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BY E-MAIL AND OVERNIGHT MAIL

September 8, 2020

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Re: Comment on the Initial Study/Mitigated Negative Declaration for The Invitation Project; DEV2019-00087; RCL2019-00324; CUP2019-06040

Dear Honorable Members of the City of Anaheim Planning Commission and Mr. Uk:

I am writing on behalf of Supporters' Alliance for Environmental Responsibility and its members living in and around the City of Anaheim ("SAFER"). These comments support SAFER's appeal of the Initial Study/Mitigated Negative Declaration ("IS/MND") for The Invitation Project, a multi-family rental residential development proposed for a 4.49-acre lot area located at 1122 North Anaheim Boulevard in the City of Anaheim, and the related project approvals (the "Project"). After reviewing the IS/MND, we conclude that it fails to analyze all environmental impacts and implement all necessary mitigation measures. SAFER respectfully requests that the City Planning Commission grant SAFER's appeal and send the Project back to staff to prepare an EIR in order to address our concerns discussed below.

These comments have been prepared with the assistance of Certified Industrial Hygienist Francis Offerman, PE, CIH and environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE"). Mr. Offermann's comment and curriculum vitae are attached as Exhibit A hereto and are incorporated herein by reference and entirety.

SWAPE's comment and curriculum vitae are attached as Exhibit B hereto and are incorporated herein by reference in their entirety.

## I. PROJECT DESCRIPTION

The Project proposes to develop a multi-family rental residential project on a 4.49-acre site consisting: 1) 269 for-rent multi-family dwelling units; 2) wrap-style building with four levels of residential units and common building areas totaling 302,011 square feet ("sq. ft."); and 3) six levels of parking structure area totaling 226,545 sq. ft.. The Project would have a density of 60 dwelling units per acre (du/ac), and provide 49 studio units, 119 one-bedroom units, and 101 two-bedroom units ranging from 594 square feet to 1,144 square feet with a net rentable space of 230,103 sq. ft. The Project also involves demolishing the existing tow yard facility – totaling 16,750 sq. ft. of building space in four buildings, a carport, and associated surface asphalt paving.

## II. LEGAL STANDARD

As the California Supreme Court has held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 (*CBE v. SCAQMD*) (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505). "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." Pub. Res. Code ("PRC") § 21068; *see also* 14 CCR § 15382. An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial*." No Oil, Inc.*, 13 Cal.3d at 83. "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." *Communities for a Better Env't v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 109 (*CBE v. CRA*).

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield (*2004) 124 Cal.App.4th 1184, 1214 (*Bakersfield Citizens*); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvements Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392. The EIR process "protects not only the environment but also informed self-government." *Pocket Protectors*, 124 Cal.App.4th at 927.

An EIR is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." PRC § 21080(d); see also *Pocket Protectors*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 CCR § 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. PRC, §§ 21100, 21064. Since "[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process," by allowing the agency "to dispense with the duty [to prepare an EIR]," negative declarations are allowed only in cases where "the proposed project will not affect the environment at all." *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study "to a point where clearly no significant effect on the environment would occur, and…there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." PRC §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331. In that context, "may" means a reasonable possibility of a significant effect on the environment. PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Res. v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–05.

Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. 14 CCR § 15064(f)(1); *Pocket Protectors,* 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it

> does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke*, Practice Under CEQA*, §6.29, pp. 273-274. The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with *a preference for resolving doubts in favor of environmental review*." *Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).

CEQA requires that an environmental document include a description of the project's environmental setting or "baseline." CEQA Guidelines § 15063(d)(2). The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *CBE v. SCAQMD*, 48 Cal.4th at 321. CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency's environmental review under CEQA:

> …must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.

*See Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124–25 ("*Save Our Peninsula*").) As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. *Id*. at 121–23.

## III. DISCUSSION

### A. Substantial Evidence Exists to Support a Fair Argument that the Project Will Have a Significant Health Risk Impact from the Project's Indoor Air Quality.

Certified Industrial Hygienist, Francis Offermann, PE, CIH, conducted a review of the proposed Project and relevant documents regarding the Project's indoor air emissions. Indoor Environmental Engineering Comments (July 27, 2020) (Exhibit A – "Offermann Comments"). Mr. Offermann is a leading expert on indoor air quality and has published extensively on the topic. *See* attached CV. Mr. Offermann determined that it is likely that the Project will expose residents of the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. *Id.*, p. 3.

Mr. Offermann explains that many composite wood products used in modern apartment home construction contain formaldehyde-based glues which off-gas

formaldehyde over a very long time period. He states, “The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particleboard. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.” Offermann Comments, pp. 2-3.

Formaldehyde is a known human carcinogen. Mr. Offermann’s review concluded that there is a fair argument that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 112 per million, even assuming all materials are compliant with the California Air Resources Board’s formaldehyde airborne toxics control measure. *Id*., pp. 3-4. This is more than 11 times South Coast Air Quality Management District’s CEQA significance threshold for airborne cancer risk of 10 per million. *Id.*, p. 4. In addition, Mr. Offermann determined that residents who do not have continuous exposure would still be exposed to a cancer risk substantially over the 10 per million threshold. *Id.*, p. 4.

Mr. Offermann further concluded that the Project’s high cancer risk from indoor air emissions, such as formaldehyde, will be exacerbated by the lack of mechanical supply of outdoor air ventilation systems, a primary removal mechanism of all indoor air generated contaminants. *Id.*, p. 9. Mr. Offermann highlights several factors to demonstrate why adequate outdoor air ventilation can reduce the impacts of indoor air emissions on residents.

First, Mr. Offermann notes that most homeowners do not use or minimally use windows or doors for air ventilation due to safety, noise, dust, and odor concerns. *Id.*, p. 9. Second, the Project site is surrounded by highways and roadways with moderate to high traffic (*i.e.*, Interstate 91, North Anaheim Boulevard, and West La Palma Boulevard). *Id.*, p. 10. With higher ambient noise, the Project’s residents will likely keep windows and doors closed continuously to control the exterior traffic noise. Without proper air ventilation from open windows or doors, the Project’s dwelling units will have lower outdoor air exchange rates and higher indoor air contaminant concentrations. *Id.*

Finally, Mr. Offermann notes that increased vehicle traffic associated with this Project and other existing and future projects is likely to result in significantly increased outdoor concentrations of $PM_{2.5}$. *Id.* Indeed, the Project is located in a state and federal nonattainment area for $PM_{2.5}$. *Id.* As such, Mr. Offermann recommends conducting an air quality analysis of the cumulative impacts of Project-related emissions and existing and projected future emissions from local $PM_{2.5}$ sources (*e.g.* stationary sources, motor vehicles, and airport traffic). *Id.* The results of a cumulative analysis can determine whether there will be an exceedance of outdoor concentrations of $PM_{2.5}$ and how to implement effective outdoor air ventilation systems such that the indoor concentrations of $PM_{2.5}$ particles would be less than the outdoor concentrations. *Id.*

Mr. Offermann determined that these significant environmental impacts should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id*., pp. 11-12. Mr. Offermann also identifies available mitigation

measures to reduce these significant health risks, including the installation of air filters and a requirement that the applicant use only composite wood materials (e.g. hardwood plywood, medium density fiberboard, particleboard) for all interior finish systems that are made with CARB approved no-added formaldehyde (NAF) resins or ultra-low emitting formaldehyde (ULEF) resins in the buildings' interiors. *Id*., p. 11. Mr. Offerman also recommends that each habitable room must have a continuous mechanical supply of outdoor air that meets or exceeds California's 2016 Building Energy Efficiency Standards. *Id*., p. 12.

The City has a duty to investigate issues relating to a project's potential environmental impacts, especially those issues raised by an expert's comments. *See Cty. Sanitation Dist. No. 2 v. Cty. of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98 ("under CEQA, the lead agency bears a burden to investigate potential environmental impacts"). In addition to assessing the Project's potential health impacts to residents, Mr. Offermann identifies the investigatory path that the City should follow in developing an EIR to more precisely evaluate the Projects' future formaldehyde emissions and establishing mitigation measures that reduce the cancer risk below the SCAQMD significance level. *Id*., pp. 5-9. Such an analysis would be similar in form to the air quality modeling and traffic modeling typically conducted as part of a CEQA review.

The failure to address the project's formaldehyde emissions is contrary to the California Supreme Court's decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA"*). At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. *CBIA*, 62 Cal.4th at 800-801. However, to the extent a project may exacerbate existing adverse environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id*. at 801 ("CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present"). In so holding, the Court expressly held that CEQA's statutory language required lead agencies to disclose and analyze "impacts on ***a project's users or residents*** that arise ***from the project's effects*** on the environment." *Id*. at 800 (emphasis added).

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. Residents and workers will be users of the Project. Currently, there is presumably little if any formaldehyde emissions at the site. Once the project is built, emissions will begin at levels that pose significant health risks. Rather than excusing the City from addressing the impacts of carcinogens emitted into the indoor air from the roject, the Supreme Court in *CBIA* expressly found that this type of effect by the project on the environment and a "project's users and residents" must be addressed in the CEQA process.

The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the

environment that must be addressed in an environmental review. "Section 21083(b)(3)'s express language, for example, requires a finding of a 'significant effect on the environment' (§ 21083(b)) whenever the 'environmental effects of a project will cause substantial adverse effects *on human beings,* either directly or indirectly.'" *CBIA*, 62 Cal.4th at 800 (emphasis in original). Likewise, "the Legislature has made clear—in declarations accompanying CEQA's enactment—that public health and safety are of great importance in the statutory scheme." *Id.*, citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d). It goes without saying that the hundreds of future residents of the Project are human beings and the health and safety of those workers is as important to CEQA's safeguards as nearby residents currently living near the project site.

Because Mr. Offermann's expert review is substantial evidence of a fair argument of a significant environmental impact to future users of the project, an EIR must be prepared to disclose and mitigate those impacts.

### B. The IS/MND Relied on Unsubstantiated Input Parameters to Estimate Project Emissions and Thus the Project May Result in Significant Air Quality Impacts

The IS/MND for the Project relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.2 ("CalEEMod"). SWAPE, p. 3. This model relies on recommended default values for on-site specific information related to a number of factors. The model is used to generate a project's construction and operational emissions. SWAPE reviewed the Project's CalEEMod output files and found that the values input into the model were unsubstantiated or inconsistent with information provided in the IS/MND. SWAPE, p. 3. SWAPE provides substantial evidence to demonstrate that each of the changes could result in an underestimation of the Project's emissions. As a result, there is a fair argument that the Project may have a significant environmental impact on air quality and an EIR must be prepared to disclose and mitigate those impacts.

#### 1. <u>The air quality model made unsubstantiated changes to the construction schedule.</u>

SWAPE's review of the CalEEMod output files revealed unsubstantiated manual changes to the default construction phase lengths. SWAPE, p. 4. The model justifies the changes as "accounts for shared equipment" and "based on info provided by applicant, normalized to fit duration provided by applicant." *Id.* However, neither the model nor the IS/MND provides the information "provided by the applicant" or explanation to justify the changes made to the individual construction phase lengths or the change to the schedule as a whole. *Id.*

SWAPE explains that significant and disproportional changes in length to each construction phase present an issue for analyzing air quality emissions because longer periods of construction emissions can underestimate the maximum daily emissions of the Project. SWAPE, pp. 4-5. Additionally, each construction phase is associated with different emissions activities. *Id.* Therefore, by disproportionally increasing or decreasing

individual phases, the model's emissions calculations can result in substantial differences. *Id.* Unless the IS/MND provides a rationale to justify these changes, the model cannot be relied upon to determine Project significance for construction-related emissions.

2. The air quality model made unsubstantiated changes to the Project's wastewater treatment system's percentage values inconsistent with the IS/MND.

The CalEEMod output files revealed unsubstantiated manual changes to default values for the Project's expected wastewater treatment system percentages. SWAPE, p. 5. Specifically, the model indicates that 100% of the Project's wastewater would be treated aerobically and 0% would be treated anaerobically. The model justifies the changes based on a sewer study that assumes 100% aerobic treatment, but SWAPE's review of the study found no mention or aerobic or anaerobic treatment. SWAPE, p. 5 (citing to Appendix K, Sewer Study and Appendix L – Solid Waste Management Plan). Additionally, the IS/MND states that sewage is conveyed to the Orange Sanitation District ("OCSD") treatment facilities. However, the OCSD uses anaerobic methods during the primary wastewater treatment process. SWAPE, p. 6.

SWAPE explains that wastewater treatment systems are associated with different greenhouse gas ("GHG") emission factors and therefore can result in substantially different calculations for the Project's total GHG emissions. *Id.* As such, by making an unsubstantiated assumption that 100% of wastewater would be treated aerobically, the model's emissions calculations can be underestimated. Unless the IS/MND provides the correct percentages for wastewater treatment systems, the model cannot be relied upon to determine Project significance for operational-related emissions.

3. The air quality model made incorrect reductions to the number of fireplaces inconsistent with the IS/MND.

The CalEEMod output files revealed reductions to the default values for the Project's fireplaces to zero based on the assumption that the Project would not include any fireplaces onsite. SWAPE, p. 6. However, the IS/MND indicates that the Project would include an outdoor fireplace and outdoor kitchen for cooking activities. *Id*. As such the model should have included at least one fireplace in calculating its operational emissions.

SWAPE explains that failing to include fireplace values results in an underestimation of the Project's area-source operational emissions. *Id.* As such, the assumption that the Project will have no fireplaces is unsubstantiated and would result in an underestimation of the model's area-source operational emission calculations. *Id.* Unless the IS/MND provides the correct number of fireplaces anticipated for the Project, the model cannot be relied upon to determine Project significance for operational-related emissions.

4. The air quality model made unsubstantiated changes to the operational vehicle fleet mix's percentage values.

The CalEEMod output files revealed unsubstantiated manual changes to the default values for the Project's anticipated operational vehicle fleet mix. SWAPE, p. 7. For example, the model decreased the percentages for heavy heavy-duty trucks, light heavy-duty trucks, medium heavy-duty trucks, motor homes, and all buses. *Id.* The model also increased the percentages for light-duty auto, light-duty trucks, motorcycles, and medium-duty trucks. The model's assumption file provides that these changes reflect a higher proportion of passenger vehicles than the regional VMT and were based on driveway counts in the traffic impact analysis. *Id.* However, SWAPE explains that this assumption is incorrect for two reasons.

First, the vehicle fleet mix values in the model's output files are inconsistent from those in the assumption file. Indeed, SWAPE's calculations revealed that the fleet mix percentage of passenger vehicles is overestimated in the assumption file by 39%, while the percentages for medium-duty trucks and heavy-duty trucks and buses were underestimated in the assumption file by 22% and 17%, respectively. *Id.*, p. 8. Second, contrary to the assumption file's statements, neither the IS/MND nor the Traffic Impact Analysis (Appendix J) substantiate the driveway counts. SWAPE, p. 8. As such, SWAPE is not able to verify the applicability of the revised fleet mix.

SWAPE explains that the fleet mix percentages inform the model's calculations of the Projects operational emissions associated with on-road vehicles. *Id*. Therefore, significantly modifying the fleet mix default values (by 39%, 22%, and 17%) may result in an underestimation of the Project's mobile-related operational emissions. Unless the IS/MND provides a rationale to justify these changes, the model cannot be relied upon to determine Project significance for operational-related emissions.

5. The air quality model made unsubstantiated reduction to the carbon intensity factor.

The CalEEMod output files revealed that the model reduced the default $CO_2$ intensity factor by 32%. SWAPE, p. 8. Although the model justifies this change based on factors provided by the City of Anaheim, the IS/MND provides no source or citation. *Id*. As such, SWAPE was not able to verify the change.

SWAPE explains that the $CO_2$ intensity factor informs the Project's GHG emissions calculations associated with electricity use. *Id.* Therefore, the unsubstantiated assumption that the Project will have an intensity factor that is 32% below the default value may result in an underestimation of the model's GHG emissions calculations. *Id.* Unless the IS/MND provides a valid justification for the reduction in the $CO_2$ intensity factor value, the model cannot be relied upon to determine Project significance for GHG emissions.

6. The air quality model applied unsubstantiated construction mitigation measures.

The CalEEMod output files show that the model applied the following construction-related mitigation measures: "Replace Ground Cover," "Water Exposed Area," "Reduce Vehicle Speed on Unpaved Roads," and "Clean Paved Roads." SWAPE, p. 9. The model also included a 9% reduction in particulate matter ("PM") emissions as a result of the "Clean Paved Roads" measure and a 15 miles per hour ("mph") reduced vehicle speed as a result of the "Reduce Vehicle Speed on Unpaved Roads" measure. The model justifies these changes by citing to SCAQMD Rule 403, Rule 1186, and a mitigation measure to water three times a day. SWAPE discusses why this justification is insufficient.

First, SCAQMD Rule 403 and Rule 1186 do not inform or substantiate the 9% PM reduction and therefore the reduction cannot be verified for accuracy. *Id.* Second, the Project is not required to implement, monitor, or enforce most of the mitigation measures. *Id.* For example, the "Replace Ground Cover," "Reduce Vehicle Speed on Unpaved Roads," and "Clean Paved Roads" measures are not discussed anywhere in the IS/MND or required as part of the Mitigation Monitoring and Reporting Program ("MMRP"). *Id.* The MMRP only includes the mitigation measure to water exposed ground surfaces and disturbed areas three times a day to minimize fugitive dust. *Id*. (citing to MM AQ-1, Appendix M, p. Table 1). Finally, SWAPE notes that while Rule 403 includes these measures as "Best Available Control Measures" to control fugitive dust, it does not explicitly require the Project to implement any of those measures. SWAPE, p. 10.

The IS/MND must provide substantial evidence demonstrating how these mitigation measures reduce PM emissions and that the measures will be mandatory and enforceable. Without this evidence, the model results in unsubstantiated PM reductions and cannot be relied upon to determine Project significance for PM emissions.

7. The air quality model applied on unsubstantiated operational mitigation measures.

The CalEEMod output files show that the model applied several energy- and water-related operational mitigation measures, including: "Exceed Title 24," "Install Low Flow Bathroom Faucet," "Install Low Flow Kitchen Faucet," "Install Low Flow Toilet," "Install Low Flow Shower," and "Use Water Efficient Irrigation System." SWAPE, p. 10. SWAPE concluded that the inclusion of these mitigation measures is unsubstantiated for two reasons.

First, SWAPE notes that, according to CalEEMod, the energy and water mitigation measures are based on the CAPCOA Quantifying Greenhouse Gas Mitigation Measures document ("CAPCOA Report"). *Id.*, p. 11. The CAPCOA Report provides standardized approaches and methods to quantify the effectiveness of mitigation measures applied to reduce a Project's GHG emissions. *Id.* SWAPE describes these methods in detail for each of the mitigation measures.

For example, the "Exceed Title 24" measure requires the project applicant to provide specific information to verify and support effectiveness of the measure, including square footage of non-residential buildings, climate zone, dwelling units, and a % reduction commitment. *Id.*, pp. 11-12. For the measures that involve installing "Low Flow" water fixtures, the CAPCOA Report requires information for total indoor water demand with and without the fixtures and a commitment to those fixtures. *Id.*, p. 12. Similarly, the CAPCOA Report requires total outdoor water demand and percent reductions of that demand from the installation of "water-efficient landscape irrigation systems." *Id.,* p. 13. As SWAPE points out, neither the model nor the IS/MND provides justifications for applying these mitigation measures to its air quality analysis.

SWAPE also states that the water and energy mitigation measures are unsubstantiated because they are not addressed anywhere in the IS/MND or required as part of the MMRP. *Id.* As such, the IS/MND does not commit the Project applicant to implement the measures and there is no mechanism to monitor or enforce the measures. Indeed, the CAPCOA Report requires statements of commitment of the above mitigation measures to ensure effectiveness in reducing GHG emissions. *Id.*, pp. 12 (*e.g.*, "% reduction commitment [over 2008 Title 24 standards]").

The IS/MND must provide substantial evidence demonstrating how these energy and water mitigation measures will effectively reduce operational emissions and that the measures will be mandatory and enforceable. Without this evidence, the model results in unsubstantiated measures and cannot be relied upon to determine Project significance for operational emissions.

### C. Substantial Evidence Exists to Support a Fair Argument that the Project Will Result in Significant Health Risk Impacts from Diesel Particulate Matter

One of the primary emissions of concern regarding health effects for land development projects is diesel particulate matter ("DPM"), which can be released during Project construction and operation. DPM consists of fine particles with a diameter less than 2.5 micrometers including a subgroup of ultrafine particles (with a diameter less than 0.1 micrometers). Diesel exhaust also contains a variety of harmful gases and cancer-causing substances. Exposure to DPM is a recognized health hazard, particularly to children whose lungs are still developing and the elderly who may have other serious health problems. According to the California Air Resources Board ("CARB"), DPM exposure may lead to the following adverse health effects: aggravated asthma; chronic bronchitis; increased respiratory and cardiovascular hospitalizations; decreased lung function in children; lung cancer; and premature deaths for those with heart or lung disease.[1]

The IS/MND fails to evaluate the adverse health impacts resulting from exposure to toxic DPM emissions resulting from the Project's construction and operational activities.

[1] *See* CARB Resources - Overview: Diesel Exhaust & Health, available at https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health.).

When a project results in exposure to toxic contaminants, a "human health risk assessment" is required. (*Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1369; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220 (CEQA requires that there must be some analysis of the correlation between the project's emissions and human health impacts.). Without a quantitative analysis, the IS/MND fails to provide substantial evidence to support its conclusion that health risks from the Project will be less than significant.

Moreover, SWAPE provides substantial evidence demonstrating that the Project may result in significant health risk impacts from DPM emissions. An EIR must be prepared disclosing the Project's health risk impacts from toxic air contaminants and proposing mitigation measures that will result in less than significant impacts.

1. <u>The IS/MND lacks substantial evidence to support its finding that the Project's emissions will not cause a significant health impact.</u>

The IS/MND concludes that the health risk impact from DPM related to the Project's construction and operation will be less than significant. IS/MND, p. 57. The IS/MND, however, makes this finding without conducting a quantified health risk assessment for both the Project's construction or operational emissions. SWAPE, p. 13. Instead, the IS/MND attempts to justify its conclusions by stating that construction would be temporary and short-term, lasting approximately 31 months, and is relatively a short duration in comparison to the 30-year exposure period analyzed by the California Office of Environmental Health Hazard Assessment ("OEHHA"). IS/MND, p. 57. The IS/MND also asserts that the Project's construction emissions do not exceed screening-level localized significance thresholds ("LST"). *Id.* In addition, the IS/MND provides no discussion on the health risk impacts related to long-term operations, despite its conclusion that operations would result in a less than significant health risk impact. *Id.* SWAPE, p. 14.

SWAPE explains that the IS/MND's health risk analysis and less-than-significant finding is incorrect. *Id.* First, the IS/MND's application of the LST methodology to determine health risk impacts is improper. As the SCAQMD guidance on the LST explains, the LST methodology only evaluates impacts from criteria pollutants (*i.e.,* $NO_x$, CO, $PM_{10}$, and $PM_{2.5}$). SWAPE, p. 14. Toxic air contaminants ("TACs") such as diesel particulate matter ("DPM") are not criteria pollutants. By relying on the LST analysis, the IS/MND failed to analyze TAC exposure from the Project's construction and operational activities.

Second, SWAPE explains that the IS/MND's failure to conduct a construction or operational HRA is inconsistent with the approach recommended by OEHHA. SWAPE, p. 14. OEHHA recommends that all short-term projects lasting at least two months and longer-term projects lasting more than six months should be evaluated to estimate individual cancer risk for the maximally exposed individual resident. *Id.* Because the Project's construction period is anticipated to last over 30 months (short-term) and the

duration of the Project would presumably operate for at least 30 years (long-term), a health risk assessment is warranted per OEHHA. SWAPE also notes that, per the Traffic Impact Analysis, the Project's operations will generate approximately 1,464 daily vehicle trips, which would generate additional exhaust emissions and continue to expose nearby sensitive receptors to DPM emissions. *Id.*, p. 15. However, as noted above, the IS/MND fails to provide any analysis for health risks related to operational emissions.

Finally, SWAPE states that the IS/MND should also compare the excess health risk impact to SCAQMD's specific numeric threshold of 10 in one million. *Id*. The IS/MND fails to provide any evidence that the Project's health risk impact would not exceed this threshold.

Without a quantified analysis for health risks associated with the Project's DPM emissions, the IS/MND lacks substantial evidence to support its conclusion that the Project will not have a significant health risk impact.

2. A screening-level health risk assessment indicates the Project will result in a significant health risk impact.

SWAPE prepared a screening-level HRA to evaluate potential impacts from Project construction and operation.[2] SWAPE used AERSCREEN, the leading screening-level air quality dispersion model. SWAPE applied a sensitive receptor distance of 125 meters and analyzed impacts to individuals at different stages of life based on OEHHA and SCAQMD guidance utilizing age sensitivity factors. SWAPE, pp. 15-18.

SWAPE found that the excess cancer risk for adults, children, and infants, and during the third trimester of pregnancy at a sensitive receptor located approximately 125 meters away over the course of Project construction and operation are approximately 4, 37, 86, and 3.6 in one million, respectively. *Id.,* pp. 18-19. Moreover, **the excess lifetime cancer risk over the course of a Project operation of 30 years is approximately 131 in one million**. *Id*. The risks to children, infants, and lifetime residents appreciably exceed the SCAQMD's threshold of 10 in one million.[3] SWAPE's analysis constitutes substantial evidence that the Project may have a significant health impact as a result of diesel particulate emissions. A health risk assessment must be prepared disclosing the health risk impacts from toxic air contaminants.

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[2] SWAPE notes that, while it applied the incorrect and unsubstantiated data inputs from the IS/MND to a screening-level analysis, these values are inappropriate for a more refined health risk assessment. Thus, the screening-level analysis conducted is a conservative analysis and using the correct inputs that do not underestimate air emissions may yield higher health risks per individual. SWAPE, p. 19.

[3] While OEHHA and SCAQMD recommend using age sensitivity factors in conducting an HRA, even without using age sensitivity factors, SWAPE determined that the excess lifetime cancer risk over the course of a Project operation would be 25 in one million, exceeding the threshold. *Id*.

### D. Substantial Evidence Exists to Support a Fair Argument that the Project May Result in Significant GHG Impacts

The IS/MND concluded that the Project's GHG impacts would be less than significant because the Project's net annual emissions fall below the GHG threshold adopted by the South Coast Air Quality Management District ("SCAQMD"). IS/MND, p. 73. The IS/MND also concluded that the Project would result in no impacts for GHG emissions because the Project is consistent with the California Air Resources Board's ("CARB") Scoping Plan and SCAG's 2020-2040 Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS 2020-2045"). IS/MND, p. 74.

SWAPE determined that the IS/MND fails to adequately evaluate GHG impacts because the GHG analysis relies on: (1) an incorrect and unsubstantiated air quality model; and (2) plans that do not apply to the Project. SWAPE, p. 20. SWAPE further concluded that the IS/MND's improper GHG analysis may result in an underestimation of the Project's GHG emissions. *Id*. As such, the IS/MND fails to provide substantial evidence demonstrating the Project will have less than significant GHG impacts and there is a fair argument that the Project may have a significant environmental impact on GHG emissions. An EIR must be prepared to adequately assess the Project's potential GHG impacts.

#### 1. <u>The IS/MND's GHG analysis improperly relies on an incorrect and unsubstantiated air quality model</u>.

The IS/MND determined that the Project would generate net annual construction and operational greenhouse gas ("GHG") emissions of 2,601 $MTCO_2e$/year and would not exceed SCAQMD's bright-line threshold of 3,000 $MTCO_2e$/year for mixed-use projects. The IS/MND therefore concludes that the Project's cumulative contribution to GHG emissions would be less than significant. IS/MND, p. 73. However, SWAPE determined that the IS/MND's quantitative GHG analysis should not be relied upon to determine Project significance. SWAPE, p. 20. As discussed above, SWAPE explains that its review of the CalEEMod output files revealed incorrect and unsubstantiated input values resulting in underestimated construction and operational emissions. *Id*. Correcting the model with correct input values could certainly result in raising the IS/MND's calculation of 2,601 $MTCO_2e$/year above SCAQMD's 3,000 $MTCO_2e$/year threshold. As such, there is a fair argument that the Project may result in significant GHG emissions.

#### 2. <u>The IS/MND's GHG analysis improperly relies on plans that do not apply to the Project</u>.

In determining the significance of impacts for GHG emissions, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulative

considerable. (CEQA Guidelines section 15064.4(b)(3).) The lead agency must also support its selection of a model or methodology with substantial evidence. (*Id.,* section 15064.4(c).)

Moreover, consistency with relevant policies cannot be used to determine a Project's significance, as projects must incorporate emission reduction measures beyond those that comprise basic requirements. The California Supreme Court has made clear that just because "a project is designed to meet high building efficiency and conservation standards … does not establish that its [GHG] emissions from transportation activities lack significant impacts." (*Center for Biological Diversity v. Cal. Dept. of Fish and Wildlife* ("*Newhall Ranch*") (2015) 62 Cal.4th 204, 229.) As such, newer developments must be more GHG-efficient. (*See Newhall Ranch,* 62 Cal.4th at 226.)

The IS/MND concluded that the Project would result in no impacts for GHG emissions after determining that the Project is consistent with the California Air Resources Board's ("CARB") Scoping Plan and SCAG's 2020-2040 Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS 2020-2045"). IS/MND, p. 74. As discussed further below, the IS/MND fails to provide substantial evidence to demonstrate why the CARB Scoping Plan and SCAG RTP/SCS 2020-2045 applies to this Project and how the Project is consistent with those plans.

### *a. CARB Scoping Plan*

SWAPE determined that the IS/MND improperly relies on the CARB Scoping Plan because it does not directly apply to the Project and the Project is not consistent with the plan. SWAPE, p. 20. In fact, the IS/MND acknowledged that the measures in the Scoping Plan applied to state agencies and not the Project. IS/MND, p. 74. Still, the IS/MND reasoned that the Project would reduce its GHG emissions through compliance with the Scoping Plan, the Project was consistent with the Scoping Plan, and therefore the Project's GHG impacts would be less than significant. *Id.*. The IS/MND also acknowledged that the Scoping Plan does not contain project-level measures or performance standards, and is not directly applicable to cities, counties or individual projects. *Id*. SWAPE explains that the Scoping Plan contains no measures to implement at the project level nor does the IS/MND provide any explanation as to how the Project could achieve the Scoping Plan's statewide goals locally. SWAPE, p. 21.

SWAPE also explains that the IS/MND fails to provide any support to demonstrate how the Project is consistent with the Scoping Plan. SWAPE, pp. 21. Instead, the IS/MND makes a blanket statement that the Project would comply with the statewide measures of the Scoping Plan and therefore there would be no impacts. IS/MND, p. 74. SWAPE notes that the claim of consistency with the Scoping Plan is misplaced since all of its measures are specifically for state-level actions. SWAPE, p. 21. In addition, SWAPE presents dozens of measures within the Scoping Plan which could potentially apply to the Project but its review determined that the Project would not be consistent with those measures. *Id.*, pp. 22-28. For example, the Scoping Plan requires construction vehicles to operate with the highest tier engines commercially available. *Id.,* p. 22. The IS/MND, however,

fails to require this for any of its construction vehicles. *Id*. SWAPE discusses various other measures related to operations, transportation, and energy efficiency that the Project does not include nor does the IS/MND touch upon for consistency. As such, the IS/MND leaves an analytical gap and fails to demonstrate that consistency with CARB's Scoping Plan can be used for project-level significance determination.

#### *b. SCAG RTP/SCS 2020-2045*

SWAPE determined that the IS/MND improperly relies on the SCAG's RTP/SCS 2020-2045 because it does not directly apply to the Project and the Project is not consistent with the plan. SWAPE, p. 29. The IS/MND states that the RTP/SCS, which was adopted for federal transportation conformity purposes only, provides incentives to governments and developers for consistency with the strategy plan. IS/MND, p. 74. The RTP/SCS aims to expand mobility options by locating housing, jobs, and transit closer together with goals focused on the economy, mobility, environment and healthy communities. *Id.* The IS/MND reasons that the Project is an infill residential development that will be within a transit priority area and therefore would reduce vehicle miles traveled. *Id.,* p. 75. As such, the IS/MND concluded that no impact would occur. *Id.*

SWAPE explains that the RTP/SCS does not apply to the Project since it has not been approved in its entirety by the Regional Council and therefore has not been officially adopted for evaluating CEQA. SWAPE, p. 29. SWAPE also explains that the IS/MND fails to demonstrate how the Project is consistent with the RTP/SCS's regional strategies and how those strategies are addressed at the project level. *Id*. SWAPE presents dozens of air quality and GHG mitigation measures outlined by the RTP/SCS and discusses how the Project is not consistent with any of them. SWAPE, pp. 30-36.

For example, the RTP/SCS requires various measures to mitigate GHG emissions, including green building measures, off-site measures, best available control technology for construction and operations, measures and programs to encourage transit use and vehicle efficiency. *Id*. SWAPE notes that the IS/MND fails to provide any discussion or evidence supporting the Project's consistency with each specific mitigation measure. *Id.* As such, the IS/MND leaves an analytical gap and fails to demonstrate that consistency with the RTP/SCS can be used for project-level significance determination.

### E. Substantial Evidence Exists to Support a Fair Argument that the Project May Result in a Significant Impact from Subsurface Contamination

It is well-established that CEQA requires analysis of toxic soil contamination that may be disturbed by a Project, and that the effects of this disturbance on human health and the environment must be analyzed. CEQA requires a finding that a project has a "significant effect on the environment" if "the environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (Public Resources Code §21083(b)(3).) As the Court of Appeal has stated, "[a] new project located in an area that will expose its occupants to preexisting dangerous pollutants can

be said to have substantial adverse effect on human beings." (*Cal. Building Industry Assn. v. Bay Area Air Quality Mgm't Dist.* (2013) 218 Cal.App.4th 1171.) The existence of toxic soil contamination at a project site is a significant impact requiring review and mitigation in an EIR. (*McQueen v. Bd. of Dirs.* (1988) 202 Cal.App.3d 1136, 1149; *Assoc. For A Cleaner Env't v. Yosemite Comm. College Dist.* (2004) 116 Cal.App.4th 629.) Furthermore, this mitigation may not be deferred until a future time after Project approval. (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 306; *Citizens for Responsible Equitable Envt'l Dev. v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 330-31.)

The Project site has a history of use as a tow yard and for vehicle repair. The IS/MND found over 150 hazardous materials sites on the Project site with the potential for contaminants of PCBs, TPH-motor oil, and tetrachloroethylene ("PCE") in the soil. IS/MND, p. 78. The Phase II identified a number of chemicals in the subsurface, including volatile organic compounds. *Id.,* p. 83. Specifically, PCE was found in 12 of the 16 soil gas samples and was detected in soil gas at 0.21 µg/L, approximately one-half the residential screening criteria. SWAPE, p. 2. SWAPE determined that an adjacent project south of the Invitation Project site, La Palma Village Project,[4] is contaminated with volatile organic compounds and is currently undergoing a cleanup with regulatory oversight from the California Department of Toxic Substances Control ("DTSC"). *Id.* SWAPE also discloses a map from La Palma Village Project's soil sampling and testing report which indicates PCE in soil vapor arguably encroaching from the La Palma site to this Project site. *Id.* In fact, the Phase I determined that it is "possible that PCE has migrated into the southwestern portion of the Project site." IS/MND, p. 78. This is presumably coming from the La Palma Village Project.

As such, despite the Phase II's finding that PCE soil gas levels were below the screening criteria, there is a fair argument that there may still be significant impacts of PCE based upon the excessive amount of PCE plumes found at La Palma Village Project's site. SWAPE, p. 2. The IS/MND recommends mitigation measures removing underground storage tanks and 36 cubic yards of total petroleum hydrocarbon-impacted soil near an oil/water separator. *Id.* However, there is no mitigation measure that mitigates the impacts from additional releases of contaminants such as PCE. Unlike the adjacent La Palma Village Project, merely feet away from this Project, the IS/MND involves no regulatory oversight as a mitigation measure to ensure proper cleanup of any potential contaminants in the subsurface of the Project site. *Id.*

PCE is a likely human carcinogen, according the U.S. Environmental Protection Agency. SWAPE, p. 1. SWAPE explains that regulatory oversight during the remediation process is necessary given that the Project is a residential development and numerous chemicals were found in the subsurface. *Id.* Regulatory oversight by DTSC would ensure that sampling at the Project site from the Phase II was adequate and any disturbances from the development of the adjacent La Palma Village Project does not create additional

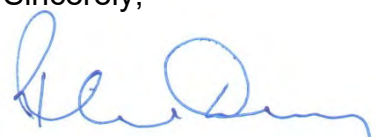
[4] Initial Study for the La Palma Village Project, City of Anaheim, November 2015, *available at* https://www.anaheim.net/DocumentCenter/View/10024/LPV-IS-MND-FINAL-With-App?bidId=.

releases of toxic contaminants, such as PCE, into the subsurface. As such, an EIR should be prepared to include mitigation measures that include regulatory oversight. SWAPE also recommends a voluntary cleanup agreement to further reduce the potential for impacts from hazardous materials.

## IV. CONCLUSION

In light of the above comments, the City must prepare an EIR for the Project and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,



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