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May 25, 2021

Via Email OnlyMohammad Habib, Chair
Members of the Planning Commission
City of Morgan Hill
c/o Minutes Clerk
17575 Peak Avenue
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pcpubliccomment@morganhill.ca.govJennifer Carman, Community Development Director
jennifer.carman@morganhill.ca.gov
Adam Paszkowski
Adam.Paszowski@morganhill.ca.gov**Re: Agenda Item No. 1: Redwood Tech at 101 Project (SR2020-0029 through SR2020-0033 and SD2020-0011)**

Dear Chair Habib, Commissioners, Minutes Clerk, Ms. Carman, Mr. Paszkowski:

We are writing on behalf of **Morgan Hill Residents for Responsible Development** ("Residents") to provide comments to the Morgan Hill Planning Commission ("Commission") on Agenda Item No. 1, the Redwood Tech at 101 Project, SR2020-0029 through SR2020-0033 and SD2020-0011 ("Project"). Proposed by Trammel Crow Morgan Hill Ventures ("Applicant"), the Project proposes approximately 501,314 square feet of flexible industrial/commercial space spread across 5 separate buildings on four separate lots in the approximately 29-acre lot south of the former Tree Farm site on Hwy 101 south of Cochrane Road in the City of Morgan Hill ("City").

The Applicant seeks a Design Permit and a Vesting Tentative Parcel Map, both discretionary approvals, to divide the property's existing 2 parcels into 4 legal lots. In accordance with Section 18.108.040.D of the City's Municipal Code, the size

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of the Project is considered significant and, as such, the Development Services Director has elevated the Project to the Planning Commission for review and consideration of the two proposed Project entitlements. The Project proposes to construct 5 buildings on the site, all designated for flexible industrial and commercial uses, including advanced manufacturing, warehouse, supporting office, and similar industrial and commercial uses. The property has a Commercial/Industrial General Plan designation and is zoned Light Industrial (IL). Access to the property will be provided via four driveways from the extension of De Paul Drive to the south from Cochrane Road. All street frontages will be improved to City Standards with sidewalk and landscaping.

The Applicant previously submitted to the City a different project titled the Morgan Hill Technology Center (“Technology Center”), which was withdrawn by the Applicant on September 18, 2020.¹ That previous project encompassed the proposed Project site and the parcels to the north. The original Technology Center proposed a mix of industrial, commercial, and residential uses on an 89-acre site. The industrial and commercial portions of the Technology Center project proposed 1.04 million square feet of light industrial uses contained in six buildings, 45,000 square feet of industrial office in one building situated between the industrial buildings on a 2.31-acre parcel, and 50,000 square feet of retail/commercial on a 2.92-acre parcel fronting Cochrane Road.

We reviewed the Staff Report and related Project documents with the assistance of environmental health, air quality, and GHG expert Paul E. Rosenfeld, Ph.D., and hazardous materials expert Matt Hagemann, P.G., C.Hg. of Soil Water Air Protection Enterprise (“SWAPE”), transportation expert Dan Smith, and noise expert Deborah Jue, INCE-USA. Comments and curriculum vitae of SWAPE are attached to this letter as Attachment A.² Mr. Smith’s comments and curriculum vitae are included as Attachment B,³ and Ms. Jue’s comments and curriculum vitae are attached as Attachment C.⁴ All expert comments are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments in Attachments A, B and C.

¹ Staff Report, p. 6; see <http://www.morgan-hill.ca.gov/1966/Morgan-Hill-Technology-Park> (last visited 5/25/21).

² **Attachment A:** Comments on Redwood Tech at 101 Project (May 21, 2021) (“SWAPE Comments”).

³ **Attachment B:** Transportation Comments re Redwood Tech@101 Project by Smith Engineering & Management (May 20, 2021) (“Smith Comments”).

⁴ **Attachment C:** Redwood Tech @ 101 Comments, Wilson Ihrig (May 25, 2021) (“Jue Comments”).
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Based on our review, it is clear that the City has not complied with the California Environmental Quality Act (“CEQA”)⁵, the Subdivision Map Act, or with local and State land use laws in its review of the Project and its proposed entitlements.

The City initially prepared a draft environmental impact report (“DEIR”) for the Technology Center Project, which found that the Technology Center Project (which included the instant Project plus the additional components) would have significant impacts on air quality, biological resources, cultural resources, greenhouse gas (“GHG”) emissions, hazardous materials, noise, and transportation which required mitigation.⁶ Before the DEIR was certified, the Project application was withdrawn. The Applicant has now repropoed the industrial/commercial component of the Technology Center Project as the Redwood 101 Project, which the City now claims does not require CEQA review because it was previously analyzed in the 2035 General Plan EIR. As discussed below, the General Plan EIR was a planning-level CEQA document which did not analyze the Project’s environmental impacts with the degree of specificity required for project-level environmental review. Nor were the project-specific impacts that were identified in the Technology Center DEIR addressed in the General Plan EIR. An EIR is required for the Project for these reasons.⁷

The City is also improperly piecemealing its environmental review of the Project from other components of the original Technology Center Project. As the Staff Report explains, the residential component of the Technology Center Project has been reduced from 319 units to 269 units and is being concurrently developed by Dividend Homes under a separate application.⁸ Two of the original project components are being reviewed by the City for a second time, yet the City failed to prepare an EIR that analyzes the impacts of both developments.

Finally, as discussed below, the Redwood 101 Project has potentially significant, unmitigated impacts on air quality, public health, GHG emissions, noise, and transportation that must be disclosed and mitigated in an EIR. These unmitigated impacts also preclude the Planning Commission from making the

⁵ Pub. Res. Code §§ 21000 et seq; 14 Cal. Code Regs. (“CCR” or “CEQA Guidelines”) §§ 150000 et seq.

⁶ See Technology Center DEIR, pp. iv-xxx, available at <https://www.morgan-hill.ca.gov/DocumentCenter/View/36693/Draft-EIR-Morgan-Hill-Tech-Center-12-May-2020-webready> (last visited 5/25/21).

⁷ See 14 CCR § 15152.

⁸ Staff Report, p. 6.
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findings required to approve the Project under the Subdivision Map Act and the City land use codes. The Planning Commission should remand the Project to staff to prepare a legally adequate EIR before the Project can be considered for approval.⁹

I. STATEMENT OF INTEREST

Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety standards associated with Project development, as well as its potential environmental impacts. Residents includes local unions, their members and families, and other individuals that live and/or work in the City of Morgan Hill and Santa Clara County.

Individual members of Residents and the affiliated labor organizations live, work, recreate and raise their families in the City of Morgan Hill and Santa Clara County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members, including Santa Clara County resident Fermin Layos, may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. Residents have a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

II. LEGAL STANDARD

In an effort to ensure the long-term protection of the environment of the state, CEQA requires governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality. To this end, CEQA requires preparation of an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment.¹⁰ In this way, CEQA is designed to inform decision makers and the public about the potentially

⁹ We reserve the right to supplement these comments at later hearings and proceedings on this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

¹⁰ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390. 5175-002acp

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significant environmental impacts of a project before it is approved and implemented.¹¹

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,”¹² an EIR’s 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.”¹³ To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹⁴ Furthermore, CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures to address all potentially significant impacts identified in the agency’s CEQA analysis.¹⁵ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.¹⁶

CEQA “projects” include activities undertaken by public agencies that cause direct physical changes to the environment.¹⁷ Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to identify several key objectives, including whether to prepare an EIR or negative declaration, as well as the appropriate process to be used for analysis of the project’s environmental effects and potential mitigation.¹⁸ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁹

¹¹ Cal. Code Regs., tit. 14, § 15002, subd. (a)(1) (“CEQA Guidelines”); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹² *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹³ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

¹⁴ CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁵ Pub. Resources Code, §§ 21002-21002.1.

¹⁶ See *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

¹⁷ *County of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, 385.

¹⁸ CEQA Guidelines, §§ 15060, 15063, subd. (c).

¹⁹ See, e.g., Pub. Resources Code, § 21100.5175-002acp

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III. CEQA PROHIBITS PIECEMEALING OF A PROJECT

CEQA prohibits a project proponent from seeking approval of a project by breaking it up, piecemeal fashion, in order to take advantage of environmental exemptions or less rigorous CEQA review for smaller projects.²⁰ The law mandates that “environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.”²¹ As courts have explained, “... [t]he CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish.”²²

Specifically, the description of a project must describe a larger future project and analyze its effects if (1) the larger project is a reasonably foreseeable consequence of the initial project, and (2) the future project will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.²³ This rule applies even if (1) the Lead Agency has not yet formally approved the larger future project, and (2) it is impossible to predict with precision the environmental effects of less-than-definite future plans, as long as these effects can be discussed at least in general terms.²⁴ Difficulty in describing the effects of less-than-definite future plans does not excuse an agency from CEQA compliance, especially since CEQA provides mechanisms, such as Program EIRs and tiering of EIRs, to facilitate environmental analysis of larger future projects.²⁵

Furthermore, “[t]iering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental impacts of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.”²⁶ If a program-level EIR has been released, it is nonetheless still not appropriate to piecemeal later tiers in order to avoid environmental review.

²⁰ *Arviv Enterprises, Inc. v. South Valley Area Planning Com.* (2002) 101 Cal. App. 4th 1336, 1340.

²¹ *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego*, (1989) 214 Cal.App.3d 1438, 1452; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165.

²² *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, (emphasis added).

²³ *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal. 3d 376, 396.

²⁴ *Id.* at 398-99.

²⁵ *Id.* at 399, n.8.

²⁶ 14 C.C.R. § 15152 (b); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 431, 150 P.3d 709, 720.
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A. Development of Multiple Components of the Original Morgan Hill Technology Center Project is Reasonably Foreseeable and Cumulative Impacts Must be Analyzed Together in an EIR

Similar to *Laurel Heights*, in which the Court found that future development was reasonably foreseeable and the university had to include environmental analysis of the anticipated future uses of the site, the Project is just one fragment of anticipated development of the site, which was already analyzed in an EIR.²⁷ Though the Applicant abandoned the larger project in September 2020, the proposed Project is merely a selection excerpted from that larger development, pulled out to be considered on a smaller scale.

Considering the sequence of events associated with development at the site, it is difficult to imagine a scenario in which the Applicant and the City are not attempting to piecemeal a large project into several smaller ones that will require less rigorous CEQA review—or none at all, as the City alleges here. The larger project, the impacts of which the DEIR concluded would be numerous, significant and, in some cases, unavoidable, was abruptly abandoned by the Applicant after considerable pushback from the community.²⁸ When the Applicant submitted the much-abbreviated application for the currently proposed Project, the City pointed out that a Vesting Tentative Map of five or more parcels would require additional CEQA review, after which the Applicant immediately revised the Project, reconfiguring the proposed site into four parcels.²⁹

Moreover, the residential portion of the larger project had been evaluated in the Technology Center DEIR together with all project components. It is now being developed concurrently under a separate application—and separate environmental review.³⁰ As the court in *Laurel Heights* found, “this is not the type of situation where it is unclear as to whether a parcel of land will be developed or as to whether activity will commence.”³¹ In fact, though no formal land use entitlement applications had been filed with the City at the time, the Technology Center DEIR acknowledged that “[t]he future development of [the residential component] is

²⁷ *Id.* at 399.

²⁸ See, e.g., public comment letters, <https://www.morgan-hill.ca.gov/1966/Morgan-Hill-Technology-Park>.

²⁹ See City Letter of Application Incompleteness (Jan. 11, 2021), p. 3; Applicant Response Letter (Feb. 1, 2021), p. 8.

³⁰ Morgan Hill Planning Commission Staff Report, p. 6.

³¹ *Laurel Heights*, 47 Cal.3d at 395.

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reasonably foreseeable given the existing land use designation and zoning.”³² Now that that foreseeable development has come to pass, the adjacent development projects are being evaluated separately.

By now omitting from its environmental review the reasonably foreseeable development of all projects at the same sites originally analyzed in the EIR for the Technology Center Project, the City has impermissibly engaged in piecemealing and must prepare an EIR for the entire site which fully describes, analyzes and mitigates potentially significant impacts.

IV. TIERING

In preparing an initial study, a lead agency is required to identify the appropriate level of environmental review and must determine whether a previously prepared EIR could be used with the project.³³ Tiering, in which the analysis of general matters contained in a broader EIR, such as one prepared for a general plan, is used to frame the general discussion of a later, narrower project and its specific issues and impacts, can be appropriate when considering large-scale planning approval or separate but related projects. A later EIR shall be required when the initial study or other analysis finds that the later project may cause significant effects on the environment that were not adequately addressed in the prior EIR.³⁴

Where a program EIR has been prepared that could apply to a later project, CEQA requires the lead agency to conduct a two-step process to examine the later project to determine whether additional environmental review is required.³⁵ First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.³⁶ Whether a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record.³⁷ If the agency finds the activity would have environmental effects that were not examined in the program EIR, it must

³² Technology Center DEIR, p. 17.

³³ CEQA Guidelines, §§ 15060, 15063, subd. (c).

³⁴ 14 C.C.R. § 15152(f).

³⁵ See CEQA Guidelines, 15168, subd. (c); S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.16 (Mar. 2018).

³⁶ CEQA Guidelines, § 15168, subd. (c)(1).

³⁷ *Id.* at (c)(2).

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then prepare an initial study to determine whether to prepare an EIR or negative declaration to address those effects.³⁸

Second, if the agency determines the project is covered by the program EIR, it must then consider whether any new or more significant environmental effects could occur due to changes in circumstances or project scope, or new information that could not have been considered in the program EIR.³⁹ More specifically, pursuant CEQA Guidelines section 15162, subsequent or supplemental environmental review is required when one or more of the following events occur:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the

³⁸ CEQA Guidelines, § 15168, subd. (c)(1).

³⁹ CEQA Guidelines, § 15168, subd. (c)(2).

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project, but the project proponents decline to adopt the mitigation measure or alternative; or

- (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.⁴⁰

The terms “supplement” and “subsequent” are not interchangeable. “A supplement to an EIR is a document that contains additions or changes needed to make the previous EIR adequate ... In contrast ... a subsequent EIR revises the previous EIR, rather than simply supplements it.”⁴¹ With subsequent review the “revised EIR must receive the same circulation and review as the original EIR.”⁴²

Similarly, Section 15183 provides a streamlined process for environmental review of projects that are “consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified,” authorizing agencies to avoid duplicative environmental review “except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site.”⁴³

Courts have held that if “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.”⁴⁴ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.⁴⁵ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.⁴⁶

⁴⁰ CEQA Guidelines, § 15162, subd. (a)(1)-(3); see also Pub. Resources Code, § 21166.

⁴¹ S. Koskte & M. Zischke, Practice Under the Environmental Quality Act 2d., § 19.4, p. 19-8 (Mar. 2018).

⁴² S. Koskte & M. Zischke, Practice Under the Environmental Quality Act 2d., § 19.4, p. 19-8, (Mar. 2018), emphasis added; see also CEQA Guidelines, §§ 15162, 15163.

⁴³ 14 C.C.R. § 15183(a).

⁴⁴ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

⁴⁵ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

⁴⁶ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed
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A. The Project Was Not Analyzed by the 2035 General Plan EIR

In 2016, the Morgan Hill City Council certified the Morgan Hill 2035 General Plan EIR analyzing “land use, urban design, circulation, public services, natural resources, and safety goals, policies, and actions to guide investment and development” in the City over a 20-year period. Prepared as a program EIR pursuant to CEQA Guidelines Section 15168, the EIR states that its intended purpose is to serve as a long-term “policy document[] guiding future development activities and City actions.”⁴⁷

The Staff Report asserts that the General Plan EIR “adequately addressed the potential environmental impacts associated with the comprehensive update of the City’s constitution for growth including certain implementation activities and provided for streamlining of the environmental review process for projects proposed subsequent to the certification of the EIR.”⁴⁸ The Report’s entire analysis of the EIR’s evaluation of impacts from activities specific to the Project consists of the following paragraph:

The proposed project entails dividing the subject property and constructing buildings consistent with the General Plan. The division and development of parcels consistent with the General Plan was addressed in the program EIR for the 2035 General Plan and, therefore, pursuant to Section 15162 and Section 15183 of the State CEQA Guidelines, no additional review under the California Environmental Quality Act is required for the proposed project.⁴⁹

It is unclear from this description how the General Plan EIR’s analysis of development and population growth over the next 15 years applies to the Project’s specific impacts, let alone how those impacts are examined in enough detail as to make further environmental review unnecessary. The Staff Report appears to conclude that, in light of the Project’s proposal to divide “the subject property and construct[] buildings,” the General Plan EIR’s analysis of the “division and development of parcels” is sufficiently adequate that no further review is

project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

⁴⁷ General Plan EIR, p. 2-2.

⁴⁸ Staff Report, p. 19.

⁴⁹ Staff Report, p. 15.

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warranted. A thorough search of the General Plan EIR, however, reveals that it does not analyze impacts from specific subdivisions or construction whatsoever. In fact, specifics of any kind associated with the Project—environmental setting, baseline, potential impacts from development, subdivision or construction, mitigation—are nowhere to be found in the EIR.

In its insistence that the General Plan EIR’s analysis of future impacts renders any further environmental review unnecessary, the Staff Report seems to unequivocally reject the EIR’s stated objective with respect to its status as a program EIR. Recognizing the utility of program EIRs when a project “consists of a series of actions related to the issuance of rules, regulations, and other planning criteria,” the EIR distinguishes itself as a document that serves to guide policy and City actions over time, rather than as a benchmark for specific project impacts:

No specific development projects are proposed as part of the proposed Project. Therefore, this EIR is a program-level EIR that analyzes the potential significant environmental effects of the adoption of the proposed Project. As a program EIR, it is not project-specific, and does not evaluate the impacts of individual projects that may be proposed under the General Plan. Such subsequent projects will require a separate environmental review, when applicable as required by CEQA, which could be in the form of a Negative Declaration, Mitigated Negative Declaration, or a Subsequent EIR, to secure the necessary development permits. Therefore, while subsequent environmental review may be tiered from this EIR, this EIR is not intended to address project-specific impacts of individual projects.⁵⁰

The City had to make a significant effort to disregard this statement in the EIR, whose preparers went so far as to announce no less than 7 times that it was not to be used to evaluate individual projects.⁵¹ The City cannot do an about-face now to claim that its own General Plan EIR analyzed something which the City has previously and unequivocally stated it did not.

Section 15168’s two-step inquiry of a program EIR’s applicability to later activities holds that “if a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an

⁵⁰ General Plan EIR, p. 2-2.

⁵¹ See, e.g., pp. 2-2, 3-1fn.2, 3-42, 4.3-34, 4.3-37, 4.3-38, 4.3-53.
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EIR or a negative declaration.”⁵² The City insists that, pursuant to sections 15162 and 15183, the Project is within the scope of the program EIR and no subsequent EIR is required. “Whether a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record.”⁵³ The City does not offer any substantial evidence to support its dubious conclusion. At most, it suggests a vague association between the EIR’s illusory “division and development of parcels” and the Project’s subdivision and development.

In contrast, as demonstrated below and supported by substantial evidence, the Project is likely to result in significant impacts to transportation, air quality, and public health—impacts specific to its development and that were not contemplated by the General Plan EIR. Since the EIR, by its own admission, did not evaluate the impacts of any specific projects, a subsequent EIR to examine “project-specific significant effects which are peculiar to the project or its site” should be prepared.⁵⁴

V. ENVIRONMENTAL REVIEW IS REQUIRED FOR DISCRETIONARY ACTIONS

In addition to claiming that the program-level General Plan EIR adequately analyzed impacts of future development, including the Project, the City advised the Applicant that the Project was further excused from CEQA review because “Environmental Review is not required for Design Review or Tentative Parcel Map applications.”⁵⁵ This conclusion is patently false for the reasons that follow.

A. Design Review

The City’s conclusion that environmental review is not required for Design Review is incorrect. Per the City’s own Municipal Code, a Design Review permit, which is required for significant projects like the Applicant’s,⁵⁶ “is a discretionary action that enables the city to ensure that proposed development exhibits high

⁵² 14 C.C.R. § 15168(c)(1).

⁵³ *Id.*

⁵⁴ 14 C.C.R. § 15183(a).

⁵⁵ City of Morgan Hill Development Services Center Completeness Comment Letter, February 16, 2021, p. 3.

⁵⁶ Municipal Code 18.108.040(D)(2) states that “[a]ny structure with more than seventy-five thousand square feet of floor area is presumed significant.”

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quality design consistent with the general plan and any other applicable specific plan or area plan adopted by the city council.”⁵⁷ CEQA clearly requires environmental review of all “discretionary projects proposed to be carried out or approved by public agencies.”⁵⁸

The Staff Report notes the receipt of a letter on behalf of the Applicant asserting that the Planning Commission “lacks discretion to address potential environmental effects, making the Project ministerial for CEQA purposes.”⁵⁹ Analogizing to a case in which a court found that approval of a design review permit limited the reviewing agency to consideration of design-related issues, the letter attempts to establish that the Planning Commission has no discretion to consider the Project’s potential environmental impacts. This is because, as the letter contends, the discretion granted to the Commission by the Municipal Code refers only to discretionary review of a project’s design elements. The letter’s interpretation of the case law, however, suffers from two fundamental flaws: (1) it attempts to apply the court’s reasoning to an inapposite set of facts, and (2) it overlooks the other discretionary approval sought for this Project, the Vesting Tentative Parcel Map.

The letter attempts to draw parallels where they do not exist, asserting that “[l]ike the fourteen design review criteria applied by St. Helena in *McCorkle*, the City’s design review criteria are limited to design review and not environmental issues.”⁶⁰ In that case, the St. Helena City Council found the local design review ordinances prevented it from disapproving the project for non-design related matters. Those ordinances did not include any required findings related to CEQA review or otherwise allow the agency to “shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report.”⁶¹ Here, on the other hand, Morgan Hill’s design review ordinance requires a finding that a project has been reviewed in compliance with CEQA, as well as a determination that it will not be “detrimental to the public health, safety, or welfare or materially injurious to the properties or improvements in the vicinity”—distinctly discretionary actions that require consideration of the Project’s effects on the environment and potential mitigation.⁶²

⁵⁷ MHMC 18.108.040(A).

⁵⁸ Pub. Resources Code § 21080(a).

⁵⁹ Staff Report, p. 19.

⁶⁰ Staff Report, p. 72.

⁶¹ *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App 5th 80, 90.

⁶² Zoning Code, § 18.108.040.

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Furthermore, even if a design permit did limit the Planning Commission to consideration only of design-related elements, the Project also seeks a Vesting Tentative Parcel Map, a discretionary permit subject to the provisions of CEQA.⁶³ As discussed above, it is well established that a project cannot be divided into smaller parts that individually will not have a significant effect on the environment. This rule is applicable even if one of the smaller parts might require only ministerial, rather than discretionary, approval.⁶⁴ Moreover, when a project “involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary.”⁶⁵

B. Vesting Tentative Parcel Map

The Project requires a Vesting Tentative Parcel Map to subdivide the existing two parcels into four separate parcels, approval of which requires that the Tentative Map is consistent with all applicable city ordinances, general and specific plans adopted by the city, and the State Subdivision Map Act (“Map Act”).⁶⁶ The Map Act, as well as the Morgan Hill Municipal Code, requires specific environmental findings before a parcel map can be approved. A map shall not be approved, for example, if its design or proposed improvements are “likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat,” or are “likely to cause serious public health problems.”⁶⁷ Regulating land subdivisions in Morgan Hill, according to the Municipal Code, is “necessary for the preservation of the public health, safety and general welfare, to promote orderly growth and development and to promote open space, conservation, protection and proper use of land and to insure provision for adequate traffic circulation, utilities and services.”⁶⁸

Once again, making these findings confers on the agency a discretionary duty to determine compliance with the statute.⁶⁹ This discretion, furthermore, involves

⁶³ See, e.g., Pub. Resources Code § 21080: “this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps ...”

⁶⁴ *Orinda Assoc. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171–1172.

⁶⁵ 14 C.C.R. § 15268(d).

⁶⁶ MHMC § 17.24.050 A; 17.24.070 A; .

⁶⁷ Gov. Code § 66474(e), (f); MHMC § 17.20.100.

⁶⁸ MHMC, § 17.04.020.

⁶⁹ Pub. Res. Code § 21080(a); *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690. 5175-002acp

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consideration of activities that have the “potential to cause a direct physical change or a reasonably foreseeable indirect physical change in the environment.”⁷⁰

The City, in an exercise of this discretionary duty, states in the Staff Report that the Project “will not be detrimental to the public health, safety, or welfare, and will not be materially injurious to the properties or improvements in the vicinity.”⁷¹ As it had previously concluded that no environmental review was required,⁷² however, it is unclear how it reached this determination, and no substantial evidence is offered in support of this conclusory statement. In addition, as discussed in Section VI. below, there is substantial evidence demonstrating that the Project is likely to have potentially significant and unmitigated impacts on air quality, public health, climate change, and traffic. As a result of these unmitigated impacts, the Project fails to comply with the Map Act and Municipal Code and the City cannot make the requisite findings to approve the Project’s Tentative Map.

VI. THE CITY MUST PREPARE AN EIR TO ANALYZE THE PROJECT’S POTENTIALLY SIGNIFICANT ENVIRONMENTAL IMPACTS THAT WERE NOT ANALYZED IN THE MORGAN HILL 2035 GENERAL PLAN EIR

Agencies must fully disclose all potentially significant impacts of a project, and must implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency’s significance determination with regard to each impact must be supported by accurate scientific and factual data.⁷³ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁷⁴

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁷⁵ Challenges to an agency’s failure to proceed in the manner required by CEQA, such as the failure to disclose

⁷⁰ *Id.*

⁷¹ Staff Report, p. 16.

⁷² Asserting that the Project “is consistent with the development projections analyzed in the Morgan Hill 2035 General Plan program EIR for the project site” and that it “is designed to be consistent with the development standards in the General Plan and Zoning Code” the City concluded that no further environmental review would be required. Staff Report, p. 52.

⁷³ 14 CCR § 15064(b).

⁷⁴ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁷⁵ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
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information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.⁷⁶ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."⁷⁷

As explained above, where a program EIR has been prepared that can apply to a later project, CEQA requires the lead agency to conduct a two-step process to examine the later project to determine whether additional environmental review is required.⁷⁸ First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.⁷⁹ If the later activity involves site-specific operations, as it does here, the City must evaluate the site and activity to determine whether the environmental effects were covered in the program EIR and document its findings by a checklist.⁸⁰ If the agency finds the activity would have environmental effects that were not examined in the program EIR, it must then prepare an initial study to determine whether to prepare an EIR or negative declaration to address those effects.⁸¹

Because the 2035 General Plan EIR did not address any project-specific impacts of future projects, significant effects resulting from the Project will be substantially more severe than anything analyzed in the General Plan EIR. Without completing additional environmental analysis, the Project cannot satisfy the requirements for disclosure and analysis under CEQA and must complete a subsequent EIR.

⁷⁶ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁷⁷ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁷⁸ See CEQA Guidelines, 15168, subd. (c); S. Kostka & M. Zischke, *Practice Under the California Environmental Quality Act 2d*, § 10.16 (Mar. 2018).

⁷⁹ CEQA Guidelines, § 15168, subd. (c)(1).

⁸⁰ 14 CCR §15168(c)(4).

⁸¹ CEQA Guidelines, § 15168, subd. (c)(1).

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A. Air Quality

i. Updated Analysis Provides Substantial Evidence of Potentially Significant Air Quality Impacts

Using Project-specific information, as well as site-specific information such as land use type, meteorological data, total acreage, and typical equipment, experts from SWAPE estimated the Project's construction and operational emissions using the most updated version of CalEEMod.⁸² SWAPE found that emissions of VOCs from construction at the Project site would be 268.96 lb/day, nearly twice the BAAQMD threshold of 137 lb/day.⁸³

This is new information about significant impacts that were not analyzed in the General Plan EIR because this specific development project was not before the City at the time the General Plan was approved. The results substantiate the conclusion that impacts to air quality will be significant and must be analyzed and mitigated in a project-specific EIR.

ii. A Health Risk Analysis Must be Prepared

SWAPE found that potentially significant impacts to public health were undisclosed and the Project failed to provide sufficient information regarding the Project's potential health risk impacts.⁸⁴ The Project will produce emissions of diesel particulate matter ("DPM") through the exhaust stacks of construction equipment throughout its construction period, and will generate daily vehicle trips, which will generate additional exhaust emissions and continue to expose nearby sensitive receptors to DPM emissions.⁸⁵ The City, however, failed to make a reasonable effort to connect the Project's construction-related and operational toxic air contaminant ("TAC") emissions to the potential health risks posed to nearby receptors.⁸⁶ These pose a significant risk to public health, and should be disclosed and mitigated in an EIR.

⁸² SWAPE Comments, p. 3.

⁸³ Id.; California Environmental Quality Act Air Quality Guidelines. BAAQMD, May 2017, available at: https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en, p. 2-2, Table 2-1.

⁸⁴ SWAPE Comments, p. 4.

⁸⁵ Id.

⁸⁶ Id.

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CEQA requires that a lead agency analyze the human health effects of the air emissions generated by a development project.⁸⁷ Additionally, as SWAPE explained, the Office of Environmental Health Hazard Assessment (“OEHHA”), recommends that exposure from projects lasting more than 6 months 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”).⁸⁸

SWAPE calculated the Project’s excess cancer risk to the MEIR using applicable HRA methodologies prescribed by OEHHA:

Consistent with the default CalEEMod construction schedule, the annualized average concentration for construction was used for the entire third trimester of pregnancy (0.25 years) and the first 1.28 years of the infantile stage of life (0 – 2 years). The annualized averaged concentration for operation was used for the remainder of the 30-year exposure period, which makes up the remainder of the infantile stage of life, and the entire child and adult stages of life (2 – 16 years) and (16 – 30 years), respectively.⁸⁹

Consistent with OEHHA, as recommended by SCAQMD, BAAQMD, and SJVAPCD guidance, we used Age Sensitivity Factors (“ASFs”) to account for the heightened susceptibility of young children to the

⁸⁷ CEQA Appendix G, Section III.D; CEQA Guidelines section 15126.2(a) (“health and safety problems caused by the physical changes” that the proposed project will precipitate); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516; *Berkeley Keep Jets. v. Bd. of Port Comrs. (“Berkeley Jets”)* (2001) 91 Cal.App.4th 1344, 1369; *Bakersfield*, 124 Cal.App.4th at 1219–1220.

⁸⁸ SWAPE Comments, p. 4; Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments. OEHHA, February 2015, available at: http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf, p. 8-6, 8-15

⁸⁹ SWAPE Comments, p. 5.
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carcinogenic toxicity of air pollution.^{90, 91, 92, 93} According to this guidance, the quantified cancer risk should be multiplied by a factor of ten during the third trimester of pregnancy and during the first two years of life (infant) as well as multiplied by a factor of three during the child stage of life (2 – 16 years). Furthermore, in accordance with the guidance set forth by OEHHA, we used the 95th percentile breathing rates for infants.⁹⁴ Finally, according to BAAQMD guidance, we used a Fraction of Time At Home (“FAH”) value of 0.85 for the 3rd trimester and infant receptors, 0.72 for child receptors, and 0.73 for the adult receptors.⁹⁵ We used a cancer potency factor of 1.1 (mg/kg-day)⁻¹ and an averaging time of 25,550 days.

The resulting impacts, SWAPE found, were highly significant and demonstrate a high risk to the health and welfare of the public from the Project:

The excess cancer risk to adults, children, infants, and during the 3rd trimester of pregnancy at the MEIR located approximately 300 meters away, over the course of Project construction and operation, utilizing

⁹⁰ “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>.

⁹¹ “Draft Environmental Impact Report (DEIR) for the Proposed The Exchange (SCH No. 2018071058).” SCAQMD, March 2019, *available at*: <http://www.aqmd.gov/docs/default-source/ceqa/comment-letters/2019/march/RVC190115-03.pdf?sfvrsn=8>, p. 4.

⁹² “California Environmental Quality Act Air Quality Guidelines.” BAAQMD, May 2017, *available at*: http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en, p. 56; see also “Recommended Methods for Screening and Modeling Local Risks and Hazards.” BAAQMD, May 2011, *available at*: <http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20Modeling%20Approach.ashx>, p. 65, 86.

⁹³ “Update to District’s Risk Management Policy to Address OEHHA’s Revised Risk Assessment Guidance Document.” SJVAPCD, May 2015, *available at*: <https://www.valleyair.org/busind/pto/staff-report-5-28-15.pdf>, p. 8, 20, 24.

⁹⁴ “Supplemental Guidelines for Preparing Risk Assessments for the Air Toxics ‘Hot Spots’ Information and Assessment Act,” June 5, 2015, *available at*: <http://www.aqmd.gov/docs/default-source/planning/risk-assessment/ab2588-risk-assessment-guidelines.pdf?sfvrsn=6>, p. 19.

“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>

⁹⁵ “Air Toxics NSR Program Health Risk Assessment (HRA) Guidelines.” BAAQMD, January 2016, *available at*: http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/workshops/2016/reg-2-5/hra-guidelines_clean_jan_2016-pdf.pdf?la=en

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ASFs, are approximately 2.4, 15, 23, and 1.1 in one million, respectively. We estimate an excess cancer risk of approximately 42 in one million over the course of a residential lifetime (30 years), utilizing ASFs. The infant, child, and lifetime cancer risks exceed the BAAQMD threshold of 10 in one million, thus resulting in a potentially significant impact.

Neither the General Plan EIR nor the Staff Report disclose this potentially significant health risk impact from the Project. This is new information about significant impacts that were not analyzed in the General Plan EIR because this specific development project was not before the City at the time the General Plan was approved. The City must prepare an EIR to fully disclose the health risk posed to nearby, existing receptors from Project construction and operation, and to require binding mitigation measures to reduce the health impacts from the Project's DPM emissions to less than significant levels.

iii. GHG Emissions Will be Significant

Because the City failed to conduct any project-specific impact analysis, the Staff Report and supporting documentation lack sufficient information regarding the Project's potentially significant GHG emissions.

SWAPE conducted an analysis of the Project's GHG emissions utilizing its CalEEMod model, with the 2030 "Substantial Progress" threshold of 660 metric tons of carbon dioxide equivalents per year ("MT CO_{2e}/year").⁹⁶ The CalEEMod output files, modeled by SWAPE with Project-specific information, showed "the Project's mitigated emissions, which include approximately 1,389 MT CO_{2e} of total construction emissions (sum of 2021 and 2022 emissions) and approximately 5,250 MT CO_{2e}/year of annual operational emissions (sum of area, energy, mobile, waste,

⁹⁶ SWAPE Comments, p. 9; See: JEFFERSON UNION HIGH SCHOOL DISTRICT FACULTY & STAFF HOUSING PROJECT AIR QUALITY & GREENHOUSE GAS ASSESSMENT. City of Daly City, June 2019, available at: https://files.ceganet.opr.ca.gov/257215-2/attachment/k-aC8VdC7LV3xz75yuUmtGiiExH-Y7HEPQ-dU-YIxuhNp95Dx9bK_TbVP3sWar00-Zx87dh7ji80vbRH0, p. 7; "TO 20-01 PAPÉ MACHINERY AIR QUALITY & GREENHOUSE GAS EMISSIONS ASSESSMENT." City of Fremont, February 2020, available at: "SOLAR4AMERICA ICE FACILITY EXPANSION AIR QUALITY AND GREENHOUSE GAS EMISSION ASSESSMENT." City of San Jose, September 2019, available at: https://www.fremont.gov/DocumentCenter/View/44974/4_Appendix-1_Air-Quality-GHG-Assessment, p. 18; and <https://www.sanjoseca.gov/Home/ShowDocument?id=45200>, p. 6. 5175-002acp

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and water-related emissions). When compared to the Project's net annual GHG emissions of 853 MT CO₂e/year to the Bay Area Air Quality Management District's ("BAAQMD") 2030 "Substantial Progress" threshold of 660 MT CO₂e/year, SWAPE found a potentially significant GHG impact, exceeding the "Substantial Progress" threshold by eightfold.⁹⁷

The Project's potentially significant GHG impacts are new information that was not analyzed in the General Plan EIR which must be fully disclosed and mitigated in an EIR.

B. Transportation

The City asserts that CEQA review is not required for the Project because the General Plan EIR evaluated impacts specific enough to release the Applicant or agency from any duty to perform subsequent environmental review. As Mr. Smith points out, however, the projected 2035 impacts to the intersections surrounding the Project site that are listed in the General Plan EIR are far less significant than those anticipated as a result of the Morgan Hill Technology Center in that project's DEIR.⁹⁸ Some of the relevant intersections, meanwhile, were not evaluated at all in the General Plan EIR. Impacts resulting from specific development of the Project site were clearly not evaluated in the General Plan EIR, necessitating further environmental review.⁹⁹

⁹⁷ SWAPE Comments, p. 9; See: "JEFFERSON UNION HIGH SCHOOL DISTRICT FACULTY & STAFF HOUSING PROJECT AIR QUALITY & GREENHOUSE GAS ASSESSMENT." City of Daly City, June 2019, available at: https://files.ceqanet.opr.ca.gov/257215-2/attachment/k-aC8VdC7LV3xz75yuUmtGiiExH-Y7HEPQ-dU-YIxuhNp95Dx9bK_TbVP3sWar00-Zx87dh7ji80vbRH0, p. 7; "TO 20-01 PAPÉ MACHINERY AIR QUALITY & GREENHOUSE GAS EMISSIONS ASSESSMENT." City of Fremont, February 2020, available at: "SOLAR4AMERICA ICE FACILITY EXPANSION AIR QUALITY AND GREENHOUSE GAS EMISSION ASSESSMENT." City of San Jose, September 2019, available at: https://www.fremont.gov/DocumentCenter/View/44974/4_Appendix-1_Air-Quality-GHG-Assessment, p. 18; and <https://www.sanjoseca.gov/Home/ShowDocument?id=45200>, p. 6.

⁹⁸ The General Plan EIR estimated that the intersection of Cochrane Road and DePaul Drive would operate at average delays per vehicle of 18.6 seconds and 19.8 seconds in the morning and evening peak periods, respectively. It found that the intersection of Cochrane Road and Mission View Drive would operate at average delays per vehicle of 20.2 seconds and 19.0 seconds in the morning and evening peaks. These values are characteristic of what the Morgan Hill Technology Center DEIR reports as *existing conditions*. It estimates significantly higher impacts to the intersections as a result of that larger project. General Plan EIR 4.14-43.

⁹⁹ Smith Comments, p. 4.
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Furthermore, Mr. Smith explains, the DEIR prepared for the Morgan Hill Technology Center project acknowledged that the General Plan EIR did not contemplate the development at issue in that project.¹⁰⁰ As one of its project alternatives, it compared potential project impacts with those estimated in the General Plan EIR buildout of the site. A Traffic Analysis concluded that, using the City's Travel Demand Forecasting Model and the General Plan's 20-year estimation for buildout of the site, VMT would increase significantly with development of the Technology Park project.¹⁰¹ That project, the analysis determined, would result in nearly double the number of miles traveled.¹⁰² The DEIR, however, attempted to cast doubt on the veracity of this conclusion by asserting that the development projections included in the General Plan EIR were "significantly lower" in intensity and "not reflective of the maximum allowed uses under the existing General Plan designations and zoning districts."¹⁰³ The DEIR acknowledges, therefore, that the Technology Park project and its specific development could not have been under consideration in the General Plan's environmental review. Likewise, the General Plan could not have contemplated this Project, as the larger Technology Center encompassed this Project's development.¹⁰⁴

Mr. Smith examined the DEIR prepared for the larger project proposed at the site. The traffic analysis performed for that DEIR, he found, showed highly significant deteriorations at the intersections surrounding the project site, from LOS B or C to LOS F in one or the other of the peak hours:

- The intersection of Cochrane Road with DePaul Drive would deteriorate in the PM peak hour from 18.7 seconds average delay per vehicle and LOS B to 101 seconds per vehicle and LOS F.
- The intersection of Cochrane Road and Mission View Drive would deteriorate in the AM peak hour from 23.0 seconds average delay per vehicle and LOS C to 94.6 seconds per vehicle and LOS F.
- The intersection of Mission View Drive and Half Road would deteriorate from 22.6 seconds average delay per vehicle and LOS C in the PM peak hour to 136.9 seconds and LOS F.¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ Technology Park DEIR, p. 160; Technology Park DEIR Traffic Impact Analysis, Appendix H, p. 79.

¹⁰² *Id.*

¹⁰³ Technology Park DEIR, p. 201; Smith Comments, p. 4.

¹⁰⁴ MHMC, Sustainable Building Regulations, § 17.32.040.

¹⁰⁵ Smith Comments, p. 3.

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He further explained: If one takes the trip generation for the RedwoodTech@101 Project as fairly calculated in the section above and assumes its share of responsibility for the delay increments disclosed in the Morgan Hill Technology Center Mixed-Use Project DEIR is proportional to the ratio of its trip generation to that of the whole Mixed-Use Project, then the following results are obtained:

- The RedwoodTech@101 Project would cause the intersection of Cochrane Road with DePaul Drive to deteriorate in the PM peak hour from 18.7 seconds average delay per vehicle and LOS B to approximately 63.55 seconds delay and LOS E in the PM peak.
- The intersection of Cochrane Road and Mission View Drive would deteriorate in the AM peak hour from 23.0 seconds average delay per vehicle and LOS C to approximately 78.99 seconds and LOS E in the AM peak.
- The intersection of Mission View Drive and Half Road would deteriorate from 22.6 seconds average delay per vehicle and LOS C in the PM peak hour to approximately 84.89 seconds and LOS F.¹⁰⁶

“The fact that the revised and renamed Project,” Mr. Smith stated, “could have effects on this scale should have been obvious to the City.”¹⁰⁷ This is new information about significant transportation impacts that were not analyzed in the General Plan EIR because this specific development project was not before the City at the time the General Plan was approved. The City must prepare an EIR to disclose and mitigate these impacts.

C. Noise

Noise expert Deborah Jue, in examining the DEIR prepared for the prior Technology Center Project, found that noise impacts were not properly identified, relying on incorrect distances between the noise sensitive land use and the project construction.¹⁰⁸ This error, she explained, may result in an inaccurate analysis of impacts for the Redwood 101 Project.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Jue Comments, p. 1: “Construction noise analyses can be done using the shortest distance between the noise sensitive land use and the work area for the project, or it can be done using the distance from the noise sensitive land use to the center, or possibly the centroid of the project. Given 5175-002acp

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The prior analysis identified a significance threshold of 60 dBA hourly Leq for construction noise received at residential land use and 70 dBA hourly Leq received at commercial land use. Ambient noise in excess of these thresholds by at least 5 dBA for more than one year would constitute a significant temporary noise increase.¹⁰⁹

Ms. Jue explained the measurements contained in the prior analysis:

[O]nly a short-term noise measurement was made near the residential neighborhood on Tolusa Place (ST-1) measuring two short 10-minute periods ranging from 58 to 62 dBA Leq; given the location's distance from the main arterial and highway noise sources, it is expected that the ambient at the future residential project, which is being permitted concurrently, would be more similar to the noise measurement data collected at ST-2 near the medical facilities which yielded 64 dBA Leq. According to the prior analysis, construction noise which exceeds 60 dBA Leq and 63 dBA Leq over the course of a year would be significant at the Tolusa Place residents, and construction noise which exceeds 60 dBA Leq and 68 dBA Leq over the course of the year would be significant at the future residential project.¹¹⁰

Putting this one-year allowance into context, Ms. Jue pointed out that the Oakland Noise Ordinance limits long-term construction projects that last more than 10 days to 65 dBA at residential land use and 70 at commercial land use, regardless of the existing ambient conditions. From this perspective, Ms. Jue stated, "the one-year requirement to determine significance seems particularly lenient."¹¹¹

Since the Project is being permitted concurrently with the residential component of the Technology Center project, residents could experience a full year or more of cumulative construction noise. The noise levels at the east residential neighborhood would exceed 60 dBA Leq and the existing environment of 58 dBA would be increased by 5 dBA or more for a period of a year or more.¹¹²

that the extent of the prior project was so large (89 acres), using either of these distances would potentially over-estimate or under-estimate the actual impacts, respectively."

¹⁰⁹ Jue Comments, p. 1.

¹¹⁰ Jue Comments, pp. 1–2.

¹¹¹ Jue Comments, p. 2.

¹¹² Jue Comments, p. 2

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The concurrent residential project would be slightly closer to existing noise sources such as Hwy 101, but still within 50 ft of the project construction. If completed prior to the commercial project, Ms. Jue explained, “some number of homes within the future residential project would be exposed to a significant noise impact as shown in Table 3. The noise levels would exceed 60 dBA Leq and the existing environment of 64 dBA would be increased by 5 dBA or more for a period of a year or more.”¹¹³

Table 1 Construction Noise Impacts from Commercial Buildings at Future Residential Project

Construction Phase	Commercial Project Source to Future Residential	
	Distance to Center: 515 ft.	Distance to nearest PL 50 ft.
Site Preparation	64	84
Grading	65	85
Trenching	59	79
Build Exterior	63	83
Build Interior	55	75
Paving	63	83

CEQA impact analysis, Ms. Jue points out, is necessary to determine the best mitigation measures to address these temporary, substantial noise impacts. Such measures could include buffer distances and sound barriers. Adequate materials for such sound barriers, she explains, would include “temporary barriers using STC 20-25 blankets on a tubular steel frame or scaffolding or 3 PSF wood frame barriers (e.g., using ¾” thick plywood).”¹¹⁴ The material, she said, should overlap or otherwise be constructed to avoid gaps of any size, and should be high enough to block the line of sight between the construction noise sources and the affected windows.¹¹⁵ “The sound barrier has to interrupt the line of sight between the source(s) and the receiver(s) and the best placement to maximize the sound barrier benefit is close the source or close to the receiver.”¹¹⁶

¹¹³ Jue Comments, 3.

¹¹⁴ Jue Comments, p. 3.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

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Ms. Jue concluded that, because the noise analysis prepared for the prior project appears to contain some errors “which could lead one to conclude that construction activities for the proposed project and the future residential project could be less than significant.”¹¹⁷ This is new information about significant impacts that were not analyzed in the General Plan EIR because this specific development project was not before the City at the time the General Plan was approved. An EIR must be prepared to disclose and mitigate these impacts.

VII. THE CITY CANNOT MAKE THE NECESSARY FINDINGS TO ISSUE A DESIGN PERMIT OR TENTATIVE MAP FOR THE PROJECT

Approval of the Project’s Design Permit and Tentative Map requires factual findings, supported by substantial evidence, pursuant to the Morgan Hill Municipal Code and the State Subdivision Map Act that a proposed subdivision is consistent with the City’s general plan and specific plans, and does not have any detrimental environmental or public health effects.¹¹⁸

The Staff Report claims that the Project is in compliance with the General Plan, Zoning Code and other City Codes as required by Section 17.50.030 of the Municipal Code, but nowhere does it make findings, or offer substantial evidence, that the Project will not have any detrimental environmental or public health effects.

As discussed in Section VI above, substantial evidence demonstrates that the Project is likely to have potentially significant impacts on air quality, public health, climate change, noise, and traffic. Silicon Valley Residents’ experts have provided ample evidence demonstrating the Project’s significant impacts, including:

- Emissions of VOCs and TACs from Project construction and operation will be significant.
- DPM emissions from construction and operation
- The cancer risk from the Project to nearby receptors would be 42 in one million over 30 years, exceeding the BAAQMD threshold of 10 in one million.¹¹⁹

¹¹⁷ Jue Comments, p. 4.

¹¹⁸ Gov Code §§66473.5, 66474; MHMC 18.108.040(A).

¹¹⁹ SWAPE Comments, p. 8.

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- Traffic and transportation in the Project vicinity could be significantly impacted by Project construction and operation.
- Nearby residents could experience significant impacts from noise for a year or more.

These effects have not been disclosed or analyzed by the City, which continues to claim that the General Plan EIR is sufficient to address any potential impacts, despite that document's repeated claim that it did not analyze any project-specific impacts. As a result, the Project fails to comply with mandatory Map Act requirements. The City, therefore, cannot make the requisite findings pursuant to Government Code Sections 66473.5 and 66474 and must deny the Project's Design Permit and Tentative Map.

VIII. CONCLUSION

The City has improperly tried to rely on the 2035 General Plan EIR as a program EIR with analysis sufficient to satisfy CEQA. That EIR, however, was never meant to serve as a review document for specific projects. Many of the impacts likely to result from the Project will be significantly more severe than what was evaluated in the General Plan EIR, while others were never analyzed at all.

Furthermore, the Design Review Permit and Vesting Tentative Map required for the Project cannot be issued. As supported by substantial evidence above and in expert comment letters attached herein, the Project will result in significant and unmitigated impacts that are not disclosed or analyzed by the General Plan EIR. Without further mitigation measures to reduce the Project's significant impacts, the City cannot find that it is not detrimental to public health, safety, or welfare, and thus cannot approve the permits necessary for the Project to move forward.

Sincerely,

Kendra Hartmann

KDH:acp
Attachments

5175-002acp