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Via U.S. Mail and Email

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Via Email Only

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Re: Comments on the Del Hombre Apartment Project Draft Environmental Impact Report (SCH # 2018102067)

Dear Ms. Napier, Mr. Kopchik and Ms. Cruz:

We are writing on behalf of Contra Costa Residents for Responsible Development regarding the September 2019 Draft Environmental Impact Report ("DEIR") for the Del Hombre Apartment Project. The Project, proposed by the Hanover Company, involves developing a 2.4-acre site as a 284-unit apartment building. The Project is located at 112 Roble Road, approximately 0.12 miles from the Pleasant Hill BART station. The Project requires the demolition of two existing residential structures and the removal of 161 trees.

According to the DEIR, the Project will require the following approvals from Contra Costa County ("County"): (1) EIR Certification; (2) a General Plan Amendment (3) Rezoning; (4) a Final Development Plan; (5) a Vesting Tentative

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Map; (6) Variances to lots size and setback from a public road; (7) a tree removal permit; (8) an exception to drainage requirements.

As explained in these comments, the DEIR does not comply with the requirements of the California Environmental Quality Act (“CEQA”) in several respects.

First, the DEIR fails to properly identify, analyze, and mitigate impacts from hazardous materials at the Project site. The DEIR fails to identify elevated concentrations of dieldrin, chlordane, and arsenic found at surface soils as a significant impact and further fails to provide mitigation measures to protect workers and neighboring residents.

Second, the DEIR fails to properly analyze and mitigate impacts on air quality. The DEIR underestimates the Project’s construction emissions and fails to provide feasible mitigation to the air quality impacts it deems significant. As a result, it lacks substantial evidence for its conclusion that air quality impacts are less than significant.

Third, the DEIR fails to support its traffic analysis with substantial evidence and underestimates the Project’s significant traffic impacts.

In addition, the Project exceeds density thresholds set in the Contra Costa County General Plan (“General Plan”) and misuses the State Density Bonus Law to avoid providing additional low-income units.

We have reviewed the DEIR and its technical appendices with the assistance of our technical consultant, air quality and hazardous resources expert James J.J. Clark, PhD, and with the assistance of traffic and transportation expert Dan Smith of Smith Engineering & Management. Dr. Clark and Mr. Smith’s comments and curriculum vitae are attached hereto as Exhibit A and Exhibit B, respectively, and are fully incorporated herein and submitted to the City herewith. The attached expert comments require separate responses under CEQA. We reserve the right to

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supplement these comments at a later date, and at any later proceedings related to this Project.¹

I. STATEMENT OF INTEREST

Contra Costa Residents for Responsible Development (“Contra Costa Residents”) is an unincorporated association of individuals and labor unions that may be adversely affected by the potential environmental impacts of the Project.

Individual members of Contra Costa Residents and the affiliated unions live, work, recreate and raise their families in Contra Costa County. These members would be directly affected by the Project’s environmental and health and safety impacts. Members of Contra Costa Residents may also work on the Project itself. Accordingly, these individuals will be first in line to be exposed to any health and safety hazards created by the Project. Contra Costa Residents 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 it less desirable for businesses to locate and people to live there.

II. THE DEIR IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND FAILS TO INCORPORATE ALL FEASIBLE MITIGATION MEASURES TO REDUCE IMPACTS TO LESS THAN SIGNIFICANT

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances).² The EIR is the very heart of CEQA.³ “The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”⁴

¹ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

² See, e.g., PRC § 21100.

³ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

⁴ *Comtys. for a Better Env’ v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBE v. CRA*”).
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CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁵ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR “protects not only the environment but also informed self-government.”⁶ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁷

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.⁸ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”⁹ If the project will have a significant effect on the environment, the agency may approve the project 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.”¹⁰

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*”¹¹ Moreover, “whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.”¹²

⁵ 14 CCR § 15002(a)(1).

⁶ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

⁷ *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁸ 14 CCR§ 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

⁹ 14 CCR §15002(a)(2).

¹⁰ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹¹ *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

¹² *Sierra Club v. Cty. of Fresno* (2018) 6 Cal. 5th 502, 514, 431 P.3d 1151, 1160.

A. The DEIR Fails to Identify, Analyze and Mitigate the Project's Impacts from Hazardous Materials in Soils at the Project Site

CEQA requires lead agencies to consider whether a project would “create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials.”¹³ Likewise, CEQA requires lead agencies to determine whether projects create “a significant hazard to the public or the environment through reasonably foreseeable upset or accident conditions involving the release of hazardous materials into the environment.”¹⁴

The DEIR states that there are no significant impacts due to the possible release of hazardous materials from contaminated soils at the Project site.¹⁵ But soil samples from the Phase II Environmental Site Assessment (“ESA”) indicate that toxins are present in the soil above residential screening levels. Grading during construction could thus release toxic chemicals and expose workers and neighbors. As discussed below, the DEIR must therefore be revised to identify this significant impact. In addition, more testing is required to determine the extent of the impact. Finally, the DEIR must be revised to include mitigation measures that protect workers and neighboring residents from contaminated soils.

1. The DEIR Fails to Inform the Public of Specific Findings of Contaminated Soil from the May 2018 Phase II ESA

The DEIR states that the Phase II ESA detected concentrations of metallic analytes and organochlorine pesticides in excess of respective residential screening levels in the upper one foot of soil on the project site.¹⁶ However, the DEIR fails to specify which pesticides and metallic analytes were present in surface soils. Moreover, the DEIR fails to identify the presence of these toxins as a significant impact, even though the toxins were present in levels that exceed screening levels. Even worse, Appendix F of the DEIR includes the soil sampling report from August 2018, when samples showed concentrations of toxins below screening levels.¹⁷ But Appendix F of the DEIR excludes the surface soil sampling report from May 2018,

¹³ CEQA Guidelines, Appendix G, Section IX: Hazards and Hazardous Materials.

¹⁴ *Id.*

¹⁵ DEIR, 3.8-17.

¹⁶ DEIR, 3.8-5.

¹⁷ DEIR, Appendix F.

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when samples showed concentrations of toxins *above* screening levels.¹⁸ This cherry-picking of data misleads the public and violates CEQA's requirement that the DEIR serve as an informational document.

Soil samples conducted in May 2018 as part of the limited Phase II ESA found the following:

- Dieldrin concentration of 53.4 micrograms per kilogram, which is in excess of its corresponding residential Environmental Screening Level ("ESL") and Regional Screening Level ("RSL");¹⁹
- Chlordane at a concentration of 1,000 micrograms per kilogram, which exceeds the corresponding residential ESL and the [California Department of Toxic Substance Control] DTSC screening level;²⁰
- Arsenic at a concentration of 13.1 milligrams per kilogram, which is in excess of both the respective residential screening levels and the expected range of background concentrations observed in the San Francisco Bay Area.²¹

Based on these findings, ENGEO, the company conducting the soil sampling, recommended that the soil "be managed and/or disposed of appropriately."²² Despite this recommendation, the DEIR includes no mitigation measures for handling and removing contaminated soils, as discussed in more detail below.

2. The DEIR Lacks Substantial Evidence to Conclude Contaminated Soils Pose No Significant Impact

In addition to omitting the findings described above, the limited Phase II ESA failed to determine the magnitude of the impact. Thus, the DEIR lacks substantial evidence to conclude there is no impact. As described in Dr. Clark's comments, "an objective of sampling at a site is to determine the general extent of contamination in order to assess immediate potential threats, scope of removal and

¹⁸ *Id.*; See Limited Phase II Environmental Site Assessment for Del Hombre, from ENGEO, Inc. to Kristen Gates (May 24, 2018), included as Attachment C.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

remediation needs.”²³ Indeed, sampling must determine both the vertical *and* lateral extent of the contamination. In other words, sampling should measure how deep the plume of contamination goes as well as how wide the plume of contamination is.

Workers who grade and remove the soil will inhale and handle contaminated soils and thus are at risk of exposure. In addition, the DEIR states that “[t]he project site is surrounded by existing residences to the north, east, and south of the project site.”²⁴ Moreover, these residences are multi-family apartment buildings, which means that many people reside near the Project site.²⁵ Indeed, the closest of these residences is only 20 feet away from Project construction.²⁶ Neighboring residents could thus be exposed to chemical-laden dust when it is disturbed during grading or when exposed soil is carried by wind. To avoid those impacts, the magnitude of the hazards must be determined and proper mitigation must be required.

Here, the soil sampling was deficient in two respects. First, the Phase II ESA performed for the DEIR used the 2008 Interim Guidance for Sampling Agricultural Properties, Third Revision (“2008 Guidance”) to determine how many soil samples to take.²⁷ In line with the 2008 Guidance, the Phase II ESA took 4 samples at the Project site. However, the 2008 Guidance also suggests taking composite samples and field duplicates. Composite samples are multiple samples combined together to show health impacts if a person is exposed at multiple points. Field duplicates ensure that sampling results are confirmed. Both are necessary to give a broader view of exposure and ensure samples are accurate. But, as stated in Dr. Clark’s comments, “[n]either the May, 2018 nor the August, 2018 sampling events performed by ENGEIO included field duplicate samples or composite samples.”²⁸

Second, while the follow-up sampling from August 2018 attempted to characterize the *vertical* extent of the contamination, it failed to characterize the *lateral* extent of the contamination. Because the May 2018 sampling found toxins at levels in excess of screening thresholds, more testing is necessary to determine the

²³ Clark Comments, 3.

²⁴ DEIR, 3.2-14.

²⁵ *Id.* at 3.2-41.

²⁶ *Id.* at 3.2-14.

²⁷ Limited Phase II Environmental Site Assessment for Del Hombro, from ENGEIO, Inc. to Kristen Gates (May 24, 2018), included as Attachment C.

²⁸ Clark Comments, 4.

horizontal area of the contamination. How large an area of soil surface is contaminated with toxins? The DEIR does not provide this information. CEQA requires that agency conclusions be backed by substantial evidence. By failing to determine the lateral extent of the contamination, the agency's conclusion that the hazards pose no significant impact is not supported by substantial evidence.

This failure to measure the lateral extent of the contamination is especially problematic for chlordane. As stated in Dr. Clark's comments "chlordane does not leach significantly and will remain in the top 20 centimeters (8 inches) of most soils and will stay at this level for more than 20 years."²⁹ Thus, if chlordane is present in surface soils, it is not likely to be found at depths. And the presence of chlordane in surface soils can pose a significant health impact. As Dr. Clark explains, "[s]ince the degradation of chlordane in the environment is so slow, if chlordane impacted soils at the Site are disturbed and released to the surrounding community the health impacts could last for 2 more decades."³⁰

In addition, because soil samples showed concentrations of toxins above residential screening levels, the DEIR should conduct a health risk assessment for those chemicals. The 2008 Guidance (used in the Phase II ESA) states that:

All detected pesticides and any onsite metals above background ***should be evaluated as COPCs in a human health risk assessment*** as described in the DTSC [Preliminary Endangerment Assessment] PEA Guidance Manual or in comparison to CHHSLs. In the initial screening analysis, the highest concentration of each detected pesticide and metal above background must be used as the exposure point concentration in the risk assessment.³¹

However, despite this guidance, neither the Phase II ESA nor the DEIR conducted a health risk assessment to determine the public health implications of elevated concentrations of toxins at the Project site.

Because the DEIR fails to inform the public about the lateral extent of contaminants found and fails to perform a health risk assessment, the DEIR lacks

²⁹ ATSDR. 2018. Toxicological Profile for Chlordane. February 2018.
<https://www.atsdr.cdc.gov/ToxProfiles/tp31.pdf>

³⁰ Clark Comments, 5.

³¹ DTSC. 2008. Sampling Agricultural Fields 2008. Section 5.3 Human Health Risk Assessment, available at <https://dtsc.ca.gov/wp-content/uploads/sites/31/2018/09/Ag-Guidance-Rev-3-August-7-2008-2.pdf>.
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substantial evidence to conclude there is no significant impact from the release of hazardous materials at the Project site. More testing is necessary to fully identify and analyze the potentially significant impact of elevated levels of dieldrin, chlordane, and arsenic.

As demonstrated below, the evidence provided in the Phase II ESA suggests that soil contaminants at the Project site *do* pose a significant impact.

3. Substantial Evidence shows that Contaminants in Soils Pose a Significant Health Risk

As stated above, the 2008 Agricultural Guidance states all pesticides and metals detected above screening levels should be evaluated in a health risk assessment as described in the DTSC'S PEA Manual. The PEA Manual provides a calculation to preliminarily determine health risk:³²

The basic screening risk approach is to calculate the estimated risk or hazard posed by the maximum concentration of a chemical detected in each medium (soil, water, air) using an established human health-risk-based residential screening level/concentration as a comparator, that is, the USEPA Regional Screening Level (RSL)³³ for residential land use, modified as necessary by DTSC in HHRA Note 3³⁴. The basic screening risk equations for each medium (soil, water, air) are as follows.

For a carcinogenic chemical: The screening concentration is based on a target cancer risk of one-in-a-million (10^{-6}).

$$\frac{\text{Maximum concentration}}{\text{Screening concentration}} \times 10^{-6} = \text{Cancer Risk}$$

For a non-carcinogenic chemical: The screening concentration is based on a target Hazard Quotient (HQ) of one.

$$\frac{\text{Maximum concentration}}{\text{Screening concentration}} = \text{Hazard Quotient}$$

The PEA Manual also states how to interpret the above calculation: if the cancer risk value is above 10^{-6} or the Hazard Quotient is greater than 1, then:

the presence of contamination ... may pose a significant threat to human health. Exceptions will generally include sites with elevated background

³² PEA Manual at p. 34.
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concentrations, sites where other agency criteria are more stringent, and sites with specific circumstances that allow for a risk management decision to increase the acceptable screening levels.³³

In short, if contaminants are present above screening levels, there are likely significant human health impacts unless extenuating circumstances exist.

Dr. Clark calculated the cancer risk and hazards quotient for dieldrin, chlordane, and arsenic at the Project site:

Contaminant	Cancer Risk
Dieldrin	7×10^{-6}
Chlordane	2×10^{-6}
Arsenic	195×10^{-6}
Cumulative	204×10^{-6}

All values in the above chart are “in excess of the risk management range used by the State of California in the PEA Manual.”³⁴ The DEIR failed to properly analyze the Phase II ESA’s findings. As a result, the DEIR failed to identify a potentially significant impact.

The DEIR’s failure to fully analyze elevated concentrations of soil contaminants violates the law. The chemicals described above have serious health impacts. Chlordane, for example, is both a carcinogen and an endocrine disruptor that can “lead to permanent alterations in the reproductive, nervous, and immune systems that are developing during prenatal growth and childhood.”³⁵ Dieldrin may “pose a risk to the brain by altering gene expression.”³⁶ And arsenic is a known human carcinogen.³⁷ The DEIR is supposed to serve as an informational document. It is irresponsible not to alert workers and neighbors, who may be exposed to chemical-laden dust, to this potentially serious health impact.

³³ PEA Manual p. 64.

³⁴ Clark Comments, 6.

³⁵ *Id.* at 9.

³⁶ *Id.* at 10.

³⁷ *Id.* at 11.

The DEIR must be revised to conduct a proper health risk assessment and document the significant impact that elevated levels of arsenic, dieldrin, and chlordane potentially pose to workers and neighbors.

4. The DEIR Must Be Revised to Mitigate the Impact from Dieldrin, Chlordane, and Arsenic in Surface Soils at the Project Site

Because soil testing revealed chemicals in excess of screening levels, the DEIR must include mitigation measures to protect construction workers and neighbors from chemical-laden dust. For example, the County should require clear warnings to workers before excavating soil. After testing determines the full extent of the contaminated plume, that plume should be marked. When workers grade those areas, workers must have appropriate protective equipment and should be trained in how to handle the contaminated soil. Contaminated areas should not be graded on windy days to protect neighboring residents from contaminated dust. In addition, the contaminated areas should not be left exposed to minimize the possibility of contaminants moving offsite.

As stated in Dr. Clark's comments, water spray alone only contains between 56% and 81% of dust.³⁸ So current dust suppression measures will not necessarily protect neighbors from chemical-laden dust. Moreover, such measures will certainly not protect workers who may handle exposed dirt. Thus, the Project should also include the following mitigation measures: particulate matter monitoring at the Project's fence-line, the installation of a meteorological station during this time frame to ensure excavation is only performed when winds are below 5 MPH, and the application of dust suppressants prior to excavation.³⁹ The DEIR must be revised to include robust mitigation measures to limit exposure to workers and neighbors from contaminated soil.

B. The DEIR Fails to Analyze and Mitigate Health and Air Quality Impacts from Construction Emissions

Under CEQA, lead agencies must consider a project's impacts on air quality, including whether the project will "expose sensitive receptors to substantial pollutant concentrations."⁴⁰ As demonstrated below, the Project's analysis finds a

³⁸ Clark letter at 12.

³⁹ *Id.*

⁴⁰ CEQA Guidelines, Appendix G, Section III: Air Quality. 4714-006acp

significant impact to sensitive receptors, but fails to effectively mitigate it. In addition, the air impact analysis underestimates emissions on sensitive receptors.

1. Mitigation Measure Air-3 Fails to Mitigate Air Quality Impacts to Less than Significant and is Unenforceable

CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid a project's potentially significant environmental impacts.⁴¹ A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.⁴² "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors.⁴³ Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.⁴⁴

Failure to include enforceable mitigation measures is considered a failure to proceed in the manner required by CEQA that is evaluated de novo by the courts.⁴⁵ The court of appeal recently clarified that, to meet this requirement, mitigation measures must be incorporated directly into the Mitigation Monitoring and Reporting Program to be enforceable.⁴⁶

Here, the DEIR fails to properly mitigate air impacts. The DEIR correctly concluded that unmitigated construction equipment would have a significant impact on cancer health risk.⁴⁷ To mitigate this impact to less than significant, the DEIR proposes Mitigation Measure (MM) AIR-3, which states that the Project will use Tier-IV Interim construction equipment.⁴⁸ The DEIR concludes that by using this mitigation measure, the Project's construction impacts will be mitigated to less than a significant level. However, MM AIR-3 has a glaring exception, stating:

⁴¹ CEQA §§ 21002, 21081(a)) and describe those mitigation measures in the EIR. (CEQA § 21100(b)(3); CEQA Guidelines section 15126.4

⁴² *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).

⁴³ 14 CCR § 15364.

⁴⁴ *Id.* at §15126.4(a)(2).

⁴⁵ *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 672.

⁴⁶ *Lotus v. Dept of Forestry* (2014) 223 Cal. App. 4th 645, 651-52.

⁴⁷ DEIR at 3.2-46.

⁴⁸ *Id.* at 3.2-47.

If engines that comply with Tier IV Interim off-road emission standards are not commercially available, then the construction contractor shall use the next cleanest piece of off-road equipment (e.g., Tier III) available. The contractor can maintain records for equipment that is not commercially available by obtaining letters from at least two rental companies for each piece of off-road equipment where the Tier IV Interim engine is not available.⁴⁹

The DEIR correctly acknowledges that Tier IV equipment is not always readily available.⁵⁰ However, this means that if two rental companies are out of Tier IV, the Project may use *any* level of equipment, as long as that equipment is the cleanest the rental company has.

Because any equipment might be used during Project construction, the significant impact of cancer risk to infants has not been mitigated as claimed. The DEIR must be revised to include mitigation measures that will *guarantee* the impact will be reduced to less than significant and safeguard public health. This is especially important because Project construction will take place in close proximity to multiple residences—the closest sensitive receptor is a mere 20 feet away.⁵¹

In addition, MM AIR-3 is deficient because it has no enforceability mechanism. MM AIR-3 contains no reporting or verification requirement that would ensure the Project does in fact use Tier IV equipment. This is especially important given the scarcity of Tier IV equipment, acknowledged in the DEIR. The DEIR must be revised to include reporting and verification requirements so that MM AIR-3 is enforceable, as required by law.

2. The Health Risk Analysis Underestimates PM 2.5 Construction Emissions

The DEIR underestimates PM 2.5 construction emissions in two respects. First, the DEIR fails to follow BAAQMD's guidance on conducting Health Risk Assessments which recommends assuming short-term projects last a full three years. Second, the DEIR fails to account for cancer-causing components of diesel exhaust.

⁴⁹ *Id.* at 3.2-49 to 3.2-50.

⁵⁰ *Id.*

⁵¹ DEIR at 3.2-14.

a) The DEIR Fails to Use BAAQMD's Most Recent Guidance on Health Risk Assessments

The DEIR claims to use BAAQMD's 2017 Health Risk Assessment Guidance to calculate cancer risk from chronic chemical exposure from construction emissions.⁵² But, as stated in Dr. Clark's comments, the DEIR fails to follow this guidance. Specifically, BAAQMD's 2017 Health Risk Assessment Guidelines state that short term projects should assume a project duration of a full three years:

To ensure that short-term projects do not result in unanticipated higher cancer impacts due to short-duration high-exposure rates, the Air District recommends that the cancer risk be evaluated assuming that the average daily dose for short-term exposure lasts a minimum of three years for projects lasting three years or less.⁵³

In contrast, the DEIR assumes cancer risk from construction emissions will last only two years, contrary to BAAQMD's guidance. The DEIR must therefore be revised to follow BAAQMD's guidance or explain how the model that the DEIR uses is backed by substantial evidence.

b) The DEIR Fails to Account for Cancer-Causing Chemicals in Diesel Exhaust

The DEIR also underestimates emissions by failing to consider all toxic components of diesel exhaust. Although both the EPA and CARB have identified 40 components of diesel exhaust that likely cause cancer, the DEIR only measures the risk from one component of diesel exhaust: DPM.⁵⁴ As stated in Dr. Clark's comments, gaseous components of diesel exhaust, like 1,3-butadiene, and benzo[a]pyrene, are also toxic.⁵⁵ The health impact of these other toxic components of diesel exhaust should be calculated *in addition* to the cancer risk from DPM. By failing to incorporate this impact, the DEIR underestimates the cancer risk from

⁵² *Id.* at 3.2-45.

⁵³ Bay Area Air Quality Management District (BAAQMD). 2016. Air Toxics New Source Review Program Health Risk Assessment (HRA) Guidelines, available at http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/workshops/2016/reg-2-5/hra-guidelines_clean_jan_2016-pdf.pdf?la=en.
clean_jan_2016-pdf.pdf?la=en

⁵⁴ Clark Comments at 16.

⁵⁵ *Id.*

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construction emissions and thus the DEIR's conclusion that there is no significant impact lacks substantial evidence.

3. Substantial Evidence shows a Significant Impact from PM 2.5 Construction Emissions

As shown in Dr. Clark's comments, when the Health Risk Assessment follows BAAQMD's guidance, the DEIR fails to reduce cancer risk from construction emissions to less than a significant level. As discussed above, the DEIR does not require Tier IV equipment and essentially allows the use of Tier III or lower equipment.⁵⁶ In addition, the DEIR fails to follow BAAQMD guidance when conducting the Health Risk Assessment, calculating PM 2.5 emissions over a two-year period instead of a three-year period.⁵⁷ After correcting these mistakes, Dr. Clark demonstrates that a significant cancer risk persists, contrary to the DEIR's conclusion. As shown below, the cancer risk to infants is 10.9 in 1,000,000,⁵⁸ which exceeds BAAQMD's thresholds for significance.⁵⁹

Exposure Year	DPM Annual Concentration (ug/m3)	Age Sensitivity Factor	Risk
3 rd Trimester	0.034	10	0.39
0-1	0.034	10	4.8
1-2	0.034	10	4.8
2-3	0.034	3	0.95
Total			10.9

Moreover, even the above calculation underestimates the risk since none of the additional toxic diesel exhaust gases were included.

Because the DEIR fails to use BAAQMD's Health Risk Assessment guidance and fails to require Tier IV construction equipment, the DEIR fails to reduce cancer risk from construction emissions to less than significant. The DEIR must therefore be revised to include this impact so that the DEIR accurately informs the public of the Project's environmental impacts and mitigates as necessary.

⁵⁶ DEIR at 3.2-49 to 3.2-50.

⁵⁷ Clark Comments, 14.

⁵⁸ *Id.*

⁵⁹ *Id.* at 16.

C. The DEIR's Traffic Analysis Fails to Identify, Analyze, and Mitigate Significant Impacts

The CEQA Guidelines state that lead agencies must consider whether a project's transportation impacts "conflict with an applicable program, plan, ordinance or policy addressing the circulation system, including transit, roadway, bicycle and pedestrian facilities."⁶⁰ The General Plan's Transportation and Circulation Element enumerates a number of Contra Costa County's transportation goals, including "[t]o provide a *safe*, efficient and integrated multimodal transportation system."⁶¹ The CEQA Guidelines also state that lead agencies should consider whether a project's transportation impacts would substantially increase a hazardous geometric design feature.⁶²

Here, the DEIR's transportation analysis underestimates trip generation rates, which renders the DEIR's conclusions about traffic impacts unsupported by substantial evidence. In addition, the DEIR fails to analyze whether the Project will create queue exceedances that cause hazardous roadway conditions and thus pose a public safety impact.

1. The DEIR's Trip Generation Rates Are Not Supported by Substantial Evidence

The DEIR estimates trip generation from the Project site using the Institute of Transportation Engineers Trip Generation Manual, 10th Edition ("Manual").⁶³ The Manual provides traffic generation rates for different kinds of land use projects.⁶⁴ For example, the Manual has an average trip generation rate for mid-rise multi-family land use projects ranging from 3 to 10 stories, like the Project.⁶⁵ To calculate the Project's trip generation rate, the DEIR takes the Manual's average rate for mid-rise multi-family land use projects and discounts this rate by 20% because the Project is sited 0.12 miles from a transit center. Specifically, the DEIR states,

⁶⁰ CEQA Guidelines, Appendix G, Section XVII: Transportation.

⁶¹ General Plan Transportation and element, P. 5-14.

⁶² CEQA Guidelines, Appendix G, Section XVII: Transportation.

⁶³ DEIR, 3.15-31.

⁶⁴ Institute of Transportation Engineers, *Trip Generation, 10th Edition*.

⁶⁵ DEIR, 3.15-31.

Review of the data indicates that ITE trip generation rates alone could overestimate vehicle trip generation as compared to projects surveyed in the project vicinity, as the ITE rates are based on surveys on apartment uses in suburban settings, not well served by transit.⁶⁶

However, as stated in Mr. Smith's comments and contrary to the DEIR's assertion, the ITE rates *do* account for proximity to transit centers. Thus, the 20% discount is unnecessary and unjustified. Indeed, the data used to generate rates in the Manual include 4 dense urban city center core sites and 32 dense multi-use urban sites with "comparable transit accessibility" to the Project site.⁶⁷ Furthermore, multi-story buildings like the Project are usually developed near transit, rather than in isolated suburban areas. This is precisely why trip generation rates in the Manual are lower for mid-rise multi-family land use projects than for single-family land use projects. The DEIR does not support its discount with substantial evidence. As stated in Mr. Smith's Comments, the DEIR's reference to two local surveys does not provide justification to deviate from the ITE rates:

In an attempt to justify the 20 percent reduction in trip generation studies carried out at two mid-rise apartment complexes near the Pleasant Hill BART station (...). Whether data measured at just two sites offers sufficient statistical reliability to decrease the multi-site based ITE rates by as much as 20 percent is highly questionable and is not in reasonable compliance with CEQA's demand of a good faith effort to disclose impacts.⁶⁸

Thus, to discount an additional 20% overestimates transit use and underestimates trip generation. As a result of this improper discount, the DEIR underestimates trip generation from the Project, rendering the DEIR's conclusions about transportation impacts unsupported by substantial evidence.⁶⁹

⁶⁶ *Id.*

⁶⁷ Smith Comments, 1.

⁶⁸ Smith Comments, 2.

⁶⁹ It should be noted that the Applicant had not yet submitted a TDM plan, required under Contra Costa County Ordinance § 82-32.004, that could have provided evidence to support this assumption. 4714-006acp

2. The DEIR's Queuing Analysis Is Unsupported by Substantial Evidence and Fails to Disclose Safety Impacts and Hazardous Roadway Conditions

As stated above, CEQA requires agencies to consider whether a project's transportation impacts are consistent with General Plan goals.⁷⁰ One stated goal of the Contra Costa General Plan is to create a safe and efficient transportation system.⁷¹ The CEQA Guidelines also require lead agencies to consider whether transportation impacts will result in a hazardous design feature.⁷² Here, the DEIR fails to properly analyze how Project-exacerbated queue exceedances could cause roadway hazards and safety impacts. Thus, the DEIR's conclusion that the Project will have no significant impact on traffic queues is not supported by substantial evidence. In fact, substantial evidence shows the Project will have significant impact from safety and hazards issues.

The DEIR states that many intersections in the Project area already exceed storage capacity.⁷³ Storage capacity is the number of cars a lane can contain before overflowing into another lane. The DEIR notes that the Project will create or exacerbate storage capacity exceedances at the following intersections:

- The north bound lane at Oak Road at the I-690 on/off ramps and Buskirk Avenue during both the AM and PM peak hours;
- The south bound lane at Treat Boulevard and Jones Road during the PM peak hours;
- The south bound lane at Oak Road and Las Juntas Way in the AM peak hours.⁷⁴

As for the threshold of significance, the DEIR states:

The addition of project traffic at a study intersection would result in the 95th percentile vehicle queue exceeding the available storage or would increase 95th percentile queue by more than two vehicles where the queue already exceeds the available storage space (for example, vehicle queues extending

⁷⁰ CEQA Guidelines, Appendix G, Section XVII: Transportation.

⁷¹ General Plan Transportation and element, P. 5-14.

⁷² CEQA Guidelines, Appendix G, Section XVII: Transportation.

⁷³ DEIR, 3.15-11 to 12.

⁷⁴ DEIR, r.15-53 to 54.

beyond the available turn pocket length, impeding travel in the adjacent lanes)[.]⁷⁵

However, the DEIR fails to analyze how the above mentioned exceedances of storage capacity will *actually* impact gridlock and safety conditions. As stated in Mr. Smith's comments, this failure renders the DEIR's queue analysis "critically flawed."⁷⁶

Gridlock and queue exceedances are not just a matter of inconvenience. As stated in Mr. Smith's comments, "[a]ny queue that seriously overflows storage capacity is a public safety problem. Indeed, gridlock and blockages can impede emergency services from accessing buildings. In addition, gridlock results in safety hazards when other traffic radically maneuvers to avoid being enmeshed in an overflow queue."⁷⁷ Here, by blocking entries to buildings and creating gridlock at intersections, the Project could make traffic conditions unsafe, contrary to stated goals in the General Plan and to CEQA Guidelines.⁷⁸

For example, Mr. Smith found that the Project's impact on queue lengths will have serious impacts on transportation safety. In his comments, Mr. Smith explains that the north bound left turn queue at Oak Road at the I-690 on/off ramp and Buskirk Avenue will extend back to the intersection of Oak Road and Las Juntas Way, creating gridlock and blocking entry to buildings, including the entry to 3000 Oak Road.⁷⁹

Despite these gridlock and safety concerns, the DEIR concludes that the Project's impact on queue lengths is less than significant because "[t]he addition of project traffic is not expected to cause vehicle queues to increase by more than 50-feet (or two car-lengths)."⁸⁰

As stated in Mr. Smith's comments, an exceedance of two car lengths is an arbitrary threshold to determine significance.⁸¹ Rather, queue exceedance can

⁷⁵ DEIR, 3.15-39.

⁷⁶ Smith Comments, 2.

⁷⁷ *Id.*

⁷⁸ General Plan Transportation and element, P. 5-14; CEQA Guidelines, Appendix G, Section XVII: Transportation.

⁷⁹ Smith Comments, 3.

⁸⁰ DEIR, 3.15-52.

⁸¹ Smith Comments, 2.

create significant impacts at any length, depending on traffic conditions on the ground. The DEIR failed to analyze these on-the-ground queue exceedance impacts and how they would create gridlock, block emergency access, or block entry to buildings. Thus, the DEIR's conclusion that the Project's impact on vehicle queues is less than significant is not supported by substantial evidence.

III. THE DEIR'S CUMULATIVE IMPACT ANALYSIS ON PM 2.5 CONSTRUCTION EMISSIONS IS INADEQUATE

An EIR is required to discuss the cumulative impacts of a project "when the project's incremental effect is cumulatively considerable."⁸² Cumulative impact analyses are necessary because "environmental damage often occurs incrementally from a variety of small sources [that] appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact."⁸³ Mere conclusory statements are not sufficient to satisfy the cumulative impacts analysis requirement.⁸⁴ A proper cumulative impacts analysis must be supported by references to specific evidence.⁸⁵ As the Court in *Mountain Lion Coalition* explained, "it is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them."⁸⁶ "A cumulative impacts analysis which understates information concerning the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decisionmaker's perspective concerning the environmental consequences of the project, the necessity for mitigation measures, and the appropriateness of project approval."⁸⁷

The BAAQMD's 2017 CEQA Guidance specifically describes how agencies should conduct cumulative impact analyses for PM 2.5 emissions, stating agencies should consider "all past, present, and foreseeable future sources within a 1,000-foot radius from the fence line of a source plus the contribution from the project..."⁸⁸

⁸² 14 CCR § 15130(a).

⁸³ *Communities for a Better Env't v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 114.

⁸⁴ *Mountain Lion Coalition v. Fish & Game Comm'n* (1989) 214 Cal.App.3d 1043, 1047.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1051

⁸⁷ *Id.*

⁸⁸ http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en.
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The DEIR identified at least one cumulative project that is within 1000-feet from the fence line of the Project: the Habitat for Humanity Townhomes on Las Juntas way (“Habitat for Humanity Project”).⁸⁹ The Habitat for Humanity Project is located less than 400 feet away from the Project site.⁹⁰ In addition, several residences are sandwiched between the Project and the Habitat for Humanity Project.⁹¹ These residences could therefore be impacted by emissions from both projects, possibly at the same time. Yet the DEIR’s cumulative impact analysis for health impacts from PM 2.5 emissions fails to include construction emissions from the Habitat for Humanity Project.⁹² Instead, the DEIR only includes existing baseline TAC emissions from Treat Boulevard, and then adds the Project’s emissions to these emissions.⁹³ Moreover, the DEIR fails to explain *why*, after identifying a cumulative project within 1000 feet of the proposed Project, this project was then excluded from the cumulative impact analysis.

The DEIR’s analysis violates CEQA’s clear guidance on the performance of cumulative impact analysis and lacks substantial evidence to support the conclusion that the Project’s cancer impact from construction emissions is less than cumulatively considerable. The DEIR should be revised to properly analyze the Project’s cumulative impact and require mitigation measures as needed.

IV. THE PROJECT VIOLATES CEQA AND THE CONTRA COSTA GENERAL PLAN’S DENSITY THRESHOLD FOR MULTIPLE FAMILY RESIDENCES AND MISUSES THE STATE DENSITY BONUS LAW

The Applicant seeks to increase the allowable density at the Project site in multiple ways. However, by allowing the requested density increase, the County is violating both the General Plan and CEQA by, among other things, miscalculating the net acreage of the Project site contrary to the mandates of the General Plan. The County should also enforce its own Inclusionary Housing Ordinance and require more low-income housing units, as discussed in more detail below.

⁸⁹ DEIR at 3-5.

⁹⁰ DEIR at Exhibit 3-1.

⁹¹ *Id.*

⁹² DEIR at 3.2-53.

⁹³ *Id.*

A. The DEIR Miscalculates the Project Site's Net Acreage Which Increases Density Above Thresholds Set in the General Plan, in Violation of the General Plan and CEQA

The General Plan allows a maximum density of 99.9 units per *net acre* for multiple-family residences. Net acreage does not include the entire area of a project site. Rather, the Contra Costa General Plan makes clear that “net acreage includes all land area used *exclusively* for residential purpose....”⁹⁴ Net acreage excludes all public rights of way.⁹⁵ The General Plan further specifies how to calculate net acreage, stating for multiple-family residences, “Net acreage ... is assumed to comprise 80 percent” of the gross acreage of a site.⁹⁶

The gross acreage of the Project site is 2.4 acres.⁹⁷ Under the General Plan, therefore, the net acreage of the Project site should be 80% of 2.4 acres, or 1.92 acres. Instead, the DEIR uses a net acreage of 2.37 acres.⁹⁸ The DEIR, contrary to the guidance of the General Plan, determined that 98% of the Project site will be exclusively used for residential purposes. Yet, elsewhere, the DEIR admits that only 79% of the gross area will be used for the apartment building, stating “[t]he new apartment building would ... cover 81,639 square feet (or 79 percent) of the project site.”⁹⁹ Thus, as the General Plan assumes, the net acreage of the Project should be about 80% of the gross acreage, or 1.92 acres rather than the 2.37 acre figure used in the DEIR. As a result of the miscalculation of net acreage, the Applicant has increased the density of the Project site from 99.9 units per net acre to 123.4 units per net acre, a density level 20% greater than the maximum allowed by the General Plan.

Two other factors compound this problematic density increase. First, the Project is currently designated as Multiple-Family Residential—Very High Density (MV), which allows a maximum of 44.9 multiple-family units per net acre.¹⁰⁰ To reach the maximum density allowed under the General Plan, the Applicant seeks a

⁹⁴ General Plan Land Element, 3-17.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ DEIR, 2-1.

⁹⁸ *Id.*

⁹⁹ DEIR, ES-1.

¹⁰⁰ General Plan 3-21.

General Plan Amendment to re-designate the Project site as Very High-Special Density (MS), which allows a maximum of 99.9 units per net acre.¹⁰¹

Second, the Applicant is receiving a 20% density increase under the State Density Bonus Law.¹⁰² In combination, the miscalculation of the net acreage, the General Plan Amendment, and the density bonus *result in a density increase of 320% over the current allowable density level at the Project site*. A density increase of this magnitude has consequences. As discussed above and as documented in the DEIR, the planned density at the Project site will have significant traffic impacts.

Moreover, CEQA requires EIRs “to discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans.”¹⁰³ If a general plan was adopted to avoid or mitigate an environmental impact, an EIR must address any significant impacts caused by conflicts with the plan.¹⁰⁴ Since the DEIR includes no discussion of how the Project’s density exceeds General Plan thresholds, the DEIR also violates CEQA.

The Project and the DEIR should be revised to calculate net acreage in a manner consistent with the General Plan. All density thresholds and increases should then be determined based on an accurate net acreage figure and any inconsistency should be properly addressed in the DEIR.

B. The State Density Bonus Law Should Not Apply in this Instance and the County Should Enforce Its More Stringent Inclusionary Housing Ordinance

Even though the Applicant already received a 20% density increase due to the miscalculation of the net acreage discussed above, the Applicant is receiving an additional 20% density bonus under the State Density Bonus Law.¹⁰⁵

The Density Bonus Law requires, in relevant part, a 20% density increase above local residential density standards if five percent of the total units is reserved

¹⁰¹ General Plan 3-17.

¹⁰² DEIR 3.10-16.

¹⁰³ CEQA Guidelines 15125(d).

¹⁰⁴ CEQA Guidelines, Appendix G, XI.

¹⁰⁵ *Id.*

for very low-income households.¹⁰⁶ Developers who receive a density bonus are also allowed one concession from the local government.¹⁰⁷

The State Density Bonus Law states that “density bonus’ means a density increase over the otherwise maximum allowable gross residential density as of the ***date of application*** by the applicant to the county.”¹⁰⁸ Here, the maximum allowable gross residential density ***at the date of the Project application*** was 44.9 multiple-family units per net acre.¹⁰⁹ Thus, the State Density Bonus Law only requires the County to allow the Applicant to build a housing development that allows 53.88 units per acre (which is 20% more than 44.9). However, the Applicant seeks a density bonus not at the date of the application, but at the date when the General Plan Amendment is approved. Since the General Plan Amendment will allow a maximum density of 99.9 units per net acre, the Applicant seeks a 222.5% “density increase over the otherwise maximum allowable gross residential density as of the ***date of application.***”¹¹⁰ The County should not provide a density increase of this magnitude.

The “spirit of the Density Bonus Law...is designed to encourage, even require, incentives to developers that construct affordable housing.”¹¹¹ In the same spirit, the County enacted an Inclusionary Housing Ordinance. The Inclusionary Housing Ordinance ***requires*** residential development of 126 or more units to reserve 15% for very low and low-income households or satisfy an alternative mode of compliance such as paying an in-lieu fee earmarked for affordable housing needs.¹¹² Applicants who provide the 15% low-income housing are eligible for a 15% density increase.¹¹³ If the Applicant provides more than the 15% required units,

¹⁰⁶ Gov. Code § 65915(b)(1)(B).

¹⁰⁷ Gov Code § 65915(d).

¹⁰⁸ Gov Code § 65915(f).

¹⁰⁹ General Plan 3-21.

¹¹⁰ Gov Code § 65915(f).

¹¹¹ Friends of Lagoon Valley v. City of Vacaville, 154 Cal. App. 4th 807, 826, 65 Cal. Rptr. 3d 251, 266 (2007)

¹¹² Contra Costa Zoning Ordinance 822-4.418(a). For any project where inclusionary units are required by this chapter, a developer may request a density bonus for providing the required inclusionary units. The developer may request a density bonus in an amount equal to or less than fifteen percent of the total units in the development, including the inclusionary units provided in the development.

¹¹³ *Id.* at § 822-4.418(b). If a project includes moderate income, lower income, very low income, or senior housing units ***at levels beyond those required by this chapter***, a developer may request a 4714-006acp

then the Applicant is eligible for a concession and a further density increase.¹¹⁴ The Project, at 284 units, falls under the purview of the Inclusionary Housing Ordinance.

Here, the County is allowing a much larger density increase than the 20% required by the State Density Bonus Law. Although the County is free to apply its own more stringent density and affordable housing requirements, it instead grants the Applicant a concession (under the State Density Bonus Law) to avoid the mandates of the County Inclusionary Housing Ordinance. Rather than providing the additional 24 units as low-income, the Applicant requests a concession to reserve these 24 units as moderate-income: “[b]y providing 5 percent of units as affordable to very low-income households, the project is also eligible for one development incentive or concession. The project would require a concession to provide the remaining affordable units (24 total) as affordable to moderate income” rather than low-income.¹¹⁵ Thus, the Applicant is using a state law that promotes affordable housing to get out of a more stringent County law that promotes affordable housing.

The County can and should require the Applicant to comply with the County Inclusionary Housing Ordinance. Under the County Inclusionary Housing Ordinance, the Applicant is only eligible for a 15% density bonus, and only if the Applicant provides the remaining 24 units as low-income. If the Applicant wants a larger density increase or a concession, then pursuant to the County Inclusionary Housing Ordinance, the Applicant must provide more affordable housing than the required 15%.¹¹⁶

I. CONCLUSION

The DEIR is inadequate as an environmental document because the County fails to adequately disclose, analyze and mitigate the Project’s significant impacts on air quality, hazardous materials and transportation. In addition, the Project violates the County’s General Plan. The county cannot approve the Project until it prepares and re-circulates a revised DEIR that resolves these issues.

density bonus under Section 822-2.404 and may request incentives or concessions under Section 822-2.408.

¹¹⁴ *Id.* at 822-2.404.

¹¹⁵ DEIR at 3.10-16.

¹¹⁶ *Id.* at § 822-4.418(b).

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Thank you for your consideration of these comments.

Sincerely,



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Associate

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Attachments

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