

ADAMS BROADWELL JOSEPH & CARDOZO

SACRAMENTO OFFICE

DANIEL L. CARDOZO
CHRISTINA M. CARO
DANIKA L. DESAI
SARA F. DUDLEY
THOMAS A. ENSLOW
ANDREW J. GRAF
TANYA A. GULESSERIAN
KENDRA D. HARTMANN*
KYLE C. JONES
RACHAEL E. KOSS
NIRIT LOTAN
AARON M. MESSING
WILLIAM C. MUMBY
CAMILLE G. STOUGH

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

TEL: (650) 589-1660

December 20, 2019

MARC D. JOSEPH
Of Counsel

*Admitted in Colorado

By E-Mail and U.S. Mail

Gian Martire
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014
gianm@cupertino.org

Re: Westport Mixed-Use Project EIR Comments

Dear Mr. Martire:

We are writing on behalf of **Cupertino Residents for Responsible Development** to provide comments on the November 2019 Draft Environmental Impact Report ("DEIR") prepared for the Westport Mixed-Use Project proposed by KT Urban. The Project involves demolishing a one-story shopping center and developing an 8.1-acre site for a mixed-use of residential and retail buildings, totaling 242 residential units and 20,000 square feet of retail space. The Project is located at 21267 Stevens Creek Boulevard, approximately 0.1-.03 miles from the De Anza Transit Center.

According to the DEIR, the Project will require the following approvals from the City of Cupertino ("City"): (1) EIR Certification pursuant to the California Environmental Quality Act ("CEQA"); (2) Development Permit (3) Architectural and Site Approval Permit; (4) Use Permit; (5) Subdivision Map Permit; (6) Heart of the City Exception; (7) tree removal permit; and (8) Encroachment permits from the City and Caltrans.

As explained in these comments, the DEIR does not comply with the requirements of CEQA in several respects:

First, the DEIR fails to properly analyze and mitigate impacts from air quality and their associated health risks. Specifically, the City failed to properly

4766-003acp

analyze construction and operational air emissions by underestimating and failing to support their emission projections. As a result, the City failed to disclose, analyze and mitigate a potentially significant health risk that is evident when the DEIR's errors are corrected.

Second, the DEIR fails to properly disclose, analyze, and mitigate Greenhouse Gas ("GHG") emissions. The DEIR's analysis uses an inapplicable threshold of significance in violation of CEQA and relies on several erroneous and unsupported assumptions which underestimate the Project's actual GHG impacts.

Third, the DEIR fails to properly disclose, analyze, and mitigate the Project's traffic impacts. The City improperly calculates VMT, at odds with the City's own general plan and California's technical guidance on VMT and fails to include traffic analysis from a major nearby construction project.

For each of these reasons, the City may not approve the Project until a revised environmental review document is prepared and re-circulated for public review and comment.

These comments were prepared with the assistance of air quality and GHG experts from Soil Water Air Protection Enterprise ("SWAPE") Matt Hagemann, P.G., C.Hg. and Paul E. Rosenfeld, PhD¹, and traffic and civil engineer Dan Smith.² SWAPE and Mr. Smith's comments and curriculum vitae are attached hereto as Exhibits A and B respectively and are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments of the experts, in addition to our comments.

I. STATEMENT OF INTEREST

Cupertino Residents for Responsible Development is an unincorporated association of individuals and labor unions that may be adversely affected by the potential environmental impacts of the Project. The association includes Silicon Valley MEPS and its members and those members' families and other individuals that live, recreate, work and raise their families in Santa Clara County, including in and around the City of Cupertino (collectively "Cupertino Residents").

¹ **Exhibit A:** A letter from Matt Hagemann and Paul Rosenfeld to Aaron Messing Re: Comments on the Westport Mixed-Use Project (SCH No. 2019070377), December 20, 2019 ("**SWAPE comments**").

² **Exhibit B:** A letter from Daniel Smith to Aaron Messing Re: Westport Mixed Use Project DEIR (SCH 2019070377), December 20, 2019 ("**Smith comments**").

Cupertino Residents supports the development of mixed-use projects where properly analyzed and carefully planned to minimize impacts on public health and the environment. Mixed-use projects should avoid impacts to air quality, public health, water resources and traffic, and should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can mixed-use development truly be sustainable.

Individual members of Cupertino Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in Santa Clara County, including in and around the City of Cupertino. These members would be directly affected by the Project's environmental and health and safety impacts. Members of Cupertino 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. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

The organizational members of Cupertino Residents and their members also have 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 businesses to expand in the region, and by making it less desirable for businesses to locate and people to live there. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities.

Finally, the organizational members of Cupertino Residents are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment.³ It is in this spirit we offer these comments.

³ Pub. Resources Code § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.
4766-003acp

II. THE DEIR LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS ON SIGNIFICANT IMPACTS AND FAILS TO DISCLOSE, ANALYZE, AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS

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).⁴ The EIR is the very heart of CEQA.⁵ “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.”⁶

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.⁷ “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.”⁸ 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.”⁹

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.¹⁰ 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.”¹¹ 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

⁴ See, e.g., PRC § 21100.

⁵ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

⁶ *Comtys. for a Better Env’ v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBE v. CRA*”).

⁷ 14 CCR § 15002(a)(1).

⁸ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

⁹ *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.

¹⁰ 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.

¹¹ 14 CCR §15002(a)(2).

that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹²

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.*”¹³ As the courts have explained, “a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.”¹⁴

A. The Project description does not provide any information on the types of retail the Project will include, which render the DEIR’s analysis on Air Quality, GHGs, and VMT incomplete

The DEIR states that the Project will contain “two mixed-use buildings” with a combined approximately 20,000 square feet of retail space on their ground levels.¹⁵ Apart from this information, however, no further description or analysis of the future retail component of the Project is provided in the DEIR.

An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.¹⁶ Without a complete project description, the environmental analysis will be impermissibly narrow, thus minimizing the project’s impacts and undercutting public review.¹⁷ The courts have repeatedly held that “an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document].”¹⁸ “Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal’s benefit against its environmental

¹² PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹³ *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.

¹⁴ *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.

¹⁵ DEIR, p. 1-1.

¹⁶ See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

¹⁷ See *id.*

¹⁸ *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.
4766-003acp

costs.”¹⁹ CEQA Guidelines § 15378 defines “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”²⁰

Without any discussion of the types of retail to be included in the Project, key elements that would comprise the Project’s Air Quality, GHG, and Traffic impacts analysis are missing. For example, “[t]he existing shopping plaza, which contains many local serving uses like cheap restaurants, dentists, nail shops, and dance studios, attracts considerably more local trips than a shopping center that has specialty shops that people drive for longer distances to get to. These differences in retail may significantly increase the VMT and GHG impacts of the project, and without more information, the DEIR cannot make reliable conclusions as to those impacts.”²¹

While a Project is entitled to some flexibility with implementation of the Project beyond the project description, there is no practical reason why the City does not provide broad categories of retail to be included in the Project, such that a significantly more accurate rendering of the Project’s impacts could be made.²² The City must include this information in a recirculated DEIR and make adjustments to its air quality, GHG, and traffic analyses accordingly.

B. The DEIR fails to identify, analyze, and mitigate the Project’s air quality impacts and associated health risks

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.”²³ The DEIR’s air quality analysis relies on emissions calculated with the California Emission Estimator Model (“CalEEMod”) 2016.3.2. The model uses site-specific information, such as land use type, meteorological data,

¹⁹ *Id.* at 192-193.

²⁰ 14 CCR § 15378.

²¹ Smith Comments, p. 1.

²² See *Stoepthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal. App. 5th 1 (finding that a project description was insufficient when there were no practical impediments to why the developer could not have provided an accurate, stable, and finite definition of what it intended to build.).

²³ CEQA Guidelines, Appendix G, Section III: Air Quality. 4766-003acp

total lot acreage, project type and typical equipment associated with project type to calculate a project's construction and operational emissions.

After reviewing the DEIR, SWAPE concluded that "several of the values inputted into the model were not consistent with information disclosed in the DEIR" and that the DEIR incorrectly evaluates diesel particulate matter emissions.²⁴ As a result, the DEIR completely fails to identify and mitigate against a potentially significant health risk impact resulting from Project emissions. The City must remedy this failure by recirculating a DEIR with the potentially significant impact disclosed, analyzed, and mitigated.

1. The DEIR underestimates air quality impacts

In their review, SWAPE determined that at least three inputs from the DEIR's CalEEMod analysis were underestimated and did not reflect disclosed information about the Project from the DEIR. They also determined that certain mitigation measures outlined by the DEIR are unverified and therefore may underestimate the Project's construction and operational emissions. If adjusted, the revised CalEEMod conclusions result in the finding of a potentially significant health risk impact, explained in section II(B)(3).

a) *Multiple CalEEMod inputs contradict Project estimations from the DEIR*

SWAPE notes that while the Project proposes to construct a 148,040 square foot parking garage, the DEIR's CalEEMod inputs only include 92,800 square feet of enclosed parking structure, an underestimation of 55,240 square feet.²⁵ SWAPE also found that the DEIR's CalEEMod transportation assessment underestimates the weekend trip rate by 242 trips based on the DEIR's own estimation of projected daily trips for the Project.²⁶ Through both of these underestimations, the DEIR underestimates the Project's construction and operational emissions and leads to an inadequate analysis of health impacts.

Additionally, SWAPE determined that the pass-by trips expected to occur throughout the Project's operation were double counted by the DEIR's analysis, and

²⁴ SWAPE Comments, p. 2.

²⁵ SWAPE Comments, pp. 2-3.

²⁶ SWAPE Comments, p. 4.

therefore, the Project's operational emissions were underestimated.²⁷ According to Appendix A of the CalEEMod User's Guide, the primary trips utilize the complete trip lengths associated with each trip type category.²⁸ Diverted trips are assumed to take a slightly different path than a primary trip and are assumed to be 25% of the primary trip lengths. Pass-by trips are assumed to be 0.1 miles in length and are a result of no diversion from the primary route.²⁹ Here, the DEIR counts the pass-by trips both in its land use analysis *and* in its transportation assessment.³⁰ And as a result, "the emissions associated with these trips are underestimated and as a result, the Project's mobile-source operational emissions are underestimated."³¹

These underestimations are compounded by the DEIR's failure to include any information about the types of retail the Project will contain. As established above, different types of retail could have substantially different implications for the projections of daily trips or of trip purposes, both of which would have air quality impacts. As a result, the Project's air quality analysis is unreliable and cannot constitute substantial evidence that no significant effect will occur from construction and operation of the Project.

b) *Multiple mitigation measures are unverified and may result in underestimated emissions*

Next, SWAPE identified at least two mitigation measures that are inadequately verified in the CalEEMod inputs, which may result in the DEIR underestimating the Project's air emissions. The Project's CalEEMod output files demonstrate that the model included a 6 percent reduction from "Clean Paved Roads" and a 12 percent moisture content for "Water Unpaved Roads" (Appendix C, pp. 40, 69, 94). The CalEEMod User's Guide requires that any non-default values inputted must be justified,³² and the DEIR includes a justification: "Per BAAQMD basic control measures."³³

²⁷ SWAPE Comments, p. 6.

²⁸ "CalEEMod User's Guide, Appendix A: Calculation Details for CalEEMod." SCAQMD, available at: <http://www.aqmd.gov/docs/default-source/caleemod/caleemod-appendixa.pdf?sfvrsn=2>, p. 20

²⁹ "CalEEMod User's Guide, Appendix A: Calculation Details for CalEEMod." SCAQMD, available at: <http://www.aqmd.gov/docs/default-source/caleemod/caleemod-appendixa.pdf?sfvrsn=2>, p. 20

³⁰ SWAPE Comments, pp. 5-6.

³¹ SWAPE Comments, p. 6.

³² "CalEEMod User's Guide." CAPCOA, November 2017, available at: http://www.aqmd.gov/docs/default-source/caleemod/01_user-39-s-guide2016-3-2_15november2017.pdf?sfvrsn=4, p. 7, 13.

³³ DEIR, Appendix C, pp. 40, 69, 94.

The DEIR purports to implement BAAQMD Basic Construction Mitigation Measures through Mitigation Measure AQ-2, which requires the preparation of a Construction Management Plan. However, “none of these measures [required in Mitigation Measures AQ-2] discusses the 6 percent or 12 percent reductions included in the model, and as a result, these reduction percentages cannot be verified. Furthermore, none of these measures address the replacement of ground cover, and as a result, the inclusion of this measure is unsubstantiated.”³⁴ As a result, SWAPE concludes “the model may underestimate the Project’s construction emissions.”³⁵

In addition, SWAPE identified two additional operational mitigation measures that were included in the DEIR’s CalEEMod modeling, but no justifications or substantiations are provided for these measures.³⁶ SWAPE again concludes that “the implementation of these measures cannot be verified, and the model should not be relied upon to determine Project significance.”³⁷

2. The Health Risk Assessments relied upon by the DEIR cannot constitute substantial evidence

SWAPE’s analysis indicates that the DEIR’s construction and operational health risk assessments (“HRAs”) are incomplete and must be revised in order to be relied upon by the City.

Although the DEIR concludes that:

As described above, worst-case construction risk levels based on screening-level modeling (AERSCREEN) and conservative assumptions would be below the BAAQMD’s thresholds”³⁸

We have already shown above that the CalEEMod model incorrectly underestimates construction emissions. Thus, the DEIR’s construction HRA relies on a flawed analysis of air emissions, and the City must revise the air analysis before it can reliably compute the health risks associated with the Project’s construction.

³⁴ SWAPE Comments, p. 7.

³⁵ SWAPE Comments, p. 7.

³⁶ SWAPE Comments, pp. 7-8.

³⁷ SWAPE Comments, p. 8.

³⁸ DEIR, Appendix C, p. 26.

With respect to the Project's operational health risk analysis, the DEIR only analyzes the risk posed to *future* sensitive receptors *on the Project site*, not to risks posed to *nearby, existing* sensitive receptors as a result of the Project's operation.³⁹ This stands in contrast with the "recommendations set forth by the Office of Environmental Health and Hazard Assessment's (OEHHA) most recent *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments*, which was cited in the DEIR."⁴⁰ OEHHA recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (MEIR). Failing to prepare an operational HRA to nearby, existing sensitive receptors is inconsistent with this guidance and thus, the DEIR has failed to provide substantial evidence that no health risk is associated with the Project.⁴¹

SWAPE's also found that the DEIR failed "to sum [the excess cancer risk calculated for each age group in order] to evaluate the total cancer risk over the course of the Project's lifetime, including both construction and operation."⁴² SWAPE concludes that "[t]his is incorrect and thus, an updated analysis should quantify the Project's construction and operational health risks and then sum them to compare to the BAAQMD threshold of 10 in one million."⁴³ Without correction, the DEIR fails to comply with OEHHA guidance and its analysis fails to constitute substantial evidence.

3. A screening-level HRA correcting for the errors in the DEIR's CalEEMod inputs indicates a potentially significant health risk impact

In contrast to the DEIR's HRAs, SWAPE prepared a screening level HRA using corrected inputs for diesel particulate matter and assumptions "[c]onsistent with recommendations set forth by the 2015 OEHHA guidance."⁴⁴ With this data,

³⁹ SWAPE Comments, p. 9.

⁴⁰ DEIR, Appendix C, p. 26; "Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments." OEHHA, February 2015, *available at*: <https://oehha.ca.gov/media/downloads/crn/2015guidancemanual.pdf>.

⁴¹ See SWAPE Comments, p. 9.

⁴² SWAPE Comments, p. 10.

⁴³ SWAPE Comments, p. 10.

⁴⁴ SWAPE Comments, p. 10.

shown below, SWAPE projects that over the course of Project construction and operation, the excess cancer risks posed to adults, children, infants, and during the third trimester of pregnancy “are approximately 4.9, 32, 100, and 4.6 in one million, respectively. The excess cancer risk over the course of a residential lifetime (30 years) at the closest receptor is approximately 140 in one million, thus resulting in a potentially significant health risk impact not previously addressed or identified by the DEIR.”⁴⁵

The Maximally Exposed Individual at a Residential Receptor					
Activity	Duration (years)	Concentration (ug/m3)	Breathing Rate (L/kg-day)	ASF	Cancer Risk
Construction	0.25	0.3953	361	10	4.6E-06
<i>3rd Trimester Duration</i>	<i>0.25</i>			<i>3rd Trimester Exposure</i>	<i>4.6E-06</i>
Construction	1.75	0.3953	1090	10	9.7E-05
Operation	0.25	0.1217	1090	10	4.2E-06
<i>Infant Exposure Duration</i>	<i>2.00</i>			<i>Infant Exposure</i>	<i>1.0E-04</i>
Operation	14.00	0.1217	572	3	3.2E-05
<i>Child Exposure Duration</i>	<i>14.00</i>			<i>Child Exposure</i>	<i>3.2E-05</i>
Operation	14.00	0.1217	261	1	4.9E-06
<i>Adult Exposure Duration</i>	<i>14.00</i>			<i>Adult Exposure</i>	<i>4.9E-06</i>
Lifetime Exposure Duration	30.00			Lifetime Exposure	1.4E-04

The City must include this potentially significant impact in its analysis of air quality impacts in a recirculated EIR. Without it, the DEIR violates CEQA’s mandate that the City disclose and mitigate the Project’s potentially significant impacts.

⁴⁵ SWAPE Comments, p. 13.
4766-003acp

C. The DEIR fails to disclose, analyze, and mitigate the Project's Greenhouse Gas impacts

The DEIR's greenhouse gas ("GHG") analysis states that the proposed Project would result in a significant impact if it would (1) generate greenhouse gas emissions, either directly or indirectly, that may have a significant effect on the environment or (2) conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases.⁴⁶

We reviewed the GHG analysis with the assistance of SWAPE. As described below, our review found that the DEIR's GHG analysis violates the law and is not supported by substantial evidence. The DEIR's conclusions are not supported for three main reasons. First, the DEIR fails to use a threshold which is applicable to the Project's built-out year, in violation of CEQA. Second, even for the threshold the DEIR did use, its GHG analyses rely on several incorrect assumptions that result in a substantial underestimation of Project-related GHGs, as described below. Third, the DEIR fails to demonstrate consistency with the Cupertino CAP.

1. The GHG analysis relies on an inapplicable threshold in violation of CEQA

Under the CEQA Guidelines, which have been recently updated, a lead agency must analyze a project's impacts on GHG emissions.⁴⁷ The Guidelines allow for several approaches to this analysis, both qualitative and quantitative. The Guidelines explicitly mandate, however, that the "analysis should consider a timeframe that is appropriate for the project. The agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes."⁴⁸

The DEIR analysis relies on the tiered approach developed by the Bay Area Air Quality Management District ("BAAQMD") for assessing the impacts of land use development projects. If a project is within the jurisdiction of an agency that has a "qualified" GHG reduction strategy, the project can assess consistency of its GHG emissions impacts with the reduction strategy. BAAQMD has adopted screening criteria and significance criteria for development projects that would be applicable for the proposed project. If a project exceeds the BAAQMD Guidelines'

⁴⁶ DEIR, p. 4.5-15.

⁴⁷ 14 CCR §15064.4.

⁴⁸ 14 CCR §15064.4(b)

4766-003acp

GHG screening-level sizes, the proposed project would be required to conduct a GHG emissions analysis using the BAAQMD significance criteria of 1,100 million metric tons of carbon dioxide equivalent per year per year (MTCO_{2e} per year). Here, the DEIR analyzed the Project's annual emissions and found they were below the "bright-line" threshold.

BAAQMD's significance threshold, however, is not applicable to the Project, and relying on it violates CEQA. BAAQMD's thresholds, included in the district's 2017 CEQA Guidelines, were developed to comply with the state reduction target as it is embodied in AB 32,⁴⁹ which mandates that statewide greenhouse gas emissions be reduced to 1990 levels by the target year 2020.⁵⁰ In 2016, the state passed SB 32,⁵¹ which codified a new statewide 2030 GHG emissions reduction target of 40% below 1990 levels. Following the new legislation, the California Air Resources Board ("CARB") adopted in December 2017 a new scoping plan to outline the strategy needed to achieve SB 32 GHG targets. These are the binding "state regulatory scheme" that the CEQA Guidelines require agencies to account for.

The BAAQMD Guidelines do not account for or include any numeric threshold for compliance with SB 32 or the scoping plan and are therefore not applicable to projects that will be built and operated beyond the AB 32 target year.⁵² Because the Project's first fully operational year would be 2023, and it would continue to operate many years beyond that, the City must analyze the Project for its compatibility with the state's mandated goals for, at the very least, the year 2030.⁵³

BAAQMD *itself* advises lead agencies not to rely on its numeric significance thresholds and instead advises they make significance determinations based on the most recent state greenhouse gas reduction targets. For example, in recent comment letters to lead agencies, BAAQMD stated as follows:

⁴⁹ See, California Environmental Quality Act Air Quality Guidelines, Bay Area Air Quality Management District, May 2017, at p. D-27.

⁵⁰ California Air Resources Board, Assembly Bill 32 Overview; available at: <https://www.arb.ca.gov/cc/ab32/ab32.htm>, accessed April 3, 2019.

⁵¹ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32

⁵² See also *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497.

⁵³ SWAPE Comments, p. 21.

The Air District encourages the City to make a significance determination for greenhouse gas impacts based on the most recent State greenhouse gas targets and CEQA guidance. The Air District's 2010 CEQA guidelines are based on the State's 2020 greenhouse gas targets. These targets have been superseded by the State's 2030 and 2050 climate stabilization goals and by the most recent draft of the AB 32 Scoping Plan written by the California Air Resources Board.⁵⁴

The GHG impact analysis should include an evaluation of the Plan's consistency with the California Air Resources Board 2017 Scoping Plan and State and Air District climate stabilization goals for 2030 and 2050. Please be advised that the Air District is in the process of updating the CEQA guidelines/thresholds and current thresholds for GHGs should not be used for this plan.⁵⁵

BAAQMD is in the process of updating its current CEQA Guidelines and thresholds of significance.⁵⁶ The Draft EIR must be revised to analyze the Project's compatibility with the reduction targets set in SB 32, which go beyond those set in AB 32. As it is now, the DEIR's analysis violates both CEQA and the Supreme Court rulings on GHG analysis and cannot constitute substantial evidence.

2. The DEIR significantly underestimates GHG emissions from the Project

- a) *The DEIR does not support its conclusion that the Project will result in a net change of 359 MTCO_{2e}/Year*

The DEIR claims "that the proposed project would generate 1,843 MTCO_{2e} per year."⁵⁷ However, because, the project site is currently developed with

⁵⁴ Greg Nudd, BAAQMD, Letter to Joshua McMurray, Oakley, CA, Oakley Logistics Center Project, March 21, 2019; available at: http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/2019_03_21_city_of_oakley_oakley_logistics_center_nop-pdf.pdf?la=en, accessed April 12, 2019.

⁵⁵ Greg Nudd, BAAQMD, Letter to Alicia Parker, City of Oakland, RE: Downtown Oakland Specific Plan - Notice of Preparation of a Draft Environmental Impact Report, February 15, 2019; available at: http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/downtown_oakland_specific_plan_eir_notice_of_preparation_021519-pdf.pdf?la=en

⁵⁶ BAAQMD, CEQA Guidelines Update Underway; available at: <http://www.baaqmd.gov/plans-and-climate/california-environmental-quality-act-ceqa/updated-ceqa-guidelines>, accessed April 9, 2019.

⁵⁷ DEIR, p. 4.5-17.

approximately 71,250 square-feet of shopping center, which generates 1,484 MTCO_{2e} per year, the proposed project's emissions would represent a net increase in GHG emissions of 359 MTCO_{2e} per year.”⁵⁸ It therefore concludes that the Project “would not result in an increase in GHG emissions that exceed the BAAQMD's bright-line screening threshold of 1,100 MTCO_{2e} per year.”⁵⁹

However, this net increase assumes, without support in the record, that the current emissions at the Project site will disappear after the Project is completed. This is contrary to common sense and the CEQA requirement that the “lead agency...make a good-faith effort, based on available information, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.”⁶⁰ Under this mandate, the City must provide substantial evidence to support its conclusion that the Project's existing emissions sources will be extinguished by the new project and not simply displaced.⁶¹ The City has not done so here.

- b) *The DEIR's GHG analysis relies upon an incorrect and unsubstantiated air model, unsubstantiated assumptions, and unsubstantiated mitigation measures that underestimate GHGs associated with the Project*

Similar to the conclusion reached in section II(b)(1) of these comments, the DEIR's analysis of GHGs relies on underestimated inputs, unsubstantiated assumptions about the Project's retail components, and unsupported mitigation measures that significantly underestimate the GHG emissions associated with the Project. The City must correct for these underestimations in a recirculated DEIR.

3. The Cupertino CAP Measures are Not Properly Incorporated in The Project

CEQA states that for a DEIR to rely on a CAP in its analysis, it must identify which requirements apply to the Project and make those requirements binding and

⁵⁸ DEIR, p. 4.5-17.

⁵⁹ DEIR, p. 4.5-17.

⁶⁰ CEQA Guidelines, § 15064.4, subd. (a)

⁶¹ See *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859 (holding that an environmental baseline is to be construed broadly to ensure the fullest protection to the environment and cannot be narrowly defined by the project site if evidence indicates the Project's environmental damage will occur beyond the boundaries of the Project site.).

4766-003acp

enforceable to the Project by listing them as mitigation measures, if they are not already binding and enforceable in the City's CAP:

An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project.⁶²

Here, the DEIR fails to demonstrate consistency with the City's CAP as required by CEQA. Although it mentions certain steps taken in coordination with the CAP's community-wide measures, it fails to incorporate any project-level measures from the CAP or include any of the CAP's measures as binding mitigation in the DEIR.⁶³ SWAPE also indicates that even for the inapplicable community-wide measures relied upon by the DEIR, it also fails to demonstrate consistency with those community-wide measures.⁶⁴ Without more, the DEIR has not provided substantial evidence of consistency with the City's CAP.

D. The DEIR fails to disclose, analyze, and mitigate the Project's Traffic Impacts

CEQA requires the City to analyze the Project's direct, indirect and cumulative impacts from traffic generated by the Project. We reviewed the DEIR and the Transportation Analysis (TA) with the assistance of Dan Smith, a Civil and Traffic Engineer. Mr. Smith's review found that the City's analysis of transportation impacts is inadequate for several reasons: The TA produces an inaccurate analysis of VMT impacts; and the TA makes no accounting of traffic impacts evident from Cupertino's Vallco Project and EIR; and the DEIR does not disclose many CalEEMod parameters that may have an impact on model outcomes.

⁶² 14 CCR § 15183.5.

⁶³ SWAPE Comments, p. 15.

⁶⁴ SWAPE Comments, p. 15.

1. The DEIR's VMT analysis does not accurately analyze VMT impacts

The DEIR purports to comply with Section 15064.3(b)(1) in its conclusion that VMT impacts from the Project would be less than significant.⁶⁵ However, the DEIR's analysis appears to contain several deficiencies that call into question the underlying analysis.

First, the DEIR appears to combine both the residential and commercial land uses in its VMT analysis, despite the CEQA Technical Advisory for VMT advising that “[c]ombining land uses for VMT analysis is not recommended...[because c]ombining land uses for a VMT analysis could streamline certain mixes of uses in a manner disconnected from policy objectives or environmental outcomes. Instead, OPR recommends analyzing each use separately, or simply focusing analysis on the dominant use, and comparing each result to the appropriate threshold.”⁶⁶ The DEIR fails to do this or justify its decision not to follow the technical advisory, and as a result, the DEIR's VMT analysis is unreliable.

Next, the DEIR's VMT conclusion includes an analysis of the approximate *annual or daily* VMT of the Project and the existing site. However, this too goes against the guidance from the Technical Advisory, which states:

When assessing climate impacts of some types of land use projects, use of an efficiency metric (e.g., per capita, per employee) may provide a better measure of impact than an absolute numeric threshold.

Thus, the Technical Advisory explicitly recommends an assessment of VMT impacts in per capita over absolute numeric impacts for climate related transportation improvements, which is the ultimate goal in the Cupertino General Plan's push for VMT.⁶⁷ What's more, in its analysis, the DEIR cites the Cupertino General Plan EIR, which calculated its VMT projections in per capita, not annual or daily.

The City must correct its VMT analysis to include a separate analysis of the projected VMT from residential and retail or on the dominant use. The City must also modify its analysis to reflect a per capita comparison, in line with the Technical

⁶⁵ DEIR, p. 4.8-23.

⁶⁶ Technical Advisory on Evaluating Transportation Impacts in CEQA, p. 6 (Dec. 2018).

⁶⁷ Cupertino General Plan M-23
4766-003acp

Advisory, and to be able to better compare to the City's VMT goals, not the existing land use.

2. The DEIR ignores development from the Vallco Project

Mr. Smith indicates that a large project in Cupertino near the Project site ("Vallco Project") was not included in the DEIR's traffic impacts analysis. Although he notes that some of the Vallco Project's approvals have been repealed, the certifying FEIR for the Vallco Project has not been repealed and there remains the potential that some form of the prior project will be implemented. Specifically, one of the alternatives would "involve 23,417 net new trips daily, including 307 in the AM peak and 2,398 in the PM peak hour that were not present when the counts supporting the Westport DEIR analysis were conducted."⁶⁸ Without analyzing the additional impact from the Vallco Project, the Project's traffic analysis is fundamentally incomplete and cannot constitute substantial evidence supporting a conclusion of less than a significant impact.

3. The DEIR does not include the underlying CalEEMod inputs that would allow for review of the DEIR's VMT analysis

Although the DEIR indicates that VMT "were calculated using California Emissions Estimator Model (CalEEMod)," the DEIR does not contain many relevant CalEEMod inputs for review to determine the validity of the DEIR's VMT conclusions, including trip length or trip purpose.⁶⁹ As Mr. Smith notes, "it is important for the public to understand whether data from local traffic models has been employed or the outcome is just the product of default values. The must clarify whether local values have been substituted for default values and if not, why not."⁷⁰ Without this information, the DEIR cannot support their conclusion of no significant impact with substantial evidence.

III. CONCLUSION

The DEIR is inadequate as an environmental document because the City fails to properly disclose, analyze and mitigate the Project's significant impacts on air quality, public health, GHGs and transportation. The City cannot approve the

⁶⁸ Smith Comments, p. 2.

⁶⁹ Smith Comments, p. 2.

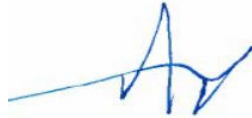
⁷⁰ Smith Comments, p. 2.

December 20, 2019
Page 19

Project until it prepares and re-circulates a revised DEIR that resolves these issues and complies with CEQA's requirements.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'A. Messing', with a long horizontal line extending to the left.

Aaron M. Messing

Attachments

AMM:acp

4766-003acp