>. This link is no longer active.
- Footnote 85 cites to the pdf/website CWE Corporation, *Los Angeles River Upper Reach 2 Watershed Management Area Coordinated Integrated Monitoring Program (CIMP)*, June 26, 2014 at [https://www.waterboards.ca.gov/rwqcb4/water\\_issues/programs/stormwater/municipal/watershed\\_management/los\\_angeles/upper\\_reach2/15-01-27LARUR2WMARevWMP.pdf](https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/watershed_management/los_angeles/upper_reach2/15-01-27LARUR2WMARevWMP.pdf). This link is no longer active.
- Footnote 136 cites to the website for the *[CalWater] District Information* at <https://www.calwater.com>. This is a link to the main page for the agency, and does not contain the information cited, or a link to that information.
- Footnote 139 cites to Google Earth at <http://www.maps.google.com/maps> for an image of the Project site. This is a link to the main, generic webpage for Google Maps, and does not contain a map or image of the Project site.

Third, the City failed to properly provide “the address where (...) all documents referenced in the draft environmental report (...) are available for review”<sup>31</sup> as required under CEQA. While the Draft EIR states that the documents are at the Planning Department building in Commerce, Planning Department staff gave the location as the Commerce public library.<sup>32</sup> As a result, the public was not provided with accurate information concerning the true location of the records for several days, delaying the review and retrieval process.

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<sup>31</sup> Pub. Resources Code, § 21092(b)(1).

<sup>32</sup> DEIR, p. 249.

Finally, the City provided inconsistent information regarding the location, and even existence of, the Draft EIR's geotechnical study. The Draft EIR states that the geotechnical study is "Appendix D."<sup>33</sup> Appendix D was not produced by the City, despite several specific requests. After several weeks, City staff admitted that there is no Appendix D. Rather, the study was produced as part of the documents referenced and relied upon in the EIR (and not as a separate appendix). This misdirection hindered the document review and retrieval process.

Due to these errors and omissions, the City has not made the documents referenced and relied upon in the DEIR available and readily accessible to the public as it must do under CEQA. As a result, the City must extend the public review and comment period on the Draft EIR for the Project by at least 45 days from the date that the City provides and makes readily accessible these documents for public review.

#### IV. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which is fulfilled by the DEIR. The first purpose of CEQA is to inform decision-makers and the public of the environmental consequences of the agency's actions by disclosing and analyzing all significant impacts.<sup>34</sup> Second, CEQA's substantive mandate requires that an agency adopt all feasible mitigation measures capable of lessening or avoiding such impacts and consider a reasonable range of environmentally-superior alternatives.<sup>35</sup> When an EIR fails to fulfill these purposes, it must be revised and recirculated.

Consistent with the first purpose, CEQA review is designed to inform decisionmakers and the public about the potential, significant environmental effects of a project.<sup>36</sup> An EIR functions 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>37</sup>

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<sup>33</sup> DEIR, p. 125.

<sup>34</sup> See generally, Pub. Resources Code, §§ 21002, 21002.1, 21003(b), 21061; CEQA Guidelines, § 15121, 15140, 15151, 15362.

<sup>35</sup> See generally, Pub. Resources Code, §§ 21002, 21002.1, 21003(b), 21061; CEQA Guidelines, § 15121, 15140, 15151, 15362.

<sup>36</sup> CEQA Guidelines, § 15002(a)(1).

<sup>37</sup> *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

The courts review the sufficiency of an EIR's disclosure and analysis under the "abuse of discretion" standard. "[A] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."<sup>38</sup>

The discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."<sup>39</sup> To that end, the EIR must disclose all direct, indirect and cumulatively-significant environmental impacts.<sup>40</sup> The EIR must contain *all* of the facts and analysis necessary to support its conclusions.<sup>41</sup> Environmental review documents must be "organized and written in a manner that will be meaningful and useful to decisionmakers and to the public."<sup>42</sup>

In analyzing the significance of an impact, the lead agency's significance determination must be supported by accurate scientific and factual data.<sup>43</sup> An agency cannot conclude that an impact is less-than-significant unless it produces rigorous analysis and concrete substantial evidence justifying its finding.<sup>44</sup>

The second purpose of CEQA is to require public agencies to avoid or reduce environmental damage by implementing "feasible" mitigation measures and through the consideration of "feasible" environmentally superior alternatives.<sup>45</sup> In other words, if an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>46</sup> CEQA defines "feasible" as "capable of being accomplished in a successful manner within a

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<sup>38</sup> *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

<sup>39</sup> CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>40</sup> Pub. Resources Code, § 21100(b)(1); CEQA Guidelines, § 15126.2(a).

<sup>41</sup> See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568; *Mountain Lion Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1043.

<sup>42</sup> Pub. Resources Code, § 21003(b).

<sup>43</sup> CEQA Guidelines, § 15064(b).

<sup>44</sup> *Kings County Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692, 732.

<sup>45</sup> Pub. Resources Code, §§ 21002-21002.1; CEQA Guidelines, § 15002(a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>46</sup> Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

reasonable period of time, taking into account economic, environmental, social, and technological factors.”<sup>47</sup>

Courts have imposed several parameters for the adequacy of mitigation measures. First, the lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards capable of mitigating the project’s impacts to a less than significant level.<sup>48</sup> Deferral is impermissible where an agency “simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report.”<sup>49</sup> Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>50</sup> Third, “[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.”<sup>51</sup> Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.<sup>52</sup>

If the agency elects to approve the project despite its significant adverse impacts, it may do only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”<sup>53</sup> The agency must describe these findings in a written document, supported by substantial evidence (“statement of overriding considerations”).<sup>54</sup>

## V. THE DRAFT EIR VIOLATES CEQA

These comments and the attached exhibits provide substantial evidence that the DEIR fails to meet either of CEQA’s key goals and requirements. The DEIR fails to disclose and evaluate all potentially significant environmental impacts of the Project. The DEIR’s analysis and disclosure of impacts, mitigation measures,

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<sup>47</sup> Pub. Resources Code, § 21061.1.

<sup>48</sup> *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>49</sup> *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>50</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

<sup>51</sup> CEQA Guidelines, § 15126.4(a)(2).

<sup>52</sup> *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

<sup>53</sup> Pub. Resources Code, § 21081; CEQA Guidelines, §§ 15092(b)(2)(A) & (B), 15093.

<sup>54</sup> CEQA Guidelines, § 15093(b).

and alternatives is so conclusory and fundamentally inadequate that the document fails as an informational document.<sup>55</sup> Accordingly, the Draft EIR must be revised and recirculated.

**A. The Draft EIR Violates CEQA and the Water Code, By Failing to Adequately Disclose, Analyze, and Mitigate the Project's Potentially Significant Impacts to Hydrology and Utilities**

The Draft EIR fails to adequately disclose, analyze, and mitigate the Project's potentially significant impacts to water supply in the DEIR's sections on "Hydrology and Water Quality" and "Utilities."<sup>56</sup> The City does not provide a WSA and a "will-serve" letter from the water agency demonstrating the quantify and availability of water for the Project. This lack of analysis and supporting documentation violates both CEQA and related provisions in the California Water Code.<sup>57</sup>

The Draft EIR found that the Project will not require new or expanded water supply facilities,<sup>58</sup> will not result in insufficient water supplies beyond existing entitlements,<sup>59</sup> and will not deplete or interfere with groundwater supplies or recharge.<sup>60</sup> In all of the above-cited areas, the Draft EIR concluded that impacts would be less-than-significant and no mitigation was required. These findings are not supported by substantial evidence.<sup>61</sup>

When an agency determines that a project is subject to CEQA, it must comply with the provisions of California Water Code, sections 10910 to 10915, concerning water supply assessments.<sup>62</sup> The CEQA Guidelines, section 15155 contain additional, specific requirements for "water demand projects."

Per CEQA Guidelines, section 15155(a)(1)(A)-(D) "A 'water-demand project' means ... [a] shopping center or business establishment employing more than 1,000 persons or having more than 500,000 square feet of floor space ... [a] commercial

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<sup>55</sup> CEQA Guidelines, § 15088.5.

<sup>56</sup> See generally, DEIR, pp. 118-130 (Section 3.6: *Hydrology & Water Quality*); 210-222 (Section 3.12: *Utilities*).

<sup>57</sup> See generally, CEQA Guidelines, § 15155; Wat. Code, § 10910 et seq.

<sup>58</sup> DEIR, pp. 216-217 (Impact 3.12.4.2).

<sup>59</sup> DEIR, pp. 218-219 (Impact 3.12.4.4).

<sup>60</sup> DEIR, p. 126 (Impact 3.6.4.2).

<sup>61</sup> See generally, SWAPE Report, pp. 2-3 (analysis of hydrology, water supply, and utilities).

<sup>62</sup> Pub. Resources Code, § 21151.9 ("projects" under CEQA are subject to the provisions of the Wat. Code, §§ 10910-10915); Wat. Code, § 10910(a) (same).

office building employing more than 1,000 persons or having more than 250,000 square feet of floor space...[or a] hotel or motel, or both, having more than 500 rooms.<sup>63</sup>

If a project meets the criteria for a “water demand project,” the lead agency must take the following steps: identify the water system that will supply the water; request that the agency identify if the project was included in a recent Urban Water Management Plan (“UMP”) and if so, analyze the project under that plan; and depending on the circumstances, either the lead agency or the water district must prepare an water supply assessment consistent with the requirements of the Water Code, section 10910 to 10915. The assessment must be included in the EIR.<sup>64</sup>

Regarding the sufficiency and specificity required for a water supply assessment, the CEQA Guidelines, section 15155(f) states that:

(f) [the] degree of certainty regarding the availability of water supplies will vary depending on the stage of project approval. **A lead agency should have greater confidence in the availability of water supplies for a specific project than might be required for a conceptual plan** (i.e. general plan, specific plan). An analysis of water supply in an environmental document may incorporate by reference information in a water supply assessment, urban water management plan, or other publicly available sources. The analysis shall include the following:

(1) **Sufficient information** regarding the project's proposed water demand and proposed water supplies **to permit the lead agency to evaluate the pros and cons of supplying the amount of water that the project will need.**

(2) **An analysis of the reasonably foreseeable environmental impacts** of supplying water throughout all phases of the project.

(3) **An analysis of circumstances affecting the likelihood of the water's availability**, as well as the degree of uncertainty involved. Relevant factors may include but are not limited to, drought, salt-

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<sup>63</sup> CEQA Guidelines, § 15155 (a)(1), (a)(1)(B)-(D) (emphasis added).

<sup>64</sup> See generally, CEQA Guidelines, § 15155; see also Wat. Code, § 10910 et seq.

water intrusion, regulatory or contractual curtailments, and other reasonably foreseeable demands on the water supply.<sup>65</sup>

In addition, Water Code, sections 10910(b), (c), (d) outline the specific requirements for the contents and sufficiency of a water supply assessment. A compliant WSA must include, *inter alia*, an assessment of water supply during normal, single dry and multiple dry years and “proof” of legal entitlement to the water required for the project under all scenarios.<sup>66</sup> Further data and analysis is required if the project will use groundwater.<sup>67</sup>

The Project fulfills multiple criteria for a “water demand” project under CEQA and the Water Code provisions apply. (The Project will develop over a million square feet of floor space, contain 700 hotel rooms, and employ over 1,000 people).<sup>68</sup> The Draft EIR does not directly dispute this, stating that a WSA was prepared.<sup>69</sup> Therefore, a WSA and documentation from the water purveyor, here, California Water Service Company (“California Water”) must identify, with “great confidence” that “projected water supplies will be sufficient to satisfy the demands of the project” and “proof” that the City / Applicant is entitled to receive the water.<sup>70</sup> This information must be included in the EIR, to allow decision-makers to thoughtfully weigh the “pros and cons of supplying the amount of water that the project will need.”<sup>71</sup>

The Draft EIR provides none of this information or documentation, in violation of CEQA and the Water Code. The Draft EIR contains only a single reference to the WSA, simply stating that one was prepared.<sup>72</sup> Given the lack of discussion of the WSA’s contents, it calls into question whether a WSA was even prepared. As discussed above, the City has not responded to repeated requests to obtain the WSA, which is a separate violation of CEQA. The Draft EIR identifies

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<sup>65</sup> CEQA Guidelines, § 15155(f) (emphasis added); see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

<sup>66</sup> See generally, Wat. Code, § 10910(d).

<sup>67</sup> Wat. Code, § 10910(f).

<sup>68</sup> DEIR, pp. 11-17, 44-56, 124.

<sup>69</sup> DEIR, p. 211.

<sup>70</sup> CEQA Guidelines, § 15155.

<sup>71</sup> CEQA Guidelines, § 15155(c); see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

<sup>72</sup> DEIR, p. 211.

California Water, and the sources of their water.<sup>73</sup> The Draft EIR does not cite to, or provide, a “will-serve” letter from the California Water or any other proof, as required by statute, that water is available to serve the Project, and that the City or Applicant is entitled to that water. Furthermore, the statement that California Water’s UMP includes the City’s long-range plans is inadequate.<sup>74</sup> The Water Code and CEQA require the City to include an analysis from the water agency itself, as to whether the UMP includes *this Project* and entitlement to that water.

These are serious omissions. As one court stated in similar circumstances “[t]he agency [will] not be allowed to hide behind its own failure to gather relevant data.”<sup>75</sup> Due to these informational deficiencies, the Draft EIR fails to “bridge the analytic gap” between its findings and conclusions, as the SWAPE Report details:

The DEIR lacks support for its inter-related conclusions that the proposed Project will not require new or expanding water facilities, will not result in insufficient water supplies, and will not deplete groundwater supplies ... In order to substantiate these conclusions, the DEIR should have provided a Water Supply Assessment (WSA) and a “will-serve” letter from the California Water Service Company.<sup>76</sup>

Furthermore, the scant information that the Draft EIR does provide does not support the City’s findings:

Even though the agency would not provide the public with the required WSA upon which it states that it relies, the estimates of water usage provided in the DEIR do not “pencil out.” The DEIR states the Project is estimated to consume **165,434 gallons of water per day** (DEIR, p.234). The DEIR goes on to say that the Project’s net increase in water consumption is **47 acre-feet per year. These two estimates do not match: 165,434 gallons of water** is equivalent to **185 acre-feet per year**, approximately four times the DEIR’s estimate of 47 acre-feet per year.<sup>77</sup>

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<sup>73</sup> DEIR, pp. 212-213.

<sup>74</sup> DEIR, p. 234.

<sup>75</sup> *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 286 (CEQA analysis of water supply impacts inadequate where CEQA document failed to discuss the known contingencies to provision of reliable water supply to project).

<sup>76</sup> SWAPE Report, p. 2.

<sup>77</sup> SWAPE Report, p. 2.

This discrepancy must be addressed in a revised and recirculated Draft EIR.<sup>78</sup>

In addition, the Draft EIR's hydrology report covers only the 10-acre portion (Area 3) of the Project.<sup>79</sup> Therefore, "[a] hydrology report which covers the entire Project site (Areas 1, 2, and 3) should be prepared and included in a revised DEIR."<sup>80</sup>

The Draft EIR's informational deficiencies, lack of analysis, and inability to support its findings with facts and evidence in the record violates CEQA's substantive and procedural requirements. The City must correct these deficiencies in a revised and recirculated DEIR.

**B. The DEIR Fails to Adequately Disclose, Analyze, and Mitigate the Project's Potentially Significant Air Quality Impacts**

The Draft EIR fails to adequately disclose, analyze, and mitigate the Project's significant and unavoidable impacts on air quality. The Draft EIR must correct this deficiency in a revised and recirculated EIR.

*i. Air Modeling*

The Draft EIR relies on emissions calculated from the California Emissions Estimator Model Version, CalEEMod.2016.3.2 ("CalEEMod"). SWAPE has reviewed the Project's CalEEMod output files and found that several of the values inputted into the model were not consistent with the information disclosed in the DEIR.<sup>81</sup> As a result, the City's air modeling underestimates the impacts on air quality from construction and operation. Specifically, the DEIR underestimates the number of truck haul trips needed during site demolition and fails to account for overlap during construction and operation.<sup>82</sup>

First, the Draft EIR underestimates the number of truck hauling trips required during project site demolition. In fact, the SWAPE Report shows that the DEIR reduced the number of demolition hauling trips from 765 to zero, without proper justification. As they explain "this is not a valid approach to calculating

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<sup>78</sup> See generally, SWAPE Report, pp. 2-3.

<sup>79</sup> SWAPE Report, p. 2.

<sup>80</sup> SWAPE Report, p. 2.

<sup>81</sup> SWAPE Report, pp. 3-6.

<sup>82</sup> SWAPE Report, pp. 3-6.

construction emissions” and the result is that “the Project’s construction emissions are substantially underestimated.”<sup>83</sup>

Second, the CalEEMod fails to account for emissions during the overlap between project construction and operation. Construction and operation will occur in phases, over a six-year period. When construction is completed on one phase, it will become operational, while construction will continue on other phases. This overlap will occur in all three Areas (Area 1, 2, and 3).<sup>84</sup> However, as SWAPE discusses:

[T]he Project’s construction and operational emissions were evaluated separately and do not account for the overlap in activities (Table 3-5, DEIR, p. 87-88 and Table 3-6, p. 90). Since the DEIR fails to evaluate the impacts that may occur from this overlap in construction and operation, the Project’s air quality impacts are potentially underestimated and inadequately addressed.<sup>85</sup>

The Draft EIR should be revised and circulated to include an analysis of the total Project emissions that will occur as a result of the overlapping construction and operational phases.<sup>86</sup>

ii. *The Risk to Human Health from Construction and Operational Diesel Particulate Matter Emissions Was Inadequately Evaluated.*

The Draft EIR concludes that health risks to nearby sensitive receptors (approximately 222 feet away from the Project) during Project construction and operation from diesel particulate matter (“DPM”) would be less-than-significant without additional mitigation measures. The Draft EIR draws this conclusion without conducting a quantitative construction or operational health risk assessment (“HRA”).<sup>87</sup> “The DEIR attempts to justify this finding by comparing the Project’s construction criteria air pollutant emissions (carbon monoxide [“CO”] nitrogen dioxide [“NOx”], and particulate matter of 10 microns or less [“PM10”] and 2.5 microns or less [“PM2.5”]) to the [South Coast Air Quality Management

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<sup>83</sup> SWAPE Report, p. 4.

<sup>84</sup> SWAPE Report, pp. 5-6.

<sup>85</sup> SWAPE Report, p. 6.

<sup>86</sup> SWAPE Report, p. 6.

<sup>87</sup> SWAPE Report, p. 11.

District's] SCAQMD's Localized Significance Threshold" ("LST").<sup>88</sup> Additionally, the DEIR attempts to justify the omission of an operational HRA by stating that the air quality mitigation measures (Mitigation Measures 5 to 9) will "reduce the project's operational mobile emissions to the fullest extent possible."<sup>89</sup> As the SWAPE Report discusses, this conclusion is flawed for several reasons.

First, the LST analysis is only applicable to NO<sub>x</sub>, CO, PM<sub>10</sub>, and PM<sub>2.5</sub> emissions, which are specific criteria air pollutants. It does not measure specifically DPM, a type of toxic air contaminant and does not use the appropriate threshold to assess potential health impacts from DPM.<sup>90</sup> Furthermore, there is a specific numerical threshold of 10 in one million cancer risk the SCAQMD provides for determining a project's health risk impact, and the DEIR should utilize this threshold in its analysis.<sup>91</sup>

Second, the LST lookup screening table methodology used is inapplicable to the Project. The LST lookup screening table can only be used to assess projects no greater than five-acres, with eight operational hours/day, which operate during the daytime only, and where there will be an distribution of emission sources across the site.<sup>92</sup> As the Project description and SWAPE Report demonstrate, the Project exceeds all of these parameters (44-acres, day and nighttime operations, uneven distribution of emissions throughout construction and operation). As the SWAPE report notes, "When a project exceeds the LST lookup parameters, a site-specific localized significance analysis is required."<sup>93</sup> This was not done here.

Third, the Draft EIR must include a construction-level HRA, in addition to an LST analysis, consistent with current SCAQMD guidance which recommends that health risk impacts from short-term projects (such as the Project's construction phase), be assessed,<sup>94</sup> because "short-term cancer risk assessments can be thought of as being the equivalent to a 30-year cancer risk estimate and the appropriate thresholds would still apply."<sup>95</sup>

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<sup>88</sup> SWAPE Report, p. 11-12.

<sup>89</sup> SWAPE Report, p. 11, citing DEIR p. 94.

<sup>90</sup> SWAPE Report, pp. 11-12.

<sup>91</sup> SWAPE Report, p. 12.

<sup>92</sup> SWAPE Report, p. 12

<sup>93</sup> SWAPE Report, p. 12.

<sup>94</sup> SWAPE Report, p. 13.

<sup>95</sup> SWAPE Report, p. 13.

Finally, as the SWAPE Report explains, “simply because the Project’s proposed operational mitigation will reduce mobile emissions does not justify the omission of an HRA”. This is especially true here where, as shown below, the mitigation measures proposed are vague, unenforceable and of uncertain efficacy.<sup>96</sup>

The State Office of Environmental Health Hazard Assessment (“OEHHA”) is responsible for providing recommendations and guidance for conducting HRAs in California. Therefore, HRAs consistent with OEHHA guidance should be prepared and included in a revised and recirculated Draft EIR.<sup>97</sup>

iii. *Updated Air Quality Modelling and Analysis Demonstrates Potentially Significant Health Risks During Project Construction and Operation*

To demonstrate the potential risk posed by Project construction and operation to nearby sensitive receptors, SWAPE prepared a preliminary “screening-level” HRA.<sup>98</sup> The HRA used the AERSCREEN modelling system. It was adjusted to include truck trips during site demolition and overlapping emissions during Project construction and operation. The HRA included an analysis of *both* criteria pollutants *and* DPM. SWAPE’s assumptions for the modelling are detailed in the report.<sup>99</sup>

The HRA revealed significant potential health risks to sensitive receptors during Project construction and operation.<sup>100</sup> SWAPE concluded:

The excess cancer risk posed to adults, children, infants, and during the third trimester of pregnancy at the MEIR located approximately located approximately 75 meters downwind, over the course of Project construction and operation, is approximately 11, 81, 84, and 4.7 in one million, respectively. Furthermore, the **excess cancer risk over the course of a residential lifetime (30 years) at the MEIR is approximately 180 in one million.**<sup>101</sup> Consistent with OEHHA guidance, exposure was assumed to begin in the third trimester of pregnancy to provide the most conservative

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<sup>96</sup> SWAPE Report, p. 13.

<sup>97</sup> SWAPE Report, p. 13-14.

<sup>98</sup> SWAPE Report, p. 14; see generally, SWAPE Report, pp. 14-18.

<sup>99</sup> SWAPE Report, pp. 14-18.

<sup>100</sup> SWAPE Report, pp. 14-18.

<sup>101</sup> SWAPE Report, p. 17.

estimates of air quality hazards. The infant, child, adult, and lifetime cancer risks **exceed the SCAQMD threshold of 10 in one million**.<sup>102</sup>

As demonstrated, these levels exceed vastly SCAQMD thresholds of significance for cancer risk of 1:10 million. The City should therefore prepare a refined HRA to fully analyze and disclose the Project's health risks.<sup>103</sup>

*iv. The DEIR's Conclusion that Air Quality Impacts Are Significant and Unavoidable, Without Considering All Feasible Mitigation Measures, is Unsubstantiated and violates CEQA*

The Draft EIR determines that the Project's emissions of criteria pollutants DPM and PM10 would exceed SCAQMD thresholds.<sup>104</sup> The DEIR concludes that these are "significant and unavoidable impacts" to air quality. In order to approve the Project, the City is required to adopt a statement of overriding considerations.<sup>105</sup> The findings in the statement of overriding considerations must be supported by substantial evidence.<sup>106</sup>

However, although the Draft EIR concludes that impacts are "unavoidable" and recommends that a statement of overriding considerations be adopted, the City "proposes a few mitigation measures to reduce the Project's air pollutant emissions."<sup>107</sup>

Therefore, "[w]hile it is true that the Project will result in significant ... air quality impacts" the conclusion that these impacts are "unavoidable" is not supported by substantial evidence.<sup>108</sup> Adopting a statement of overriding considerations under these circumstances is contrary to both CEQA and SCAQMD guidance for CEQA compliance. As discussed above, the CEQA Guidelines provide that when a project will result in significant and unavoidable impacts, even after the adoption of feasible mitigation measures, a statement of overriding considerations is required, and the it must be "supported by substantial

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<sup>102</sup> SWAPE Report, p. 17.

<sup>103</sup> SWAPE Report, pp. 17-18.

<sup>104</sup> SWAPE Report, p. 10.

<sup>105</sup> SWAPE Report, p. 6; see also DEIR, pp. 19-21 (Table 3, Summary of Impacts including GHG and air quality impacts), 91, 105; Pub. Resources Code, § 21081 (statement of overriding considerations); CEQA Guidelines, §§ 15092(b)(2)(A)-(B) (same), 15093 (same).

<sup>106</sup> CEQA Guidelines, § 15093(b).

<sup>107</sup> SWAPE Report, p. 10.

<sup>108</sup> SWAPE Report, p. 10.

evidence.”<sup>109</sup> Similarly, the SCAQMD guidance which “requires lead agencies to consider feasible mitigation measures to avoid or substantially reduce a project’s significant environmental impacts.”<sup>110</sup> The San Joaquin County Air Pollution Control District provides similar guidance.<sup>111</sup>

Because of these deficiencies, additional mitigation measures should be identified and incorporated into the Project which will lessen or avoid the Project’s impacts to air quality and global climate change. Otherwise, the agency lacks substantial evidence to support the adoption of a statement of overriding considerations relative to air quality emissions.

As will be discussed in more detail below, additional feasible mitigation measures are available and should be incorporated into the Project’s mitigation monitoring and reporting program to lessen or avoid impacts from air pollutants.

v. *The Proposed Mitigation Measures are Vague, Unenforceable, and of Uncertain Efficacy*

The DEIR failed to consider additional, feasible mitigation measures to lessen or avoid impacts to air quality, as required under CEQA.<sup>112</sup> The SWAPE Report both: 1) suggests additional, feasible mitigation measures for construction and operational impacts and; 2) analyzes the proposed mitigation measures and describes the ways in which they are inadequate to lessen or avoid impacts.<sup>113</sup>

<sup>109</sup> CEQA Guidelines, § 15093; 15092; Pub. Resources Code, § 21081.

<sup>110</sup> SWAPE Report, p.8, citing SCAQMD, *CEQA Air Quality Analysis Handbook*, “Mitigation Measures and Control Efficiencies”, available at <http://www.aqmd.gov/home/rules-compliance/ceqa/air-quality-analysis-handbook/mitigation-measures-and-control-efficiencies>, last viewed May 1, 2019.

<sup>111</sup> SWAPE Report, pp. 10, citing San Joaquin County Air Pollution Control District, *Guidance for Assessing and Mitigating Air Quality Impacts* (March 2015), p.115, available at [http://www.valleyair.org/transportation/GAMAQI\\_3-19-15.pdf](http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf), last viewed May 1, 2019.

<sup>112</sup> See generally, Pub. Resources Code, §§ 21002-21002.1; CEQA Guidelines, § 15002(a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>113</sup> SWAPE Report, pp. 19-30.

As discussed above, CEQA requires public agencies to avoid or reduce environmental damage by implementing “feasible” mitigation measures.<sup>114</sup> In other words, if an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>115</sup> CEQA defines “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.”<sup>116</sup>

Courts have imposed several parameters for the adequacy of mitigation measures. First, the lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards capable of mitigating the project’s impacts to a less than significant level.<sup>117</sup> Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.<sup>118</sup> Third, “[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.”<sup>119</sup> Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.<sup>120</sup>

As SWAPE discusses, several of the mitigation measures proposed by the City to reduce air quality impacts are vague, unenforceable, and of limited efficacy. SWAPE suggests additional, feasible actions which can be incorporated into these measures, to bolster efficacy and enforceability (see below).

MM-5 states the Project Applicant and future tenants will incentivize employees to utilize alternative modes of transportation. This vague measure fails to describe any specific programs that will achieve this goal and lacks any

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<sup>114</sup> Pub. Resources Code, §§ 21002-21002.1; CEQA Guidelines, § 15002(a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Comm’rs* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>115</sup> Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

<sup>116</sup> Pub. Resources Code, § 21061.1.

<sup>117</sup> *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>118</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

<sup>119</sup> CEQA Guidelines, § 15126.4(a)(2).

<sup>120</sup> *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

performance standards and is completely unenforceable.<sup>121</sup> Specific programs suggested by SWAPE include implementing a commute trip reduction program, a riding sharing program, price workplace parking, and employee parking “cash-out.”<sup>122</sup>

MM-8 states the Project will include kiosks and directories depicting mass transit times and routes, the location of bicycle racks, and the location and timing of Project shuttles. This measure too “does not provide any facts or evidence to support the DEIR’s conclusion that this measure will lessen or avoid impacts.”<sup>123</sup> SWAPE suggests incorporating a “bike lane street design” on the Project’s 44-acre site to increase bicycle usage and reduce VMT.<sup>124</sup>

MM-6 requires that the Project include electric vehicle charging stations in parking and garages, but does not specify their location and number, nor quantify how many stations would be sufficient to lessen or avoid impacts and fulfill projected demand for EV parking.<sup>125</sup> As SWAPE explain, the “Applicant should commit to a minimum percentage of parking spaces that will be equipped with EV charging stations.”<sup>126</sup> Consistent the California Green Building Standards Code, which is already applicable to the Project, “it is recommended that any project with over 200 parking spaces equip a minimum of 6% of their parking spaces with EV charging stations.”<sup>127</sup>

Finally, MM-9 states that the Project will encourage local hire, through job fairs and similar events, and that this will address both air quality and “environmental justice” impacts.<sup>128</sup> While local hire is certainly a laudable goal, this mitigation measure is vague, and its efficacy in reducing air quality impacts is not supported by any evidence. MM-9 does not include a local hire percentage goal or “bridge the analytic gap” by quantifying how local hire will reduce VMT and thus, lessen or avoid air quality impacts.

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<sup>121</sup> DEIR, pp. 19, 90.

<sup>122</sup> SWAPE Report, pp. 27-29.

<sup>123</sup> SWAPE Report, p. 27.

<sup>124</sup> SWAPE Report, pp. 26-27.

<sup>125</sup> SWAPE Report, p. 27.

<sup>126</sup> SWAPE Report, p. 27.

<sup>127</sup> SWAPE Report, p. 27.

<sup>128</sup> DEIR, p. 20.

If an agency elects to approve the project despite its significant adverse impacts, it may do so only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”<sup>129</sup> Described in a “statement of overriding considerations”.<sup>130</sup>

SWAPE suggests several mitigation measures to reduce or avoid construction and operational emissions. Many of these measures are suggested measures from GHG reduction plans or other guidance by agencies concerning GHG emission reductions, including the U.S. Environmental Protection Agency (“EPA”), the California Air Pollution Control Officer’s Association (“CAPCOA”), regional air districts, and measures that have been implemented in other development projects by other California cities.

The SWAPE Report details many feasible mitigation measures to reduce construction-related air quality emissions.<sup>131</sup> These include: limiting construction equipment idling *beyond* regulation requirements; implementing diesel control measures; repowering or replacing older construction equipment engines; installing retrofit devices on existing construction equipment; using electric and hybrid construction equipment; implementing a construction vehicle inventory tracking system; implementing the enhanced control practices promulgated by the Sacramento Metropolitan Air Quality Control District; using zero-emissions VOC paint or use of materials that do not require paint (which is of particular importance in light of the surface area potentially requiring paint, consistent with a million square foot development) and using electrostatic sprays and coatings.

SWAPE also described feasible mitigation measures to reduce operational air quality emissions.<sup>132</sup> These include: reducing unnecessary outdoor lighting; developing and following a “green streets guide” which reduces dependence on non-permeable asphalt and concrete; installing high-efficiency heat, ventilation and air-conditioning systems; using electric sweepers or sweepers fitted with HEPA filters; using CARB-certified electric landscaping equipment and additional measures, beyond the existing Project features, which reduce car reliance by customers and employees, and promote the use of electric vehicles, including EV trucks.

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<sup>129</sup> Pub. Resources Code, § 21081; CEQA Guidelines, §§ 15092(b)(2)(A) & (B), 15093.

<sup>130</sup> CEQA Guidelines, § 15093(b).

<sup>131</sup> SWAPE Report, pp. 19-24.

<sup>132</sup> SWAPE Report, pp. 24-30.

For the above-stated reasons, the Draft EIR fails to adequately disclose, analyze, and mitigate the Project's potentially significant impacts to air quality. The Draft EIR's conclusions regarding the quantity of emissions and efficacy of mitigation measures are not supported by substantial evidence. On the basis of the information in the Draft EIR, the City cannot support a statement of overriding considerations, finding that impacts would be "unavoidable" in the absence of quantifying and adequately mitigating these impacts. The Draft EIR must correct these deficiencies in a revised and recirculated EIR.

**C. The Draft EIR Fails to Adequately Disclose, Analyze, and Mitigate the Project's Impacts to Global Climate Change from Greenhouse Gas Emissions (GHG Emissions)**

The Draft EIR fails to adequately disclose, analyze, and mitigate the Project's potentially significant impact from GHG emissions. The conclusion that impacts will be "unavoidable" lacks substantial evidence, in the absence of adopting all feasible mitigation measures to lessen or avoid GHG impacts. The Draft EIR must correct these deficiencies in a revised and recirculated EIR.

The CEQA Guidelines require agencies to "make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project."<sup>133</sup> In determining the significance of the project's GHG emissions, the "agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes."<sup>134</sup> The agency must consider "[w]hether the project emissions exceed a threshold of significance that the lead agency determines applies to the project."<sup>135</sup> While the lead agency has discretion to choose a modeling system and methodology, the selection of the methodology and its application must be supported by substantial evidence.<sup>136</sup> Finally, as with the analysis of all impact areas, the agency must employ all feasible mitigation measures to reduce or eliminate impacts. The City's failed on every step of this process and its analysis of GHG impacts violates CEQA.

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<sup>133</sup> CEQA Guidelines, § 15064.4 (a).

<sup>134</sup> CEQA Guidelines, § 15064.4 (b).

<sup>135</sup> CEQA Guidelines, § 15064.4 (b)(2).

<sup>136</sup> CEQA Guidelines, § 15064.4 (c); see also *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204.

i. *The DEIR's Analysis of the Project's Potential to Generate GHG Violates CEQA*

Impact 3.4.4.1 analyzes the Project's potential to generate GHG emissions.<sup>137</sup> It determines that the project's operational GHG emissions will exceed SCAQMD's significance threshold and that the City would be required to adopt a Statement of Overriding Consideration.<sup>138</sup> The City's analysis of the Project's potential GHG generation relies on no substantial evidence, includes numerous contradicting statements within a two page range and violates CEQA.

First, the City failed to disclose the Project's construction emissions. Table 3-8 of the DEIR presents the reader with the number of 27,849.32 pounds per day as the Project's "Total Construction Emissions"<sup>139</sup>. As the SWAPE Report shows, the CalEEMod files reveal that in fact 27,849.32 pounds per day is the maximum *daily* emissions expected during construction, that is, this amount would be emitted on a daily basis and would add up during the six years of construction. The City, however, fails to provide the total construction emissions generated by the Project anywhere else in the DEIR or its appendices<sup>140</sup>. Hence, the DEIR completely underestimates and misrepresents the Project's construction impacts, in violation of CEQA.

SWAPE were able to calculate the total construction emissions based on the limited information provided in the CalEEMod files. SWAPE found that total construction emissions are approximately 27,362 MT CO<sub>2</sub>e. Per the SCAQMD guidance, and as is common practice for many lead agencies, construction emissions are typically totaled, amortized over thirty years, and added to the operational emissions.<sup>141</sup> SWAPE found that the amortized construction emissions would be approximately 912 MT CO<sub>2</sub>e/year over a project lifetime.<sup>142</sup> There is no indication that these emissions were accounted for in the DEIR, and it must be revised to properly reflect these emissions.

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<sup>137</sup> DEIR, pp. 104-105.

<sup>138</sup> DEIR, p. 105.

<sup>139</sup> DEIR, p. 105.

<sup>140</sup> SWAPE Report, p. 6-7

<sup>141</sup> Draft Guidance Document – Interim CEQA Greenhouse Gas (GHG) Significance Threshold," SCAQMD, October 2008, available at: [http://www.aqmd.gov/docs/default-source/ceqa/handbook/greenhouse-gases-\(ghg\)-ceqa-significance-thresholds/ghgattachmente.pdf](http://www.aqmd.gov/docs/default-source/ceqa/handbook/greenhouse-gases-(ghg)-ceqa-significance-thresholds/ghgattachmente.pdf), p. 3-9.

<sup>142</sup> SWAPE Report, p. 7-8.

Second, the DEIR's analysis of operational emissions is not supported by any evidence, let alone substantial evidence, and fails entirely to present a "good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project" as required under CEQA:

The first paragraph of the DEIR's "Discussion of Impact Analysis" includes the following statement: "As seen in Table 3-8, the total project-related direct *operational* emissions would result in 27,849 MTCO<sub>2</sub>E/year".<sup>143</sup> However, as mentioned above, the number 27,849 actually appears under the *construction* emissions section in the table. Table 3-8 indicates that the amount of "Long Term Operational Emissions (Mitigated)" is actually 174,741 lbs/day, which as SWAPE show can be converted to approximately 28,949 MT CO<sub>2</sub>e/year.

In the next paragraphs the City claims that the project-related *mitigated* operational emissions (direct and indirect) would result in 19,480 MT CO<sub>2</sub>e/year. That is, the DEIR claims that about 9,000 MT CO<sub>2</sub>e/year GHG emission reductions will be achieved by measures which include, according to the DEIR, "the use of energy and water efficient appliances and fixtures, the location of the nearest bus stops, the project's infill nature, and that the project contains a mix of uses".<sup>144</sup> These statements and the emissions reduction the City claims to achieve are wholly unsupported for the following reasons:

First, Table 3-8 presents the "Long-Term Operational Emissions (*Mitigated*)"<sup>145</sup>, which as was discussed above are approximately 28,949 MT CO<sub>2</sub>e/year. If these are the mitigated emissions, it is unclear how come the next paragraph presents a different number for the mitigated emissions.

In addition, the "mitigation measures" mentioned in the DEIR are completely vague, do not qualify as mitigation measures and the City fails to provide any support to reductions attributed to them. In what way, for example, is the "location of nearest bus stops", which is a pre-existing condition that is not even a Project feature, a mitigation measure? How much GHG reduction is attributed to it? The same questions apply to the project's "infill nature" and "mix of uses".

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<sup>143</sup> DEIR, p. 104, Emphasis added

<sup>144</sup> DEIR, p. 105.

<sup>145</sup> Emphasis added

Even more importantly, SWAPE's review of the CalEEMod files revealed that many emissions reduction measures were *already included* within the CalEEMod output files. That is, they are already accounted for in the Project's GHG emissions estimate of approximately 28,949 MT CO<sub>2</sub>e/year. According to the CalEEMod output files, the Project's emissions estimate incorporated the following: first, it incorporated what it referred to as "Mitigation Measures Mobile" which include "Increase Diversity", "Improve Destination Accessibility" and "Improve Pedestrian Network". While vague, these measures seem to correspond to the "mix of uses", "infill nature" and "location of bus stops" measures the DEIR lists as mitigation measures. Second, the modeling for the Project incorporated installment of high efficiency lighting and appliances and of low flow plumbing, which seem to correspond to the "use of energy and water efficient appliances and fixtures" the DEIR purports to present as additional measures.<sup>146</sup> In other words, it appears the DEIR is trying to take credit *twice* for the same mitigation measures (assuming they can count as mitigation measures)

The DEIR GHG analysis must be revised to properly and accurately reflect the Project's construction and operational GHG emissions *before* any mitigation measures are applied, to accurately describe *in detail* any mitigation or reduction measure the Project will employ and the level of emission reduction each measure will achieve, and to support this analysis with substantial evidence. As it is now, the analysis is wholly unsupported and violates CEQA.

ii. *The City Failed to Establish or Use a Proper Threshold for its GHG analysis*

CEQA Guidelines require the agency to consider "[w]hether the project emissions exceed a threshold of significance that the lead agency determines applies to the project."<sup>147</sup> Agencies may use existing numerical thresholds, provided that they apply to the project.

The DEIR states that "Despite the use of in-program mitigation measures, the project's operational GHG emissions are still expected to exceed the 10,000 MTCO<sub>2</sub>e/year thresholds."<sup>148</sup> The DEIR fails to refer to the source of this threshold or support its decision to use it with any evidence. As SWAPE explain, it can be

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<sup>146</sup> SWAPE Report, p. 8.

<sup>147</sup> CEQA Guidelines, § 15064.4 (b)(2).

<sup>148</sup> DEIR, p. 105.

assumed that this threshold was taken from the *Interim* CEQA GHG Significance Threshold for Stationary Sources, Rules, and Plans report released by SCAQMD on December 2008 (which was never officially adopted). The use of this threshold is inappropriate for two main reasons:

First and foremost, this threshold was developed when AB 32 was the governing statute for GHG reductions in California and it does not reflect the current state reduction goals as they are stated in SB 32 that was adopted almost ten years later. The CEQA Guidelines explicitly require GHG analysis to “reasonably reflect evolving scientific knowledge and state regulatory schemes”<sup>149</sup> and the use of such an outdated threshold violates this mandate. Moreover, even at the time it was proposed, this threshold was proposed for *industrial* projects, not for commercial/mixed use project, and was never applicable to it.<sup>150</sup>

The City must set forth an applicable threshold of significance and must support its decision to use that threshold with substantial evidence.

iii. *The City Lacks Substantial Evidence to Support a Statement of Overriding Considerations because the DEIR Fails to Consider All Feasible Mitigation Measures to Lessen or Avoid Impacts from GHG Emissions*

The DEIR follows its brief and flawed GHG analysis with the conclusion that “[t]he GHG emissions will exceed the SCAQMD significance thresholds even with the implementation of the CARB requirements” and states that the City would be required to adopt a statement of overriding considerations.<sup>151</sup> This conclusion violates CEQA.

Under CEQA, “lead agencies shall consider feasible means, supported by substantial evidence and subject to monitoring or reporting, of mitigating the significant effects of greenhouse gas emissions.”<sup>152</sup> The Guidelines provide several suggestions for sources of mitigation measures. Such measures may include

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<sup>149</sup> CEQA Guidelines, § 15064.4 (b).

<sup>150</sup> SWAPE Report, p. 9. SCAQMD Interim Guidance proposes the use of a 3,000 MTCO<sub>2</sub>e/yr threshold for mixed-use developments, a 3,500 MTCO<sub>2</sub>e/yr threshold for residential developments, a 1,400 MTCO<sub>2</sub>e/yr threshold for commercial developments.

<sup>151</sup> DEIR, p. 105.

<sup>152</sup> CEQA Guidelines, § 15126.4(c).

“measures in an existing plan or mitigation program” developed for the purpose of reducing GHG emissions, “implementation of project features, project design, or other measures, such as those described in [CEQA Guidelines] Appendix F,” off-site mitigation measures, and “[m]easures that sequester greenhouse gases.”<sup>153</sup>

Besides some vague references to the Green Building Code and some Project’s features, not supported by substantial evidence and by any quantitative or qualitative analysis, the City failed to propose *any* mitigation measures to mitigate the GHG impacts of the Project<sup>154</sup>.

The SWAPE Report details many mitigation measures to lessen or avoid construction-related and operational GHG emissions. Consistent with CEQA Guidelines, section 15126.4(c), many of these measures are taken from GHG reduction plans and related guidance from the EPA, CAPCOA, regional air districts, and have been used in other development projects.

Feasible mitigation measures to reduce GHG emissions during Project construction include: using electric and hybrid construction equipment; implementing a construction vehicle inventory tracking system; implementing the “Enhanced Exhaust Control Practices” suggested by the Sacramento Metropolitan Air Quality Management District; and reducing VOC emissions, which are an indirect cause of GHG emissions by using of zero-emission VOC paint or use of materials that do not require paint and; using electrostatic sprays and coatings.<sup>155</sup>

Feasible mitigation measures to reduce GHG emissions during Project operation include: developing a “green streets guide” which reduces the dependence on non-permeable asphalt and concrete; installing high-efficiency heat, ventilation and air-conditioning systems; requiring LEED certification on all buildings; developing consumer education programs; and implementing additional measures, beyond the existing Project features, which reduce car reliance by customers and employees, and promote the use of electric vehicles, including EV trucks.<sup>156</sup>

The City must revise the DEIR to include all feasible mitigation measures to reduce GHG impacts below a level of significance.

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<sup>153</sup> CEQA Guidelines, § 15126.4(c).

<sup>154</sup> SWAPE Report, p. 10.

<sup>155</sup> SWAPE Report, pp. 19-24.

<sup>156</sup> SWAPE Report, pp. 24-30.

iv. *The Determination that GHG Impacts Are Less-Than-Significant Because the Project Will Not Conflict with Applicable Plans, Policies or Regulations Is Not Supported by Substantial Evidence*

Impact 3.4.4.2 analyzes the Project's potential to conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing GHG emissions and determines that impacts will be less-than-significant.<sup>157</sup> This determination is not supported by substantial evidence.

The DEIR analyzes the Project's consistency with thirty-nine actions outlined in the CARB's 2017 Climate Scoping Plan ("Scoping Plan"), and summarily concludes that there are no conflicts with the Climate Plan. This analysis is flawed for two reasons.

First, the cursory discussion provided in the DEIR is not a meaningful analysis consistent with CEQA's informational and procedural requirements, specifically as they relate to a project-level EIR. The DEIR merely provides a one-line "strategy name" without a specific reference to any specific strategy (or location) in the Scoping Plan. Without this information, the public cannot retrieve, review, and evaluate the City's consistency with that "strategy." The DEIR addresses the question of whether the Climate Plan is applicable and if there is a conflict by a simple "Yes/No" answer. No analysis of the strategy's applicability to or compatibility with the Project is provided. For the few strategies deemed applicable to the project by this "analysis" the DEIR offers a few more bare conclusions such as that the programs "correspond to the project's use of energy efficiency appliances" without any further detail and analysis.<sup>158</sup> These conclusory statements do not contain sufficient detail to allow those who did not participate in the EIR's preparation to understand and meaningfully consider the issues raised by the Project.<sup>159</sup>

Second, the City failed to analyze the Project's compatibility with other applicable plans, notably the Southern California Association of Government's ("SCAG") Regional Transportation Plan / Sustainable Communities Strategy

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<sup>157</sup> DEIR, pp. 106-108.

<sup>158</sup> DEIR, p. 108

<sup>159</sup> E.g. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516 ("The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'")

("RTP/SCS"). The RTP/SCS was adopted pursuant to Senate Bill 375 and is used identify strategies to reduce GHG emissions as part of long-range transportation planning. On April 7, 2016, SCAG adopted the 2016-2040 RTP/SCS. Using growth forecasts and economic trends, the RTP/SCS provides a vision for long-range transportation planning for the next 25 years.<sup>160</sup> The RTP/SCS is specifically designed to achieve the GHG emission-reduction targets set by CARB for the transportation sector, consistent with statutory mandates. Given that transportation emissions are the largest source of emissions produced by the Project,<sup>161</sup> a CEQA-compliant EIR must include an analysis of the Project's compatibility with the RTP/SCS measures and recommendations. The DEIR lacks this analysis, and thus the City failed to adequately disclose and evaluate GHG impacts.

For the above-stated reasons, the Draft EIR fails to adequately disclose, analyze, and mitigate the Project's significant and unavoidable impacts to GHG emissions. On the basis of the information in the Draft EIR, the City cannot support a statement of overriding considerations, finding that impacts would be "unavoidable" in the absence of quantifying and adequately mitigating these impacts. The Draft EIR must correct these deficiencies in a revised and recirculated EIR.

**D. The Draft EIR Fails to Adequately Disclose, Analyze, and Mitigate the Project's Impacts to Population and Housing**

The DEIR concludes that there will be "no impact" regarding the Project's potential to result in substantial population growth and need for housing.<sup>162</sup> The Draft EIR lacks substantial evidence to support this conclusion.

An EIR is required to analyze a project's impact on population and housing. As discussed above, as a project-level EIR, impacts must be analyzed to the highest level of detail and specificity.<sup>163</sup>

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<sup>160</sup> Southern California Association of Governments, 2016-2040 Regional Transportation Plan/Sustainable Communities Strategy, <http://scagrtpscscs.net/Pages/FINAL2016RTPSCS.aspx>

<sup>161</sup> See also, DEIR pp. 158-209 (Section 3.11: *Transportation and Circulation*).

<sup>162</sup> DEIR, pp. 150-152.

<sup>163</sup> CEQA Guidelines, § 15146(a); see also CEQA Guidelines, § 15161 (describing a project-level EIR).

The Draft EIR describes the environmental setting for population and housing. The CEQA Guidelines explain that the function of the environmental setting is to act as the baseline for a project's impacts: "[a]n EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published ... This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."<sup>164</sup>

The baseline reflects that the City is "currently experiencing a period of population growth."<sup>165</sup> The "lack of available land has presented unique challenges to the [C]ity in its efforts to provide housing for its growing population."<sup>166</sup> While redevelopment and housing rehabilitation programs have improved the quantity and quality of local housing, "the average household size continues to grow, placing increased pressure on the existing housing stock."<sup>167</sup> Furthermore, the most recent data provided by City states that Commerce's population is 12,960 people.<sup>168</sup> The total number of dwelling units in the City is 3,384.<sup>169</sup> Residential housing stock increase has been *de minimus* in recent years; with 50 units added in the last seven years.<sup>170</sup> Optimistically, the City hopes to increase housing supply by 200 more units over the next two years (by 2022).<sup>171</sup>

The Draft EIR must measure the Project's impacts to population and housing against this baseline. The Project will create over one million square feet of commercial, retail, and hotel uses. The Project will create temporary construction jobs, as well as 1,750 jobs when operable.<sup>172</sup>

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<sup>164</sup> CEQA Guidelines, § 15125(a).

<sup>165</sup> DEIR, p. 224.

<sup>166</sup> DEIR, p. 151.

<sup>167</sup> DEIR, p. 151.

<sup>168</sup> City of Commerce, *Demographics*, <http://www.animateddemographics.com/commerce>, last viewed May 3, 2019.

<sup>169</sup> City of Commerce, *Demographics*, <http://www.animateddemographics.com/commerce>, last viewed May 3, 2019.

<sup>170</sup> City of Commerce, *Household Trends*, click on [http://www.animateddemographics.com/commerce/household\\_trends](http://www.animateddemographics.com/commerce/household_trends) and scroll over graph (reflecting 3,328 housing units in 2010, 3,384 units in 2017, and 3,495 project units by 2022) last viewed May 3, 2019.

<sup>171</sup> City of Commerce, *Household Trends*, click on [http://www.animateddemographics.com/commerce/household\\_trends](http://www.animateddemographics.com/commerce/household_trends) and scroll over graph (reflecting 3,328 housing units in 2010, 3,384 units in 2017, and 3,495 project units by 2022) last viewed May 3, 2019.

<sup>172</sup> DEIR, p. 152.

As a threshold of significance, the DEIR uses SCAG employment projections. SCAG projections allow for 4,500 new jobs in the City 2040. The DEIR concludes that since the Project will create less than 4,500 new jobs, this impact is insignificant (“no impact”).<sup>173</sup> ).<sup>174</sup> This conclusion is not supported by the evidence, for the following reasons:

First, the DEIR cites Table 3-15 (excerpted below)<sup>175</sup> which does not support the EIR’s conclusion.

Factor Contributing to Growth	Project’s Potential Contribution	Basis for Determination
Additional population growth leading to increased demand for goods and services.	The proposed project would result in long-term growth in employment.	The proposed project will result in a potential build-out of 1,750 new jobs.
Short-term growth inducing impacts related to the project’s construction.	The proposed project may result in the creation of new construction employment.	Short-term increases in construction employment are considered a beneficial impact.

Table 3-15 merely recites Project facts and does not provide any analysis as to how and to what extent the Project will contribute to population growth and the need for housing, including affordable workforce housing, and why the Project will have no impact to this resource area. Indeed, the facts cited support the *opposite* conclusion - that the Project will foster population growth and an increased need for housing, by creating jobs during project construction and operation. Furthermore, the statement that construction employment is a “beneficial” (economic) impact does not in any way address what CEQA requires – an analysis of the Project’s reasonably foreseeable adverse direct, indirect, and cumulatively considerable impacts to the physical environment as they concern population and housing, against the existing baseline.

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<sup>173</sup> DEIR, p. 153.

<sup>174</sup> DEIR, p. 153.

<sup>175</sup> DEIR, p. 157.

Second, the SCAG employment projections are not adequate as a threshold of significance. SCAG merely provides employment projections. The DEIR does not cite to any authority supporting these employment projections as a threshold of significance for population and housing. For example, a potential source of a threshold is General Plan's Housing Element, which the DEIR mentions in the regulatory setting.<sup>176</sup> Yet, the DEIR does not use the General Plan to provide a threshold of significance for housing impacts, and whether adding 1,750 new jobs would cause that threshold to be exceeded. If a similar analysis was performed by SCAG, it is not cited or relied upon in the DEIR.

Moreover, even if SCAG's employment projects were an appropriate indication of impacts on housing and population, the fact that the Project by itself does not reach the full capacity projected for 2040 does not support the conclusion it does not have a significant impact on growth. The Project will contribute a significant amount of jobs, *almost 40% of all jobs projected in the next 20 years*. This is a significant contribution. The DEIR must also provide data regarding other existing and in-pipeline projects that will create jobs to estimate the Project's impacts in conjunction with other projects.

Finally, The City provides no other facts and analysis to support its bare conclusion that the Project will have no impact to population and housing, after creating 1,750 jobs in a City with a total population of 12,960 people, with 3,384 housing units, and a growing household population.<sup>177</sup> For example, the DEIR does not analyze or disclose the current status of workforce housing in the City, where the majority of the projected workforce currently resides (in the City or in the surrounding region), housing needs required to accommodate the projected workforce, whether sufficient affordable housing exists or is planned, and the implications of MM-9 (which promotes local hire). The DEIR thus fails to "bridge the analytic gap" between the Project and the impact.

The Draft EIR must be revised and recirculated and adequately disclose, analyze and mitigate impacts to population and housing created by the Project.

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<sup>176</sup> DEIR, p. 151.

<sup>177</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404–405 (emphasis added); see also, *Concerned Citizens of 405 Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841–842 (conclusory statements fail to crystallize issues).

**E. The Draft EIR Fails to Adequately Disclose, Analyze, and Mitigate the Project's Growth-Inducing Impacts**

The Draft EIR fails to adequately disclose, analyze, and mitigate the Project's growth-inducing impacts.<sup>178</sup> The City must address these deficiencies in a revised and recirculated Draft EIR.

CEQA mandates that an EIR analyze growth-inducing impacts. CEQA Guidelines, section 15126.2(e) describes what this analysis must entail:

[A growth-inducing analysis must describe the] ways in which the proposed project **could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment.** ... Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. [The EIR must also] discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. **It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.**<sup>179</sup>

In the California courts it is "settled that the EIR must discuss growth-inducing impacts even though those impacts are not themselves a part of the project under consideration, and even though the extent of the growth is difficult to calculate."<sup>180</sup> In determining if a project has growth-inducing impacts, the agency must assess whether the project sets in motion forces that can lead to pressure for growth.<sup>181</sup>

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<sup>178</sup> DEIR, pp. 223-224 (Section 4.1: *Mandatory CEQA Considerations: Growth-Inducing Impacts*).

<sup>179</sup> CEQA Guidelines, § 15126.2(e) (emphasis added).

<sup>180</sup> *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 368.

<sup>181</sup> See *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337-1336 (holding that environmental review for a proposed road and sewer project was inadequate because "[c]onstruction of the roadway and utilities cannot be considered in isolation from the development it presages. Although the environmental impacts of future development cannot be presently predicted, it is very likely these impacts will be substantial".)

The DEIR purports to analyze the Project's "potential indirect population growth impacts from job creation."<sup>182</sup> The DEIR acknowledges that the "project has the potential to indirectly induce population growth by creating" 1,750 jobs.<sup>183</sup> The DEIR goes on to state that the "project would more likely respond to regional demand for additional goods and services" such as the "increased demand for entertainment, commercial recreation, retail services, and other services."<sup>184</sup> The DEIR then concludes its analysis by stating that there will be "no impact," as the "project would generally accommodate rather than induce population growth."<sup>185</sup> This brief discussion does not address the requirements of CEQA Guidelines, section 15126.2(e) concerning growth-inducing impacts, and the DEIR's conclusion is not supported by substantial evidence.

This DEIR's brief analysis focuses solely on economic growth and its conclusion is based on irrelevant information. CEQA does not require an analysis of the local demand for goods and services and whether the Project will accommodate those needs. The issue that must be disclosed, analyzed, and mitigated here is whether "the project could foster ... population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment."<sup>186</sup> The DEIR admits that the Project has the potential to induce population growth by creating jobs, and this is the impact that should be analyzed and addressed. It is undisputed that the Project will *not* create housing but will create a significant number of jobs; therefore, in no way does the Project accommodate growth within the meaning of CEQA Guidelines, section 15126.2(e).

The Draft EIR justifies its lack of analysis by stating that growth-inducing impacts are "generally associated with the provision of urban services to an undeveloped or rural area."<sup>187</sup> This is false. CEQA Guidelines, section 15126.2(e) and the requirement to analyze growth-inducing impacts applies equally to *all* projects. The CEQA Guidelines draw no distinction between projects in rural versus urban areas or projects that provide infrastructure versus other types of development.<sup>188</sup>

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<sup>182</sup> DEIR, p. 224.

<sup>183</sup> DEIR, p. 224.

<sup>184</sup> DEIR, p. 224.

<sup>185</sup> DEIR, p. 224.

<sup>186</sup> CEQA Guidelines, § 15126.4(e).

<sup>187</sup> DEIR, p. 223.

<sup>188</sup> CEQA Guidelines, § 15126.4(e); see also 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar 1994, rev. Mar. 2019), Significant Environmental

The Draft EIR fails to adequately disclose, analyze, or mitigate the Project's growth-inducing impacts. A revised and recirculated EIR must include an adequate discussion of the Project's potential to foster population growth and the related need for housing in the surrounding environment.

**F. The Draft EIR Fails to Adequately Disclose, Analyze, and Mitigate the Project's Potentially Significant Noise Impacts.**

The Draft EIR fails to adequately disclose, analyze, and mitigate the Project's potentially significant direct, indirect, and cumulative noise impacts on sensitive receptors located in the Project's vicinity, particularly during the Project's six-year overlapping construction and operational phases.

Section 3.8 of the DEIR analyzes the Project's operational and construction-related impacts to noise. The DEIR concludes that impacts will be less-than-significant, without mitigation measures, concerning the potential of the Project to expose persons to noise levels in excess of standards,<sup>189</sup> expose people to, or generate, excessive ground-borne noise,<sup>190</sup> permanently increase ambient noise in the vicinity above existing levels,<sup>191</sup> substantially increase noise levels, periodically or temporarily,<sup>192</sup> and cumulatively impact noise.<sup>193</sup> As discussed below and in the Watry Report, these conclusions are not based on substantial evidence. The Draft EIR must be revised and recirculated, with an adequate discussion, analysis, and mitigation of noise impacts.

*i. The DEIR's Analysis of Noise Impacts is Not Supported by Substantial Evidence as No Proper Noise Analysis was Conducted*

As the Watry Report states, the DEIR's section on noise impacts entirely lacks foundation, because the DEIR failed to perform the required studies upon which to make accurate and adequate noise determinations, and the information that is provided is inconsistent and inaccurate. First, the DEIR does not contain a Technical Noise Study, but rather only provides "Noise Worksheets" in Appendix

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Effects, § 13.54, p. 13-57 ("The CEQA Guidelines do not attempt to define the types of projects that might be growth inducing" although they provide a non-exhaustive list of two examples.)

<sup>189</sup> Impact 3.8.4.1, DEIR, pp. 145-146.

<sup>190</sup> Impact 3.8.4.2, DEIR, pp. 146-148.

<sup>191</sup> Impact 3.8.4.3, DEIR, pp. 148-149.

<sup>192</sup> Impact 3.8.4.4, DEIR, pp. 149-150.

<sup>193</sup> DEIR, p. 232.

B.<sup>194</sup> Noise Worksheets contain raw data and not analysis or discussion. As the Watry Report states, “[F]or a project of this size (over 1 million square feet) and duration (6 years in construction), we would have expected a formal Technical Noise Study to have been prepared as a matter of best practice.”<sup>195</sup> Furthermore, the data in Appendix B is not accurately labelled or defined. Rather in “all of the screen shots are labeled, “Existing Noise Levels,” although some are “without Project” while others are “with Project.”<sup>196</sup> Therefore, decision-makers and the public cannot assess what the data purports to demonstrate. The Draft EIR must be revised and recirculated, after a Technical Noise Study has been conducted, supported by data that is accurately and consistently presented.

ii. *The City Failed to Establish the Existing Setting for the Project’s Noise analysis*

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.<sup>197</sup> 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>198</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.

The courts have clearly stated that “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”<sup>199</sup> The City failed to establish the baseline in two aspects:

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<sup>194</sup> Watry Report, pp. 1-2.

<sup>195</sup> Watry Report, pp. 1-2

<sup>196</sup> Watry Report, pp. 1-2.

<sup>197</sup> See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 (“*Fat*”), citing Remy, et al., Guide to the Calif. Environmental Quality Act (1999) p. 165.

<sup>198</sup> CEQA Guidelines § 15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

<sup>199</sup> *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

First, the noise analysis is not based on field measurements taken from the Project site and vicinity. Rather, the DEIR relies solely on modeling. This approach runs contrary to accepted best practices and guidance in the field of acoustics.<sup>200</sup> Caltrans guidance states that field measurements provide the most accurate data concerning existing conditions and that this method should be used when feasible.<sup>201</sup> The Project site is in a developed area which is fully accessible to the City. Field measurements were therefore feasible and required.<sup>202</sup> The City does not support its decision to base its impacts analysis on modeling, rather than field measurements, with any evidence in the record.

Second, the DEIR failed to include in the environmental setting the largest roadway and dominant noise source is the I-5. This issue is clearly demonstrated in Table 3-12, which purports to establish “Existing Roadway Noise Levels” but *entirely excludes the I-5 Freeway*. By failing to include such a dominant noise source in the environmental setting the City fails to establish the existing conditions and violates CEQA.

iii. *The DEIR’s Analysis of Operational Impacts is Not Supported by Substantial Evidence*

The DEIR’s analysis of operational impacts is not supported by substantial evidence. As the Watry Report demonstrates, these impacts are likely to be significantly adverse on sensitive noise receptors in the vicinity of the Project and mitigation is required. The operational noise analysis is flawed for several reasons.

First, the analysis failed to consider all existing noise-sensitive receptors, and, for the receptors that it does identify, the DEIR inaccurately calculate distance from the Project site.<sup>203</sup> The Project is located on the north side of the I-5 but fails to identify any noise-sensitive receptors on that side of the freeway. A review of the Project vicinity in Google Earth clearly identifies two overlooked receptors – the Double Tree Hotel and the Crowne Plaza Hotel & Casino (a.k.a., “Commerce Casino”). The DEIR acknowledges the presence of these receptors elsewhere in the DEIR when analyzing impacts to other resource areas.<sup>204</sup>

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<sup>200</sup> Watry Report, pp. 2-3.

<sup>201</sup> Watry Report, pp. 2-3.

<sup>202</sup> Watry Report, pp. 2-3.

<sup>203</sup> Watry Report, p. 4.

<sup>204</sup> Watry Report, p. 4.

The DEIR does identify the Rosewood neighborhood on the south side of I-5 as a potential receptor but fails to accurately measure the area's distance from the Project site. In the Noise section, the DEIR states that the area is 250 feet from the Project. In the analysis of all other impact areas, the DEIR states that this neighborhood is 222 feet away.<sup>205</sup> Using Google satellite imagery and measuring tools, noise expert Derek Watry establishes that the area is actually 175 from the centerline of Telegraph Avenue, a noise source.<sup>206</sup> The analysis must be revised to include *all* noise-sensitive receptors and their accurate location.

Second, the DEIR *vastly underestimates noise impacts by excluding any analysis of the dominant noise source – traffic from Interstate 5 (“I-5”)*. As the Watry Report states: [t]he discussion of the existing ambient noise environment identifies three sources of traffic noise: Washington Boulevard, Telegraph Road, and the Interstate -5 Freeway (I-5) (DEIR pp. 143-144). The largest roadway and dominant noise source is the I-5. Yet, the DEIR fails to model, measure or analyze traffic noise from I-5. This issue is clearly demonstrated in Table 3-12, which purports to establish “Existing Roadway Noise Levels” but *entirely excludes the I-5 Freeway*. The omission of the dominant noise source in the DEIR’s noise section renders the entire analysis wholly incomplete and inaccurate.”<sup>207</sup>

Third, the noise section failed to consider applicable Caltrans standards for noise exposure, despite CEQA’s mandate to use “applicable standards of other agencies” and despite the fact that road traffic is the dominant noise source of the area<sup>208</sup> As the Watry Report states, “[f]or residential areas, the applicable standard is a peak hour average (Leq) noise level of 67 dBA, and for hotels it is a peak hour average of 72 dBA. The DEIR does not calculate peak hour noise levels, but, had it done so, it would have come to conclusions very similar to those presented in the preceding section based on the City’s Ldn standards”,<sup>209</sup> that is, that the Project will create noise impacts in excess of the applicable standards.

Fourth, the noise section’s analysis of permanent increase in ambient noise is based on data that is inconsistent and inaccurate. It cites to a General Plan Policy that does not exist, and states that noise levels of 84 and 89 dBA “do not exceed 70

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<sup>205</sup> Watry Report, p. 4.

<sup>206</sup> Watry Report, p. 4 and Appendix A.

<sup>207</sup> Watry Report, p. 3.

<sup>208</sup> Watry Report, pp. 7-8.

<sup>209</sup> Watry Report, p. 8.

dba,” which is clearly erroneous.<sup>210</sup> These discrepancies must be corrected in a revised and recirculated DEIR.

Fifth, even if the information was accurate and consistent, which it is not, the analysis and conclusions concerning the potential to create permanent increases in ambient noise levels are not supported by substantial evidence, as it is based on false logic that was rejected by the Federal Transit Administration (“FTA”).<sup>211</sup> The approach used in the DEIR would allow noise impacts to incrementally increase, on a project-by-project basis, increasing impacts to an area that is already significantly impaired by noise. The FTA rejects this approach. As the Watry Report states:

The fallacy of this logic is that it effectively means there is no limit on permanent increases in ambient noise over the long run. In other words, once a project is constructed, it establishes a new, higher level of ambient noise, and future projects would be permitted to increase noise incrementally and indefinitely, by 3.0 to 5.0 dBA.

...

[W]hen the existing noise exposure is 84 dBA Ldn, an increase of even 0.1 dBA would result in a Moderate Impact, and an increase of 0.5 dBA would result in a Severe Impact. At an existing noise exposure of 87 dBA Ldn, the noise level is so high that the area should already be considered to suffer a Moderate Impact even without any additional noise exposure, and an increase of 0.3 dBA would result a Severe Impact.<sup>212</sup>

Sixth, the DEIR’s discussion of cumulative noise impacts is conclusory and inadequate. An EIR is required to analyze cumulative impacts.<sup>213</sup> The CEQA Guidelines, sections 15130(a), (a)(1) state: “(a) An EIR shall discuss cumulative impacts of a project when the project’s incremental effect is cumulatively considerable ... a cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts.”

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<sup>210</sup> Watry Report, p. 9.

<sup>211</sup> Watry Report, pp. 9-10.

<sup>212</sup> Watry Report, p. 9.

<sup>213</sup> CEQA Guidelines, §§ 15065(a)(3) (a cumulatively significant impact must be analyzed as a significant impact in an EIR; 15130 (analysis of cumulative impacts); 15355 (definition of cumulative impacts).

The DEIR analyzes cumulative impacts in Section 4.4 and provides a list related projects.<sup>214</sup> Yet, the DEIR fails to accurately account for the Project's incremental impacts, as compared to this list. This approach violates CEQA. As the Watry Report states:

The Project DEIR makes no attempt to determine if the cumulative noise levels resulting from all of the foreseeable projects presented in DEIR Table 4-1 are significant. Had it done so, it would have found that the cumulative noise levels in the area around the Citadel project are cumulatively significant based on the fact that the existing noise levels presented in the DEIR are already pose a significant impact on noise-sensitive receptors in the area.<sup>215</sup>

The DEIR must be revised and recirculated to include feasible mitigation measures to lessen or avoid these potentially significant impacts, including increasing the existing sound wall and adding another on the Project site.<sup>216</sup>

*iv. Substantial Evidence Shows the Project will Have Significant Noise Impacts*

The DEIR's conclusion that noise impacts will not be significantly adverse is not supported by substantial evidence. Updated modelling provided in the Watry Report and shows that the Project will result in significant noise impacts.<sup>217</sup>

"The City's General Plan establishes two levels of Noise and Land Use Compatibility Standards: a Desired Maximum and a Maximum Acceptable. For Low-Density and Medium-Density Residential areas, such as in the Rosewood area bounded by I-5, Boris Avenue, Jillson Street, and Commerce Way, the Maximum Acceptable is 65 dBA Ldn."<sup>218</sup> For the analysis, Mr. Watry inputted the correct parameters for the Rosewood neighborhood, "175 from the centerline of Telegraph Road to the nearest R1 residential receiver and 1,920 feet is the farthest distance" and display the results graphically.<sup>219</sup> His analysis shows that the Project will create significant noise impacts for the Rosewood area:

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<sup>214</sup> DEIR, pp. 226-227, 232.

<sup>215</sup> Watry Report, pp. 10-11.

<sup>216</sup> Watry Report, pp. 11.

<sup>217</sup> Watry Report, pp. 4-7.

<sup>218</sup> Watry Report, pp. 4-5.

<sup>219</sup> Watry Report, pp. 5, 7.

“The analysis presented above already indicates that the noise levels in the Rosewood area due to Telegraph Road alone will be over the City of Commerce’s Maximum Allowable limit and will create adverse noise impacts at many residences”<sup>220</sup>

It should be noted that this analysis is only provided for noise from the Telegraph Road to the Rosewood area. As previously discussed, the DEIR failed to model impacts to the hotels and from the I-5.<sup>221</sup> This information must be included in a revised and recirculated EIR.

v. *The DEIR’s Analysis of Construction-Related Impacts is Not Supported by Substantial Evidence*

Construction impacts were discussed in Impact 3.3.4.2 (potential to expose people to ground-borne noise, such as through pile-driving) and Impact 3.8.4.4 (potential to cause a temporary or permanent increase in ambient noise levels). The analysis of construction impacts is flawed for several reasons, as discussed in detail in the Watry Report.

First, as discussed above with operational impacts, here again the “DEIR fails to account for all sensitive receptors, neglecting the impacts to existing receptors on the north side of the I-5 freeway (the Double Tree and Crowne Plaza hotels) where the Project site is located. Therefore, the DEIR lacks a basis to conclude that it has considered construction impacts for all noise-sensitive receptors.”<sup>222</sup>

Second, the DEIR does not quantify the type of construction equipment that will be used or for what duration. Rather, “the DEIR simply provides a laundry list of common construction activities that *might* be used” for “excavation, grading, demolition, drilling, trenching, earth movement, vehicle travel to and from the project site, and possibly pile driving.”<sup>223</sup> Absent facts and evidence, the conclusion that impacts will not be significant is a conclusory statement, a bare assertion, and is not supported by the evidence.<sup>224</sup> Moreover, detailed information about

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<sup>220</sup> Watry Report, p. 6.

<sup>221</sup> Watry Report, pp. 6-7.

<sup>222</sup> Watry Report, p. 12.

<sup>223</sup> See DEIR, p. 149; Watry Report, p. 12.

<sup>224</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404–405; *Concerned Citizens of 405 Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986)

construction equipment is available in DEIR Appendix A – Air Quality Worksheets , but the City failed to use it.<sup>225</sup>

The DEIR then attempts to justify this lack of analysis by dismissing construction impacts as merely “short-term” and “temporary.”<sup>226</sup> This approach violates CEQA and the plain language of the impact analysis. CEQA does not exclude analysis of construction impacts, which are by their nature, temporary. In addition, the Project has a six-year construction schedule, which is a significant period of time. This approach is also directly contrary to the plain language of the Impact 3.8.4.4, which expressly requires an EIR to analyze “temporary or periodic increase in ambient noise levels.”<sup>227</sup> In this way, the DEIR creates its own “Catch-22” concluding that the required analysis of temporary impacts is not required, because they will be temporary.

Although impacts from construction noise are likely to significant, the DEIR does not include any feasible mitigation measures to lessen or avoid these impacts. The Watry Report includes several suggested mitigation measures in Appendix B. These measures are suggested actions but are not a comprehensive list nor do they contain all possible components. The proposed measures should be reviewed, analyzed, and expanded upon in a revised and recirculated EIR. These measures include limiting construction days and hours; implementing noise reduction measures on construction equipment; notifying the public prior to extreme noise events; and drafting and implementing a comprehensive construction noise management plan.<sup>228</sup>

For the above-stated reasons, the DEIR’s analysis of noise fails to adequately disclose, analyze, and mitigate impacts to noise sensitive receptors from the Project’s construction or operation. The DEIR’s findings and conclusions are not supported by substantial evidence, thwarting CEQA’s informational and procedural requirements. The DEIR must be revised and recirculated consistent with the comments and the Watry Report.

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42 Cal.3d 929, 935; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841–842; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

<sup>225</sup> Watry Report, p. 12.

<sup>226</sup> Watry Report, pp. 12-13; DEIR, p. 146, 149.

<sup>227</sup> DEIR, p. 149.

<sup>228</sup> Watry Report, pp. 15-17.

**G. The DEIR Fails to Disclose, Analyze, and Mitigate the Project's Impacts to Transportation and Circulation**

The DEIR fails to properly disclose, analyze, and mitigate the Project's impacts to transportation and circulation (collectively, "transportation"). The DEIR must be revised and recirculated to correct these deficiencies.

In the DEIR the City acknowledges significant traffic impacts to ten signalized intersection as a result of the Project's operations.<sup>229</sup> The DEIR then present the "mitigation program for the project" which includes three major components: implementation of a "Transportation Demand Management (TDM) program" for the project site to promote peak period trip reduction, "Transportation Systems Management (TSM) improvements" and "specific intersection improvements", including physical mitigations and signal phasing enhancements.<sup>230</sup> As described below, this proposed "mitigation plan" violates CEQA for a number of reasons.

*i. The DEIR Fails to Adequately Identify and Define the Mitigation Measures*

The DEIR fails to clearly identify and define the applicable mitigation measures for transportation impacts. This lack of clarity violates CEQA's information and disclosure requirements.<sup>231</sup>

Under the section "mitigation of potential impacts" for Impact 3.11.4.1 discussed above, the DEIR lists certain actions. However, unlike the mitigation measures articulated in the DEIR concerning air quality, these actions are not assigned numbers (i.e., MM-1 et seq.) There is no explanation given for this internal inconsistency. Furthermore, Table 3: *Summary of Impacts*, lists these actions but also without numbering them, and refers to them collectively as a "mitigation program."<sup>232</sup> This language and internal inconsistency lends itself to the conclusion that the actions are not mitigation measures as defined under CEQA, but rather Project features.

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<sup>229</sup> DEIR, p. 198.

<sup>230</sup> DEIR, p. 198.

<sup>231</sup> CEQA Guidelines, § 15121 (an EIR is an informational document); 15140 (EIR must be written in plain language); Pub. Resources Code, § 21061 (purpose of an EIR is to inform the public of significant impacts and mitigation measures).

<sup>232</sup> DEIR, pp. 28-29.

The distinction between project features and mitigation measures is critical under CEQA. As discussed above, the courts have imposed several parameters for the adequacy of mitigation measures. No such parameters apply to project “features.”

The courts have invalidated EIRs for improperly “compressing” the analysis of a project feature and mitigation measures. In *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655–656, the Court invalidated an EIR promulgated by Caltrans where mitigation measures to protect redwood trees during highway construction were improperly characterized as project features, and thus were not subject to the parameters stated above. The court stated:

Caltrans [compounds its errors by] incorporating the proposed mitigation measures into its description of the project and then concluding that any potential impacts from the project will be less than significant. As the trial court held, the “avoidance, minimization and/or mitigation measures,” as they are characterized in the EIR, are not “part of the project.” They are mitigation measures designed to reduce or eliminate [adverse environmental impacts]. By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA.<sup>233</sup>

That an EIR contains such a “structural deficiency” is particularly impermissible when the agency is made aware of the issue during the public review and comment period.<sup>234</sup>

The DEIR improperly compresses its analysis of Project features with enforceable mitigation measures. A revised DEIR must clearly identify and define which (if any) mitigation measures apply to this impact.

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<sup>233</sup> *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655–656.

<sup>234</sup> *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 657.

- ii. *The “Traffic Demand Management Plan” is Not Supported by substantial evidence and is Vague, Unenforceable, and of Uncertain Efficacy*

Assuming the “mitigation program” contain mitigation measures within the meaning of CEQA, they are vague, unenforceable, and of uncertain efficacy. The DEIR must correct these errors in a revised and recirculated EIR.

The Traffic Demand Management Plan (“TDM”) presented in the DEIR includes “a set of strategies proposed for the project designed to reduce peak hour vehicular traffic to and from the project site” that are “subject to review and approval by the City”. These strategies “could include, but are not necessarily limited to” Transportation Information Center, Educational Programs, Project Design Features to Promote Bicycling and Walking and a few more “strategies”.<sup>235</sup> The City then argues that the TDM is assumed to achieve 10% trip reduction, providing the following explanation:

“At places that had the most comprehensive programs, including both economic incentives (e.g., transit passes) and support services, the programs resulted in an average 24% reduction in commuter vehicles. Thus, as an achievable but conservative estimate, an overall TDM trip reduction credit of ten percent was assumed on the retail portion of the project”<sup>236</sup>

This conclusion violates CEQA and is not supported by substantial evidence for a number of reasons.

First, as Smith Engineering notes, “[t]he TDM measures as proposed in the DEIR are vaguely described and lack any performance standard or enforcement measure to guarantee they will be effective in reducing vehicle trips.” This violates CEQA: CEQA prohibit public agencies from relying on mitigation measures of uncertain efficacy or feasibility.<sup>237</sup> “[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.”<sup>238</sup> Mitigation measures that are vague or so undefined that it is impossible to evaluate

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<sup>235</sup> DEIR, pp. 198-200.

<sup>236</sup> DEIR, p. 200.

<sup>237</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

<sup>238</sup> CEQA Guidelines, § 15126.4(a)(2).

their effectiveness are legally inadequate.<sup>239</sup> This is exactly the case with the proposed TDM.

It should be noted here that according to the DEIR “A formal TDM Program would be submitted for the approval of the City Director of Public Works prior to issuance of the Certificate of Occupancy for the retail portion of the project”<sup>240</sup> That means that the program is *improperly deferred until after the project is built*. Under CEQA, the lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards capable of mitigating the project’s impacts to a less than significant level.<sup>241</sup> This was not done here.

Second, the effectiveness of this measure is not supported by substantial evidence. Just because the DEIR assumes a lower reduction percentage than the “most comprehensive” TDMs there are, does not make the assumption of 10% reduction “conservative” or supported by the evidence in any way.

Moreover, as the Smith Engineering Report explains, because the site already has what the DEIR labels as a “TDM program” that operates shuttles bringing consumers to the site, one way the DEIR could support its assumption on TDM effectiveness is by showing the data on the *existing* TDM effectiveness. The DEIR failed to do so:

(The DEIR) “should compare existing traffic counts at all the access/egress points to their theoretical traffic generation for the existing facility estimated per the accepted rates provided in The Institute of Transportation Engineers (ITE) Trip Generation, 10th Edition. Such a comparison can show how effective the existing TDM program on the site is and can support claims for potential future reduction. This was not done.”<sup>242</sup>

Not only is the 10% reduction assumption not supported by the evidence, it is contradicted by the evidence. As the Smith Engineering Report explains, this assumption “ignores the fact that travelers to the specific uses proposed in the

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<sup>239</sup> *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

<sup>240</sup> DEIR, p. 196.

<sup>241</sup> *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

<sup>242</sup> Smith Engineering Report, p. 2.

Project are generally non-responsive to TDM initiatives due to the sporadic nature of their trips.”<sup>243</sup> As the Report explains, TDM measures primarily affect travel by employees on such projects. However, employee trips comprise a small component of total trips and are usually conducted in the off-peak hours, thus the impacts from TDM measures used by employees would be minimal.<sup>244</sup>

The DEIR must be revised to include a TDM plan that supports its reduction assumptions with substantial evidence, and that includes binding, measurable and enforceable measures.

- iii. *The “Transportation Systems Management (TSM) improvement” plan effectiveness and funding are not supported by substantial evidence and is Vague, Unenforceable, and of Uncertain Efficacy*

The “Transportation Systems Management (TSM)” improvements proposed in the DEIR include three measures: Signal Controller Upgrades, CCTV Cameras and System Loops, which the DEIR claims were “shown to increase the efficiency of traffic signals and result in capacity increases of 7 to 20% along coordinated corridors.” Here, again, the City argues that it is making a “conservative” assumption by determining that “TSM improvements could improve traffic operations and increase intersection capacity by approximately seven percent along a corridor.”<sup>245</sup>

This proposed “mitigation measure” violates CEQA for a number of reasons: First, like the TDM plan, it is vague, unenforceable and lacks specific enforcement measures.

Second, like with the TDM plan, the assumptions behind its effectiveness are not supported by the evidence. As the Smith Engineering Report explains, “the DEIR fails to establish any direct link between TSM actions and increased capacity at the specific 12 intersections where significant traffic impacts have been identified. Hence, the subject intersections cannot be assumed to have been mitigated by a generalized TSM program.”<sup>246</sup> Just because the DEIR assumes a

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<sup>243</sup> Smith Engineering Report, p. 2.

<sup>244</sup> Smith Engineering Report, p. 2.

<sup>245</sup> DEIR, p. 201.

<sup>246</sup> Smith Engineering Report, p. 3.

relatively low percentage of capacity increase does not support the conclusion that this increase, or any increase at all, will be achieved.

Third, the City's assumptions regarding the effectiveness of the TSM improvements rely on measures that are not (and cannot) be part of the DEIR and the Project's conditions: The DEIR attributes 7% capacity increase to TSM improvements. This is based, as stated explicitly by the DEIR, "on the traffic signals *in the study area boundaries* and along the key corridors serving the study area" *only*.<sup>247</sup> However, Smith Engineering reviewed the TIA, which is supposed to support this assumed capacity increase with evidence, and found that the TIA in fact analyzed the capacity increase that will be achieved by a *city-wide* TSM plan.<sup>248</sup> Thus, the DEIR assumptions regarding the capacity increase are not supported by the evidence provided in the TIA.

Finally, the City failed to show that funding for the project will be available and require any kind of commitment from the Applicant, thus failing to show it is feasible. Regarding the cost and funding of the TSM measures, that DEIR vaguely states the following:

TSM contributions by the project would help pay for traffic signal system enhancements in the study area. The City should consider a program that allows a Traffic Impact Fee to be paid by new development to pay for TSM improvements in the short-term and new access routes to/from the study area in the long-term.<sup>249</sup>

This vague statement says nothing about the projected cost of the TSM measures and fails to require any commitment from the applicant to cover it. Moreover, Smith Engineering's review of the TIA found that in fact such funding is not guaranteed in any way. As the Smith Engineering Report explains, the DEIR Appendix 2 proposes that the cost will be shared between the Project and the 18 other development projects assumed to be in place in the 2025 scenario. This means the 18 other projects would be responsible for about half the cost. This, however, also means that there is not guarantee that funding will be even available:

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<sup>247</sup> DEIR, p. 201.

<sup>248</sup> Smith Engineering Report, p. 3.

<sup>249</sup> DEIR, p. 196.

One problem with this is that few of the 18 other projects are of a scale such that they are likely to be found to have traffic impacts under the City's criteria. If they are not found to have impact, they cannot be assessed mitigation fees. Appendix 2 also suggests that the City adopt a Traffic Impact Fee based on a uniform rate per pm peak hour trip generated. The problem with this is that unless the fee program is already established and provides a clear funding mechanism to implement specific improvements in a timely way, the project's impacts cannot be said to be mitigated.<sup>250</sup>

The DEIR must be revised to include a TSM plan that supports its reduction assumptions with substantial evidence, and to show funding for the plan is available and binding on the Applicant.

*iv. The proposed specific intersection improvements measure is not Feasible and Violates CEQA*

Under the headline "Potential Physical Improvement Measures" the DEIR states that "[t]he following is a description of the *feasible* proposed intersection mitigation measures",<sup>251</sup> and follows with proposed physical improvements in four intersection which, according to the DEIR, will remain impacted even after the implementation of the TDM and TSM measures. Despite the fact the DEIR explicitly calls these measures "feasible", the text of the proposed improvements itself includes the following statement with regard to *each* proposed improvement:

Should this improvement be determined infeasible during the design process, the impact at the intersection would remain and be considered significant and unavoidable.<sup>252</sup>

The same statement is repeated further along in the DEIR, concluding that "if the specific physical intersection improvements are determined to be infeasible during the design process" four study intersections would remain significantly impacted after mitigation.<sup>253</sup> This conclusion violates CEQA.

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<sup>250</sup> Smith Engineering Report, p. 4.

<sup>251</sup> DEIR, pp. 202-203. Emphasis added.

<sup>252</sup> DEIR, pp. 202-203.

<sup>253</sup> DEIR p. 204.

CEQA requires that an EIR will include feasible and enforceable mitigation.<sup>254</sup> For one thing, it means the City must do the work required to thoroughly evaluate the feasibility of a mitigation measure and any issues that may hinder its application. Here, as the Smith Engineering Report states, the measures are described “at conceptual level” only and no real work was done to assess their feasibility. Only if, after taking all the necessary steps, the city determines no feasible measure exists, it may adopt a statement of overriding consideration. As currently proposed, this measure violate CEQA.

#### **H. The Draft EIR Fails to Analyze a Reasonable Range of Alternatives**

The failure to analyze any alternatives that would avoid or substantially lessen the Project’s environmental effects to air quality, GHG, and transportation and its selection of Alternative 2 as the “environmentally superior alternative” is not supported by substantial evidence. The Draft EIR must be revised and recirculated, with an analysis of a reasonable range of alternatives.<sup>255</sup>

One of the most substantive aspects of CEQA is section 21002 of the statute, which forbids agencies from approving projects with significant adverse impacts when feasible alternatives can substantially lessen or avoid such impacts.<sup>256</sup> The statute states, “[t]he purpose of an [EIR] is to identify the significant effects of a project, to identify *alternatives* to the project, and to indicate the way in which those effects can be mitigated or avoided.”<sup>257</sup> Therefore, the Draft EIR must consider a “reasonable range” of alternatives, “which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the

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<sup>254</sup> CEQA Guidelines, § 15126.4.

<sup>255</sup> See generally, Pub. Resources Code, §§ 21002; 21002.1; CEQA Guidelines, § 15126.6.

<sup>256</sup> *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41; *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 440-41; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 711, 730-31; Pub. Resources Code, § 21081.

<sup>257</sup> Pub. Resources Code, § 21002.1(a) (emphasis added); see also Pub. Resources Code, §§ 21002 (CEQA’s substantive mandate includes an analysis of alternatives that are capable of avoiding or lessening impacts); 21061 (purpose of an EIR is provide public agencies and the public with “detailed information about the project’s effects,” “to list ways in which [these effects] might be minimized;” and to provide “alternatives to such a project”); CEQA Guidelines, § 15126.6(a) (requirements of an alternatives analysis).

significant effects of the project.”<sup>258</sup> An inadequate alternatives analysis can invalidate an EIR.<sup>259</sup>

The Draft EIR acknowledges that the Project will result in significant and unavoidable impacts to air quality, GHG, and transportation. *Yet, every single proposed alternative would have the same (or greater) impacts as the proposed Project* with regard to these impact areas.<sup>260</sup> A “reasonable range” of alternatives must include an alternative, such as a “reduced project” alternative, which would lessen or avoid these impacts.

Aside from the mandatory “No Project” alternative, the Draft EIR describes two alternatives. The first alternative is the “Residential Development Alternative (Area 1). This alternative would involve the construction of a residential development within the northeastern portion of Area 1 where one of the hotels is proposed. The residential development would consist of six levels with 96 market rate units.”<sup>261</sup> DEIR, Table 5-1 compares this alternative’s impacts to the project. In all impact areas, this alternative would have the “same” or “greater than” project impacts.<sup>262</sup>

The second alternative is the “Institutional/Office Use Alternative (Area 3). This alternative would involve the construction of a 70,000 square-foot, four-level office building. The precise occupancy is not known though it could be general office or an institutional use.”<sup>263</sup> This office building would be located on Area 3, Pad 5, where the Project currently places restaurants.<sup>264</sup> The DEIR states this alternative “would result in *similar impacts on the environment* than the proposed project for all resource areas considered in the analysis.”<sup>265</sup> Confusingly, Table 5-1 then indicates that this alternative would have less impacts to aesthetics than the

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<sup>258</sup> CEQA Guidelines, § 15126.6(a) (emphasis added);

<sup>259</sup> *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 937 (“the EIR did not meaningfully address feasible alternatives or mitigation measures ... [and] the decision to forego discussion of these topics cannot be considered reasonable.”); *id.* at p. 942 (finding the lead agency abused its discretion when it certified an inadequate EIR); *Washoe Meadows Community v. Department of Parks and Recreation* (2017) 17 Cal.App.5th 277, 287.

<sup>260</sup> Draft EIR, p. 228 (Table 5-1, *Comparison of Project Alternative Impacts to Project Impacts*).

<sup>261</sup> DEIR, p. 239.

<sup>262</sup> DEIR, pp. 246-247 (Table 5-1).

<sup>263</sup> DEIR, p. 245.

<sup>264</sup> DEIR, p. 244.

<sup>265</sup> DEIR, p. 245 (emphasis added).

Project. Thus, the DEIR designates Alternative 2 as the “environmentally superior alternative.”<sup>266</sup>

This conclusion is not supported by substantial evidence. The discussion of Alternative 2’s aesthetic impacts contains no facts, evidence or analysis supporting the City’s conclusion that substituting several restaurants on Pad 5 in Area 3 with relatively tall office building would lessen aesthetic impacts.<sup>267</sup> Furthermore, the DEIR does identify significant and unavoidable impacts to GHG, air quality, and transportation. This “environmentally superior alternative” would therefore have the same impacts as the Project with regard to those impact areas.

Under similar circumstances, courts have invalidated EIRs. In *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413 (“*CNFF*”), the EIR identified a significant impact to GHG from mobile sources. The court stated that the EIR was “deficient because it does not discuss an alternative which could significantly reduce total vehicle miles traveled” and therefore reduce GHG.<sup>268</sup> The EIR even included two “transit-oriented” alternatives. Even so, the EIR was inadequate because there was no substantial evidence that GHG reductions were achievable under either alternative.<sup>269</sup> Here, the Project’s Draft EIR is even more deficient than in *CNFF*, as this Draft EIR does not include a single alternative which even purports to reduce the identified significant impacts to GHG, air quality, or transportation.

The Draft EIR fails to analyze a single alternative that would avoid or lessen the significant impacts to GHG, air quality, and transportation, and its selection of Alternative 2 as the “environmentally superior alternative” is not supported by substantial evidence. The Draft EIR must be revised, recirculated and include an analysis of a reasonable range of alternatives.<sup>270</sup>

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<sup>266</sup> DEIR, p. 246.

<sup>267</sup> DEIR, p. 244.

<sup>268</sup> *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 436.

<sup>269</sup> *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 436.

<sup>270</sup> See generally, Pub. Resources Code, §§ 21002; 21002.1; CEQA Guidelines, § 15126.6.

#### IV. CONCLUSION

An EIR “protects not only the environment but also informed self-government” by informing the public and its responsible officials of the environmental consequences of government decisions before they are made.<sup>271</sup> The DEIR fails to fulfill CEQA’s informational and procedural requirements, in multiple ways, across a long list of impact areas. As such, the extent of the Project’s adverse environmental impacts is hidden from public view. Nor can the City rely on the document to determine if the Project’s benefits outweigh its environmental impacts, if those impacts have been lessened or avoided to the extent feasible, and if there is an environmentally-superior alternative which could be adopted that fulfills the Project’s objectives. The DEIR must be revised and recirculated, consistent with CEQA’s Legislative intent and substantive requirements.

Thank you for considering our comments.

Sincerely,



Sara Dudley

SFD:lj1

cc: Lena Shumway, City Clerk, [lshumway@ci.commerce.ca.us](mailto:lshumway@ci.commerce.ca.us)

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<sup>271</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; see also e.g., Pub. Resources Code, § 21061 (“The purpose of an [EIR] is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”)