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March 3, 2021

Via Email Submission Only

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Re: Agenda Item No. 1: 1396 5th Street Project (Case File Number: PLN20-101)

Dear Chair Limon and Members of the Planning Commission, Mr. Vollmann:

We write on behalf of **East Bay Residents for Responsible Development** (“East Bay Residents” or “Residents”) regarding the 1396 5th Street Project (Case File Number: PLN20-101; APN: 004-0069-004-00) (“Project”) proposed by Scott Cooper, The Michaels Organization, and/or Oakland Housing Investors LP (listed as Owner) (collectively, “Applicants”). The Applicants are requesting Regular Design Review, a Minor Conditional Use Permit (“Minor CUP”), a Major Conditional Use

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Permit (“Major CUP”), a Tentative Parcel Map; and an exemption from further environmental review under the California Environmental Quality Act (“CEQA”).¹

The proposed Project is bordered by the Bay Area Rapid Transit (“BART”) tracks to the north, Mandela Parkway to the west, 5th Street to the south, and Kirkham Street to the east. The Project site is approximately 38,000 square feet.² The Project building height would be 85 feet, and the site would contain 41 vehicle parking spaces.³ The Property will contain 222 residential units.⁴ The proposed Project would also include a diesel-powered emergency generator.⁵

Nine percent (9%) of the Project’s residential units are proposed to be reserved for Very Low-Income Housing (“VLI”).⁶ The Applicants are seeking a density bonus under State law for including VLI housing. The density bonus would qualify the Applicants to receive one development waiver and one concession.⁷ Consequently, the Applicants hope to receive a State density bonus to construct 30% more units⁸, a waiver to reduce the open space and minimum court between opposite walls requirements, and a concession to reduce the number of parking spaces.⁹

The proposed Project would be located within the 7th Street Opportunity Area of the West Oakland Specific Plan (“WOSP”) in the S-15W Transit-Oriented Development Commercial Zone.¹⁰ The CEQA Analysis determined that the Project is subject to a (1) Specific Plan exemption per CEQA Section 21155.4 and CEQA Guidelines Section 15182, (2) Community Plan exemption because it is consistent with a community plan, general plan, or zoning per CEQA Guidelines Section 15182 and 15183; (3) Qualified Infill projects exemption per CEQA Guidelines 15183.3;

¹ Oakland Planning Commission Agenda, March 3, 2021 available at: <https://cao-94612.s3.amazonaws.com/documents/March-3-2021-Planning-Commission-Meeting-Agenda-Online.pdf>.

² 1396 5th Street CEQA Analysis (February 2021) available at: <https://cao-94612.s3.amazonaws.com/documents/1396-5th-Street-CEQA-Analysis.pdf> (“CEQA Analysis”).

³ CEQA Analysis, p. 10.

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⁶ CEQA Analysis, p. 10.

⁷ *Id.* at C-2.

⁸ *Id.* at 18.

⁹ *Id.* at C-2.

¹⁰ Oakland City Planning Commission, Staff Report, Case File Number PLB20-101, (March 3, 2021) p. 1 available at: <https://cao-94612.s3.amazonaws.com/documents/01-Staff-Report-Case-File-PLN20101-1396-5th-Street.pdf> (“Staff Report”).

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and (4) Addendum to the 2014 certified WOSP EIR per CEQA Guidelines Sections 15162, 15164, and 15168 such that no additional environmental review is required.¹¹

Without the Minor CUP, Major CUP, Tentative Parcel Map, and subsequent density bonus and waiver, the total permitted number of residential units at 1396 5th Street under existing zoning would be 171 units, with a maximum building height of 100 feet.¹² With the approvals proposed for the Project, the Applicants would be permitted to build 222 units in an eight-story building, at a height of 85 feet.¹³

The CEQA Analysis contends that the Project meets the conditions for an Addendum to the WOSP EIR pursuant to CEQA Guidelines Section 15162, 15164, 15168, and 15182 because there is no new information about significant environmental effects or new mitigation measures for the Project that is beyond the scope of effects addressed in the WOSP EIR.¹⁴ Public Resources Code Section 21166 and CEQA Guidelines Section 15164 state that an addendum to a certified EIR is allowed when minor changes or additions are necessary and none of the conditions for preparation of a subsequent EIR or Negative Declaration pursuant to Section 15162 are satisfied.¹⁵ The CEQA Analysis also contends that the Project is subject to the Community Plan and Infill Exemptions because its environmental and public health impacts would be substantially mitigated by existing Standard Conditions of Approval (“SCAs”) of the WOSP EIR. These conclusions are factually unsupported and legally incorrect.

There is substantial evidence demonstrating that the Project has changed circumstances, and new and more severe significant environmental and public health impacts that are peculiar to the Project site and are more severe than the effects analyzed in the WOSP EIR. These impacts are not adequately mitigated by the SCAs from the WOSP EIR. In order to substantially mitigate these impacts, the City must adopt considerably stronger and different mitigation than the measures included in the SCAs.

We have prepared our comments on air quality, public health, GHG

¹¹ *Id.* at B-2

¹² *Id.* at 18.

¹³ CEQA Analysis, p. 10.

¹⁴ CEQA Analysis, p. B-1.

¹⁵ *Id.* at p. 9.

Emissions, and noise with the assistance of air quality and GHG expert Matt Hagemann P.G., C.Hg. and Paul E. Rosenfeld, Ph.D. of Soil Water Air Protection Enterprises (“SWAPE”), whose comments are included in the SWAPE Report. The SWAPE Report and Dr. Rosenfeld’s expert curriculum vitae (“CV”) are attached hereto as **Exhibit A**.

I. STATEMENT OF INTEREST

Easy Bay Residents for Responsible Development (“ERRBD” or “Residents”) is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes City of Oakland (“City”) residents Luis Valencia, Erik Line, Jason Gumataotao, labor organizations UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families who live and/or work in the City of Oakland and Alameda County.

The individual members of EBRRD live, work, and raise their families in the City of Oakland (“City”). They would be directly affected by the Project’s impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of EBRRD also have an interest in enforcing the City’s planning and zoning laws and 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. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, EBRRD’s members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

II. THE CITY MUST PREPARE A SUBSEQUENT OR SUPPLEMENTAL EIR WHICH DISCLOSES, ANALYZES, AND MITIGATES THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS TO AIR QUALITY, PUBLIC HEALTH, GHG, HAZARDOUS MATERIALS, NOISE, AND TRAFFIC.

CEQA has two basic purposes, neither of which is satisfied by the CEQA Analysis. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.¹⁶ The Environmental Impact Report (“EIR”) is the “heart” of this requirement.¹⁷ 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.”¹⁸

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹⁹ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.²⁰ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.²¹

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.²² If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.²³ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.²⁴ Without an adequate analysis and

¹⁶ 14 Cal. Code Regs. § 15002(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.

¹⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

¹⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹⁹ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

²⁰ *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

²¹ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

²² CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

²³ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

²⁴ *Id.*, §§ 21002-21002.1.

description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.²⁵ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.²⁶ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”²⁷

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 determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project’s environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.²⁸ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.²⁹ A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project “would not have a significant effect on the environment.”³⁰

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;

²⁵ CEQA Guidelines § 15126.4(a)(2).

²⁶ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

²⁷ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

²⁸ CEQA Guidelines §§ 15060, 15063(c).

²⁹ *See, e.g.*, Pub. Resources Code § 21100.

³⁰ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.³¹

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if 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 project, but the

³¹ Pub. Resources Code § 21166.
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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.³²

Only where *none* of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further documentation.³³ For Addendums specifically, which is one of several CEQA exemption/streamlining avenues that the City claims is applicable to the Project, CEQA allows Addendums to a previously certified EIR if minor changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.³⁴

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Analysis provided. Indeed, as explained in this letter, the City must disclose, analyze, and mitigate the Project's significant impacts in an EIR. Otherwise, the City's approval of the Project would violate CEQA.

The lead agency's significance determination for each impact must be supported by substantial evidence, including accurate scientific and factual data.³⁵ Under CEQA, an agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.³⁶ Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.³⁷ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than

³² CEQA Guidelines § 15162(a)(1)-(3).

³³ CEQA Guidelines § 15162(b).

³⁴ CEQA Guidelines § 15164; CEQA Analysis, p. 9.

³⁵ 14 C.C.R. § 15064(b).

³⁶ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

³⁷ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

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challenges to an agency’s factual conclusions.³⁸ 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.”³⁹

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not ‘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.’⁴⁰ Here, the City cites incorrect analysis of annual operational emissions and construction emissions.⁴¹ An EIR is required to remedy these informational deficiencies.

A. The Project is Not Consistent with CEQA Addendum and Exemption Requirements

The City Relies on three CEQA provisions in proposing to approve the Project without an EIR.⁴² Those provisions include the Community Plan Exemption,⁴³ Qualified Infill Exemption,⁴⁴ and Addendum to the WOSP EIR.⁴⁵ However, the City’s reliance on these provisions is misplaced.

The CEQA Analysis does not simply provide “some changes or additions are necessary” to the EIR as is allowed under the Addendum provision.⁴⁶ Rather, it includes a new substantive analysis for a large development project which was not specifically analyzed in the WOSP EIR.⁴⁷ Second, as explained further below, the Project will result in new or more severe significant impacts than analyzed in previous EIRs, and there are new mitigation measures that were not considered in the previous EIRs, but that would reduce those impacts to a less than significant

³⁸ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

³⁹ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁴⁰ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁴¹ SWAPE Comments, p. 2.

⁴² CEQA Analysis, p. 2.

⁴³ CEQA Guidelines § 15183.

⁴⁴ CEQA Guidelines § 15183.3.

⁴⁵ CEQA Guidelines § 15164.

⁴⁶ CEQA Guidelines § 15164(a).

⁴⁷ *See* CEQA Analysis, p. B-1.

level. The City's decision not to prepare a subsequent or supplemental EIR for the project is not supported by substantial evidence.⁴⁸

The City also relies on additional CEQA provisions that allow approval of projects without an EIR in narrow circumstances. Specifically, the City relies on CEQA Guidelines Sections 15183 (Community Plan)⁴⁹ and 15183.3 (Qualified Infill)⁵⁰ for Project approval. However, the City's determination that exemptions also apply is not supported by substantial evidence.

The exemptions apply only when a Project does not have impacts peculiar to the proposed project that are new or more significant than previously analyzed or can be substantially mitigated by uniformly applicable development policies or standards. The Project fails to meet these requirements because the site is highly contaminated with carcinogenic compounds in soil and groundwater that have not been remediated to residential standards. These contaminants could pose a significant risk to construction workers, residents and off-site receptors which was not fully disclosed or analyzed under the WOSP EIR. Furthermore, the Project's health risks from diesel particulate matter ("DPM") emissions during construction may be highly significant. In particular, because the WOSP EIR did not actually quantify project-level health risks, the absence of any previous project-specific analysis undermines the City's determination that SCAs would mitigate the impact. Unfortunately, the WOSP EIR did not fully address these peculiar and more significant impacts, and there are mitigation measures not previously identified that would reduce these significant impacts.

Thus, the Project will have new and more severe significant impacts than previously analyzed in the WOSP EIR. These impacts are peculiar to the Project site, and were not contemplated in the WOSP EIR. In addition, as described below, the site-specific analysis conducted for the Project is legally deficient in several ways and the CEQA Analysis fails to incorporate all feasible mitigation. Therefore, the City may not rely on the CEQA Analysis for Project approval, and must provide detailed analysis of the Project's impacts in a subsequent or supplemental EIR.

⁴⁸ CEQA Guidelines §§ 15162 (a), 15164(e), and 15168(c)(4).

⁴⁹ CEQA Guidelines Section 15183.

⁵⁰ CEQA Guidelines Section 15183.3.

B. The Project is Inconsistent with the Density Established by Existing Zoning and Does Not Qualify for the Infill Exemption

In order to qualify for the Infill Exemption under CEQA Guidelines Section 15332, projects must meet four mandatory requirements:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

The Project fails to meet the requirements of Section 15332(c) and (d) because, as discussed below, the Project is likely to result in significant, unmitigated air quality impacts. Moreover, the City lacks substantial evidence to support the CEQA Analysis's conclusion that the Project will not result in significant air quality impacts because the City failed to conduct a health risk analysis. For these reasons, the Project fails to qualify for the Infill Exemption.

It is well established that, if a project requires mitigation measures, it cannot be approved via a categorical exemption. As the court explained in *SPAWN v. Marin*:⁵¹

Only those projects having no significant effect on the environment are categorically exempt from CEQA review. (Pub. Resources Code, §§ 21080, subd.(b)(9), 21084, subd. (a).) If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1199-2000.) Mitigation measures may support a negative declaration but not a categorical exemption.

⁵¹ (2004) 125 Cal.App.4th 1098, 1102.
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The CEQA Checklist require the adoption of a Mitigation Monitoring and Reporting Plan (“MMRP”) for the Project. The MMRP includes 93 separate mitigation measures in the form of the City’s SCAs. But, no mitigation measures beyond the SCAs are required for this project.⁵² The SCAs that are applicable to the Project include mitigation measures to reduce potentially significant impacts in virtually every resource areas, including: aesthetics, shadow and wind; air quality; cultural resources; geology, soils, and geohazards; greenhouse gases and climate change; hazards and hazardous materials; hydrology and water quality; noise; population and housing; public services and recreation; transportation and circulation; and utilities and service systems.⁵³

The SCAs are required mitigation for the Project, which the City proposes to adopt in a binding MMRP. The City therefore concedes that extensive mitigation is required for this Project to reduce potentially significant impacts. Moreover, our experts demonstrate that the existing SCAs are inadequate to mitigate the Project’s air quality and public health impacts to less than significant levels, and that additional site-specific mitigation is required. The City therefore cannot rely on the Infill Exemption (15332) or any other categorical exemption from CEQA, to approve the Project.

Further, the 1396 5th St. Parcel is zoned for a density of development that would permit 171 units, with a maximum building height of 100 feet.⁵⁴ With the approvals proposed for the Project, the Applicants would be permitted to build 222 units in an eight-story building, at a height of 85 feet.⁵⁵ As discussed above, the Applicants are requesting discretionary approvals including a Major Conditional Use Permit because any development in the S-15W-zone exceeding 100,000 square feet of new floor area requires a Major CUP. Applicants also request a Minor Conditional Use Permit because in the S-15W zone, any off-street parking, loading, or driveway located on the ground floor within 20 feet of a pedestrian walkway or plaza requires a conditional use permit. Because the proposed onsite parking and loading areas are within 20 feet of pedestrian walkway/plaza off Kirkham Street, a conditional use permit is required here. The applicants also request Regular Design Review for new construction, Tentative Parcel Map.

⁵² CEQA Analysis, p. A-1.

⁵³ CEQA Analysis, p. A-1– A-42.

⁵⁴ *Id.* at 18.

⁵⁵ CEQA Analysis, p. 10.

The City’s reliance on anticipated density bonus approvals to claim that the Project is currently “consistent” with existing zoning and land use plans in order to claim an exemption from CEQA is unsupported and contrary to CEQA. CEQA requires that the lead agency determine the appropriate form of CEQA review at the time the project application is submitted, not based on speculative future approvals.⁵⁶

CEQA requires lead agency to analyze the ‘whole’ of the project – this includes all foreseeable discretionary approvals.⁵⁷ For example, in *Laurel Heights Improvement Association v. Regents of University of California*⁵⁸ the California Supreme Court rejected an EIR where the agency failed to consider the whole of the project. The agency defined the project as involving “only the acquisition and operation of an existing facility and negligible or no expansion of use of existing use at that facility.”⁵⁹ However, the Court found that future expansion of the project was a reasonably foreseeable consequence of the project and would likely change the scope or nature of the initial project or its environmental effects.⁶⁰ Here, approval of the Project’s requested density bonus is a reasonably foreseeable consequence of the Project. The City therefore has a duty to analyze the impacts of the increase in density (and other associated impacts) that would result from approval of the density bonus.

When viewed as a whole, there is no dispute that the Project exceeds applicable WOSP zoning, density and height requirements. By ignoring the Project’s facial inconsistency with these requirements, the potentially significant impacts associated with those inconsistencies escape environmental review. As a result, the City has both failed to comply with its CEQA obligations to disclose the nature and severity of the Project’s impacts, and the City lacks substantial evidence to support its density bonus findings that the Project’s proposed height waiver and

⁵⁶ CEQA Guidelines, § 15063 (timing and process of initial study); Pub. Resources Code, §§ 21003.1 (early identification of environmental effects), 21006 (CEQA is integral to agency decision making).

⁵⁷ Pub. Resources Code, § 21082.2(a) (“The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record”); CEQA Guidelines, § 15003(h) (“The lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect” and citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 401 (“*Laurel Heights I*”)

⁵⁸ *Laurel Heights I, supra*, 47 Cal.3d 376.

⁵⁹ *Laurel Heights I, supra*, 47 Cal.3d at p. 388.

⁶⁰ *Laurel Heights I, supra*, 47 Cal.3d at p. 396.

additional density bonus units would not have a specific adverse impact upon public health and safety or the physical environment.⁶¹

The City may be attempting to rely on *Wollmer v. City of Berkeley*⁶² to determine the Project's consistency with WOSP zoning requirements based on the Project's pre-density bonus "base units" rather than on the actual size of the Project. This reliance is misplaced.

Wollmer applied to the CEQA Guidelines 15332 categorical in-fill exemption, and not the in-fill exemption relied on here, at CEQA Guidelines, Section 15183. The *Wollmer* Court relied on express language in the 15332 exemption which qualifies consistency determination based on whether the land use plan is "applicable" to the project. CEQA Guidelines, Section 15183 contains no such language, and does not qualify plan consistency with any discretionary decision by the lead agency as to whether the plan is, or is not, "applicable" to the Project once the density bonus is applied.

Moreover, the *Wollmer* court found that the applicable plan was the City of Berkeley's general plan, which did not contain a density restriction that would conflict with the proposed project. The court explains, "[t]he City's zoning ordinance does not specify a maximum density for the [district applicable to the proposed project] However, the land use element of the general plan specifies a maximum density of 44 to 88 persons (20 to 40 dwelling units) per acre for the area within the land use classification that includes the [applicable] District...."⁶³ The court went on to explain that "the City does not apply the general plan density standards to specific parcels. Instead, it applies the standards to larger areas of a land use classification surrounding a proposed project."⁶⁴ As opposed to a general plan, "[a]llowable densities and uses in each zoning district are established in the more detailed and specific Zoning ordinance."⁶⁵ Using this approach, the *Wollmer* court found that the project was consistent with applicable plan - the general plan - because the project would create a density of "approximately 19 units per acre, which is well below the general plan standard of 40 units per acre."⁶⁶

The Supreme Court, as well as the Courts of Appeal, have held that CEQA

⁶¹ Gov. Code, § 65589.5(d)(2); see also OPC, §§ 17.107.100.B; 17.107.095.A.1.

⁶² *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329 ("*Wollmer*").

⁶³ *Wollmer, supra*, 193 Cal.App.4th at p. 1345.

⁶⁴ *Wollmer, supra*, 193 Cal.App.4th at p. 1345.

⁶⁵ *Wollmer, supra*, 193 Cal.App.4th at p. 1345, citing the Berkeley General Plan.

⁶⁶ *Wollmer, supra*, 193 Cal.App.4th at p. 1345.

exemptions must be narrowly construed and “[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.”⁶⁷ The Supreme Court has also consistently held that CEQA exemptions are not to be implied,⁶⁸ and that other statutes do not implicitly preempt CEQA or exempt proposed projects from CEQA review – even if the other statute has environmental safeguards of its own. Instead, CEQA must be harmonized with other statutes and a proposed project must comply with both CEQA and any other applicable statute.⁶⁹

In this case, the CEQA Analysis relies on the assumption that the City will grant a density bonus to the Project, consistent with the Density Bonus Law.⁷⁰ However, since the density bonus would result in the Project being inconsistent with the WOSP zoning designation and development standards, the CEQA In-Fill Exemption does not apply, and full CEQA review is required. While the legislature created a CEQA exemption for “Qualified In-Fill Development Projects,” there is no such CEQA exemption for “Density Bonus Projects.” Thus, while in-fill development projects are exempt from CEQA if they comply with all applicable general plan and zoning requirements, an in-fill development project that exceeds general plan and zoning designations as a result of a density bonus waiver granted to accommodate its entitlement to density units and/or incentives and concessions from zoning requirements, is not subject to the Infill Exemption. While the City may be within its rights to grant density bonus and zoning concessions for the Project pursuant to the Density Bonus Law, it is still required to conduct CEQA review for the entire Project – including the additional units and building height added by the density bonus - since the Project as a whole fails to comply with the zoning designations as a result of the density bonus. When properly considered, the Project exceeds applicable density and does not qualify for the Infill Exemption.

The CEQA Analysis provides no evidence to support its conclusion that the Project is “consistent” with applicable density so as to rely on the Infill Exemption. Instead, the CEQA Analysis merely references the City’s reliance on the anticipated density bonus as the bases for its consistency determination. The City must withdraw the CEQA Analysis and direct staff to prepare an EIR which discloses, analyzes, and mitigates the proposed Project’s impacts, and considers environmentally-superior alternatives.

⁶⁷ *Mountain Lion Found. v. Fish & Game Comm’n* (1997) 16 Cal.4th 105, 125 (“*Mountain Lion*”).

⁶⁸ *Wildlife Alive v. Chickering*, 18 Cal.3d at 195-198, 202.

⁶⁹ *Bozung v. Local Agency Formation Comm.* (1975) 13 Cal.3d 263, 274.

⁷⁰ Gov. Code sec. 65915; OPC Chapter 17.107 (Density Bonus and Incentive Procedure).
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The Density Bonus Law authorizes the City to deny requested density bonus units incentives, concessions, and waivers where the resulting project would have a “specific adverse impact” on public health and safety or the physical environment.⁷¹ A denial is warranted here because the CEQA Analysis fails disclose and mitigate several potentially significant, unmitigated environmental impacts that are likely to be caused or exacerbated by the Project.

As discussed below, there is substantial evidence demonstrating that the Project is likely to have significant and unmitigated impacts on public health from excess construction TAC emissions and noise, as well as significant environmental impacts on air quality, from GHGs, and on traffic and transportation. Because the City failed to prepare an EIR for the Project, these impacts have not been fully disclosed or mitigated, as required by CEQA.⁷²

The Density Bonus Law provides that projects with adverse impacts warrant denial unless the approving agency is able to find that “there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low and moderate income households.”⁷³ The City has not performed the requisite CEQA analysis to evaluate the cost and feasibility of mitigation required to reduce the Project’s impacts to the greatest extent feasible. Therefore, the City lacks substantial evidence to support a finding that there is “no feasible method” of mitigating these impacts without rendering the Project’s affordability component infeasible. As a result, the City cannot make the requisite findings to approve a density bonus in the face of the Project’s significant public health and environmental impacts.

The City should deny the requested density bonus unless and until the City prepares an EIR to fully disclose and mitigate these impacts to the greatest extent feasible.⁷⁴

C. The Project is Not Consistent with Substantive Requirements for the Community Plan Exemption

CEQA Guidelines Section 15183 (Community Plan) may apply only when a Project does not have impacts that are peculiar to the proposed project which are

⁷¹ See OPC, §§ 17.107.100(B); 17.107.095.A.1.

⁷² Pub. Res. Code §§ 21002.1(a), 21100(b)(3).

⁷³ See OPC, sec. 17.107.100(B).

⁷⁴ OPC, § 17.107.100(B) (density bonus cannot be approved where it would release in an adverse impact, as defined by Gov. Code, § 65589.5(d).)
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new or more significant than previously analyzed, or which can be substantially mitigated by uniformly applicable development policies or standards.

The Project fails to meet these requirements because the site is highly contaminated and could pose a significant risk to construction workers, residents and off-site receptors which was not fully disclosed or analyzed under the WOSP. Furthermore, the Project's health risks from diesel particulate matter ("DPM") emissions during construction may be highly significant. In particular, because the WOSP did not actually quantify project-level health risks, the absence of any previous project-specific analysis undermines the City's determination that SCAs would mitigate the impact. Unfortunately, the WOSP did not fully address these peculiar and more significant impacts, and there are mitigation measures not previously identified that would reduce these significant impacts. Moreover, the City's reliance on SCAs to mitigate these impacts, without first analyzing them in an EIR, violates the requirements of Section 15183, rendering it inapplicable to the Project.

Thus, the Project will have new or more severe significant impacts than previously analyzed in the WOSP EIR. In addition, as described below, the site-specific analysis conducted for the Project is legally deficient in several ways and the CEQA Analysis fails to incorporate all feasible mitigation. Therefore, the City may not rely on the CEQA Analysis for Project approval, and must provide detailed analysis of the Project's impacts in a subsequent or supplemental EIR.

D. The CEQA Analysis Fails to Adequately Analyze and Mitigate On-Site Hazards

1. Project Site Contamination Has Not Been Adequately Disclosed and Mitigated

The CEQA Analysis inaccurately concludes that existing soil and groundwater contamination is less than significant.⁷⁵ But, the site is identified as a Cleanup Program Site on the State Water Resources Control Board ("SWRCB") GeoTracker database due to previous potential groundwater contamination.⁷⁶ The SWRCB determined that "[t]here is no potential exposure to chemicals of concern

⁷⁵ CEQA Analysis, p. 62.

⁷⁶ https://geotracker.waterboards.ca.gov/profile_report?global_id=T06019794669.5085-002acp

for current commercial land use as a vacant lot.”⁷⁷ This Project proposes to convert the site from a vacant lot to a residential project. Because residual subsurface contamination remains at the site at levels that exceed residential screening levels. The site is also subject to existing regulatory conditions requiring that, if any redevelopment occurs including the change in land use to residential, the Alameda County Department of Environmental Health (“ACEH”) must be notified as required by Government Code Section 65850.2. ACEH must also be notified if any construction or excavation activities take place or the building structure is otherwise modified. The CEQA Analysis provides to evidence that ACDEH has been contacted about the Project, or that the City consulted with ACDEH when preparing the CEQA document.

In June 2016, the SWRCB collected 27 soil samples and 2 grab groundwater samples at the Project site. “The analytical results for the fill showed that some PAHs were elevated above the ESLs for residential land use ... Groundwater results indicate that there is TPH-g, TPH-d, BTEX and TBA impacts to groundwater in the norther portion of the site.”⁷⁸ The SWRCB wrote, “[t]he most likely source of this contamination is the railroad right-of-way immediately north of the site or the former service station located approximately 175 feet north of the site.”⁷⁹ Groundwater was noted at depths of about 1 to 2 feet BSG at the Project site.⁸⁰ Shallow groundwater reduces the depth of unsaturated soil available for treatment, increasing the likelihood of groundwater contamination.⁸¹

The site’s Phase II Subsurface Investigation Work Plan⁸² contradicts the unsupported conclusions articulated in the CEQA Analysis, and demonstrates that there are significant levels of existing contamination at the site which pose a potentially significant health risk to the public.⁸³ The SWRCB soil samples detected Polycyclic Aromatic Hydrocarbons (PAHs) in the soil on the Project site.

⁷⁷ State Water Resources Control Board GeoTracker Red Star Yeast/1396 Fifth Street LLC (T06019794669) *available at*:
https://geotracker.waterboards.ca.gov/profile_report?global_id=T06019794669.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ CEQA Analysis, Attachment E. Geotechnical Analysis, p. E-5.

⁸¹ EPA, Getting Up To Speed: Ground Water Contamination,
<https://www.epa.gov/sites/production/files/2015-08/documents/mgwc-gwc1.pdf>.

⁸² Citadel Environmental, Phase II subsurface Investigation Work Plan – Draft, (May 13, 2016)
available at:

<https://dehpra.acgov.org/LOP/Lopinfor/ReadFile?filePath=%5C%5Cac01fs8600.acgov.org%5CLOPIMAGE%5CPDF%5CRO0002896%5CCORRES L 2016-06-23 2.pdf>.

⁸³ SWAPE Comments, p. 2.
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Because the CEQA Analysis fails to disclose the Project's significant levels of contamination, it also fails to analyze the potentially significant health effects of the Project.⁸⁴ In particular, the CEQA Analysis fails to include any quantified study or discussion of the health risks that may result when Project construction workers encounter contaminated soil when conducting earthmoving activities, or from tracking that contamination off-site. The CEQA analysis also fails to evaluate the potential that future residents, Project site workers and visitors will contact contaminated soil. SWAPE determined that any such persons who come into contact with Project-site contaminants may be subject to central nervous system impairments and effects to the blood, immune system, lungs, skin, and eyes when touching contaminated soil or breathing contaminated dust.⁸⁵ This is a potentially significant impact that the City must disclose and analyze in an EIR.

The CEQA Analysis also fails to provide effective mitigation that would target and remove the sources of PAHs and mitigate potential health risks from exposure to chemicals. The US Department of Health and Human Services has determined that some PAHs may reasonably be expected to be carcinogens.⁸⁶ The CEQA Analysis provides that SCA-HAZ-2 will require Applicants to submit a comprehensive assessment report documenting the presence or lack thereof of hazardous materials.⁸⁷ This report is not made available for public comment and we therefore cannot determine the efficacy of such a report.

The WOSP EIR reported that hazards and hazardous materials impacts would be mitigated to less-than-significant levels with compliance with local, state, and federal regulations for treatment, remediation, and/or disposal of contaminated soil and/or groundwater and the City SCAs that were in effect at the time including SCA-HAZ-1: Hazardous Materials Related to Construction #43, SCA-HAZ-2: Hazardous Building Materials and Site Contamination #44, and SCA-HAZ-3 Hazardous Materials Business Plan #45. However, compliance with applicable regulations does not automatically obviate the need for further analysis of impacts at this pre-approval stage of the Project.

In *Keep our Mountains Quiet v. County of Santa Clara*, neighbors of a wedding venue sued over the County's failure to prepare an EIR due to significant

⁸⁴ SWAPE Comments, p. 2.

⁸⁵ SWAPE Comments, p. 2.

⁸⁶ Agency for Toxic Substances and Disease Registry, ToxFAQs for Polycyclic Aromatic Hydrocarbon (PAHs), *available at*:

<https://wwwn.cdc.gov/TSP/ToxFAQs/ToxFAQsDetails.aspx?faqid=121&toxid=25>.

⁸⁷ CEQA Analysis, p. A-17.

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noise impacts. The court concluded that “a fair argument [exists] that the Project may have a significant environmental noise impact” and reasoned that although the noise levels would likely comply with local noise standards, “compliance with the ordinance does not foreclose the possibility of significant noise impacts.”⁸⁸ The court ordered the County to prepare an EIR. The ruling demonstrates the possibility that a project may be in compliance with an applicable regulation and still have a significant impact.

In *Communities for a Better Env't v. California Res. Agency*, the court struck down a CEQA Guideline because it “impermissibly allow[ed] an agency to find a cumulative effect insignificant based on a project's compliance with some generalized plan rather than on the project's actual environmental impacts.”⁸⁹ The court concluded that “[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.”⁹⁰ Thus, the ruling supports the notion that despite assured compliance with applicable standard outside of the CEQA process, a lead agency still has an obligation to consider substantial evidence and analyze and mitigate potentially significant impacts.

In *Leonoff v. Monterey County Bd. of Supervisors*, the court held that conditions requiring compliance with regulations are proper “where the public agency had meaningful information reasonably justifying an expectation of mitigation of environmental effects.”⁹¹ The ruling suggests that an agency that merely provides a bare assertion that the project will be in compliance with applicable regulations, without further explanation or enforceability, may not fulfill the requirements of CEQA.

Here, the City failed to provide any information explaining how compliance with the outside laws and regulations would reduce the risks posed to workers and residents from the high levels of PAH contamination on the site. The City may not rely solely on compliance with regulations or laws as reducing impacts without a full analysis of impacts or enforceable mitigation. Furthermore, reliance on the WOSP EIR is improper because the WOSP EIR did not conduct a site-specific investigation of the contaminated site.

⁸⁸ *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.

⁸⁹ *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.

⁹⁰ *Id.*

⁹¹ *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.
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CEQA requires that the City describe all components of the Project that may have a significant impact, and adequately analyze and require mitigation for all potentially significant impacts related to on-site hazards.⁹² Here, the City failed to do so in its CEQA Analysis. SWAPE concludes that the site's existing soil and groundwater contamination are significant impacts which require comprehensive analysis and mitigation prior to Project approval. SWAPE explains that Project construction should not be allowed until a full EIR has been prepared to include a thorough assessment and cleanup of the contamination.⁹³ An EIR must be prepared to remedy the defects in the City's CEQA Analysis of hazardous materials impacts. In particular, this analysis must include proper disclosure and assessment of site contaminants, the risk they pose to the health of construction workers, site visitors and future occupants, and a regulatory agency-approved cleanup plan to address any health risks that the contaminants pose.

2. Dewatering Impacts Have Not Been Adequately Addressed

Under CEQA, a project may have a significant impact if it would violate any water quality standards or waste discharge requirement, create or contribute runoff water that would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, or otherwise substantially degrade water quality. CEQA and applicable case law require the City to describe all aspects of the Project, and, as explained above, disclose the significance of all impacts and provide separate and enforceable mitigation.⁹⁴

The CEQA Analysis states that dewatering may be required during construction for all excavations extending greater than 5 feet BSG.⁹⁵ The CEQA Analysis provides the SALEM report⁹⁶, which recommends deep ground improvements such as social cement columns that should extend to depths of at least 25 feet BSG.⁹⁷ Thus, dewatering will most likely be required at those depths. SWAPE explains that the contaminated groundwater generated from the dewatering process may pose a potentially significant water quality issue, and that

⁹² *Cal. Build. Indust. Ass'n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90; *Citizens For Responsible Equitable Env't'l Dev. v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331-2.

⁹³ SWAPE Comments, p. 2.

⁹⁴ *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645.

⁹⁵ CEQA Analysis, p. 66.

⁹⁶ Salem Engineering Group, Inc. 2020. Update Geotechnical Engineering Investigation. *Proposed 8-story Mixed*

Use Retail and Residential Building, 1396 5th Street, West Oakland, California, June 5.

⁹⁷ CEQA Analysis, p. 52.

any contaminated groundwater encountered during Project construction must be handled and disposed in accordance with the San Francisco Bay Regional Water Quality Control Board's NPDES General Permit requirements⁹⁸ SWAPE further notes that the CEQA Analysis fails to consider that groundwater that would be dewatered is known to be contaminated with TCE and other compounds.⁹⁹ Nevertheless, the City is still required under CEQA to fully describe, analyze, and mitigate potential impacts from dewatering in its CEQA document.

An EIR must be prepared to analyze the impact and identify the Regional Board's dewatering requirements and how they will be met during Project construction.¹⁰⁰

E. The CEQA Analysis Fails to Adequately Analyze the Project-Specific Health Risk from Impacts to Air Quality

1. Criteria Pollutants Have Not Been Adequately Addressed or Mitigated

SWAPE determined that the proposed Project's construction related emissions should have been considered by the CEQA Analysis, but were not.¹⁰¹ As a result, an updated air quality analysis, including an analysis of the Project's construction-related criteria air pollutant emissions, should be prepared in an EIR. Furthermore, SWAPE's review of the Analysis' CalEEMod output files demonstrates that the proposed Project includes 1,600-SF of "High Turnover (Sit Down Restaurant)" in addition to the residential land use.¹⁰² As a result, the above-mentioned BAAQMD guidelines, which apply only to "Apartments, mid-rise," are not applicable to the proposed Project. Thus, the Analysis' air quality significance determination should not be relied upon. Until an analysis is prepared quantifying and comparing the Project's estimated emissions to the applicable BAAQMD thresholds, the proposed Project should not be approved.

2. SCA-AIR-2 Constitutes Impermissibly Deferred Mitigation

CEQA Guidelines Section 15126.4 provides:

⁹⁸ SWAPE Comments, p. 10.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ SWAPE Comments, p. 11.

¹⁰² CEQA Analysis, p. F-2.

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Formulation of mitigation measures shall not be deferred until some future time. The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) *identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure*. Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards".¹⁰³

SCA-AIR-2 impermissibly defers mitigation and fails to identify potential actions that are feasible that could reduce the Project's construction related criteria air pollutant emissions to less than significant levels.¹⁰⁴ An EIR should be prepared incorporating an adequate analysis of the Project's criteria air pollutant emissions and identifying actions that would feasibly reduce the Project's construction-related criteria air pollutant emissions to less-than-significant levels.¹⁰⁵

The Project's would result in a significant health risk impact that should be mitigated further. In an effort to reduce the Project's emissions, SWAPE identified several mitigation measures that are applicable to the proposed Project.¹⁰⁶ Feasible mitigation measures can be found in BAAQMD's *Community Risk Reduction Plans for Toxic Air Contaminants (TACs) and Fine Particulate Matter (PM2.5)*.⁴¹ Therefore, to reduce the Project's emissions, consideration of the following measures should be made¹⁰⁷:

- Zoning to provide segregation from receptors;
- Establishment of zoning buffer zones, such as vegetated areas or wall barriers, around mobile sources;
- Operational hour limitations for truck deliveries;
- Alternative vehicle routing (i.e. re-route truck traffic by adding alternate access for truck traffic or by restricting truck traffic on certain sensitive routes);

¹⁰³ CEQA

¹⁰⁴ SWAPE Comments, p. 13.

¹⁰⁵ *Id.*

¹⁰⁶ SWAPE Comments, p. 23.

¹⁰⁷ SWAPE Comments, p. 23-24.

- Truck parking restrictions (i.e. establish a buffer zone between truck parking and new housing or restrict truck parking in certain areas to specific hours of the day);
- Alternative mobile source fuel requirements;
- Improve road infrastructure to facilitate improved traffic flow without inducing capacity through:
 - Signal synchronization;
 - Locations of on- and off-ramps for freeways;
 - Assessment of speed limits and roadway capacities;
- Provide mechanisms for communication between carriers and operators at facilities such to manage demand and flow at facilities with heavy diesel traffic;
- Require the installation of electrical hookups at loading docks and the connection of trucks equipped with electrical hookups to eliminate the need to operate diesel-powered TRUs at the loading docks;
- Improve alternative transportation options such as biodiesel or CNG-powered buses, light rail, community shuttles, etc.
- Require new development to incorporate:
 - Bicycle parking, bicycle infrastructure (i.e. bike lanes and bike racks), and “end-of-trip” facilities;
 - Pedestrian infrastructure (i.e. pedestrian network, minimize barriers, etc.);
 - Traffic calming measures;
 - Bus shelters on the perimeter of development;
 - Parking measures (paid parking, shared parking among land uses, and preferential parking for alternative-fueled vehicles, etc.);
 - Incentives for ridesharing and use of alternative-fueled vehicles (carpool lanes, electric vehicle charging stations, car-share programs, etc.);
 - Smart landscaping utilizing vegetation which requires minimal maintenance; and
 - Electrical outlets at building exterior areas and complimentary electric lawnmowers for residents.

These measures offer a cost-effective, feasible way to incorporate lower-emitting design features into the proposed Project, which subsequently, reduce TAC emissions released during Project construction and operation. An EIR should be prepared to include all feasible mitigation measures, as well as include an updated health risk analysis to ensure that the necessary mitigation measures are implemented to reduce emissions to below thresholds. The EIR should also demonstrate a commitment to the implementation of these measures prior to Project approval, to ensure that the Project's significant emissions are reduced to the maximum extent possible.

3. Diesel Particulate Matter Health Risk Emissions Have Not Been Adequately Analyzed or Mitigated

The WOSP EIR determined that health risk impacts posed to future, on-site receptors as a result of exposure to DPM would be less than significant.¹⁰⁸ However, the CEQA Analysis determined that the health risk impacts as a result of the Project's proximity to the I-880 would be significant and unavoidable.¹⁰⁹ These statements are inconsistent and not supported by substantial evidence.

An impact can only be labeled as significant and unavoidable after all available, feasible mitigation is considered. Review of the CEQA Checklist demonstrates that the Project fails to consider all feasible mitigation measures that would provide for mitigation from air quality impacts. “[P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects...”¹¹⁰ An EIR must be prepared to adequately analyze all feasible mitigation measures.

SWAPE determined there are a number of mitigation measures that the City failed to consider in the CEQA Analysis. The CEQA Analysis fails to mention or assess additional non-cancer, freeway-related health risks, including asthma. As such, an EIR should be prepared to include an assessment of all health risks, not only cancer, faced by residents at the Project site, especially to sensitive groups, such as newborns and the elderly. Furthermore, because of the Project's proximity to the I-880, all feasible mitigation should be considered in the EIR to reduce health impacts to people living at the project.

¹⁰⁸ WOSP EIR, p. 4.2-50.

¹⁰⁹ CEQA Analysis, p. 44-45.

¹¹⁰ California Code of Regulation, Title 14, Chapter 3, § 21002.5085-002acp

Feasible mitigation, implemented at other Southern California projects adjacent to freeways include:

- Disclose to residents the potential health impacts from living in proximity to the I-880 freeway;
- Installation, use, and maintenance of filtration systems with at least a Minimum Efficiency Reporting Value (MERV) 15;
- Lead Agency verification and certification of the implementation the filtration systems;
- Lead Agency verification of maintenance to include manufacturer's recommended filter replacement schedule;
- Disclosure to residents that opening windows will reduce the health-protectiveness of the filter systems.

4. TACs from 880 Freeway Have Not Been Adequately Addressed or Mitigated

The Project site is within 500 feet of I-880 and subject to emissions from the I-8880 freeway that are indicated to result in a risk of contracting cancer.¹¹¹ The projects exceeds the threshold level of 10 in one million risk of contracting cancer.¹¹² SWAPE estimated that an excess cancer risk of approximately 82 in one million over the course of a residential lifetime (30 years), utilizing age sensitivity factors.¹¹³ Without the age sensitivity factors, the cancer risk still exceeds the

¹¹¹ CEQA Analysis, p. 44.

¹¹² SWAPE Comments, p. 21.

¹¹³ SWAPE Comments, p. 21.

BAAQMD threshold. SWAPE’s modeling is shown in the figure below.

The Closest Exposed Individual at an Existing Residential Receptor

Activity	Duration (years)	Concentration (ug/m3)	Breathing Rate (L/kg-day)	Cancer Risk without ASFs*	ASF	Cancer Risk with ASFs*
Construction	0.25	0.3549	361	4.1E-07	10	4.1E-06
3rd Trimester Duration	0.25			4.1E-07	3rd Trimester Exposure	4.1E-06
Construction	0.69	0.3549	1090	3.4E-06	10	3.4E-05
Operation	1.31	0.09015	1090	1.6E-06	10	1.6E-05
Infant Exposure Duration	2.00			5.1E-06	Infant Exposure	5.1E-05
Operation	14.00	0.09015	572	7.8E-06	3	2.3E-05
Child Exposure Duration	14.00			7.8E-06	Child Exposure	2.3E-05
Operation	14.00	0.09015	261	3.6E-06	1	3.6E-06
Adult Exposure Duration	14.00			3.6E-06	Adult Exposure	3.6E-06
Lifetime Exposure Duration	30.00			1.7E-05	Lifetime Exposure	8.2E-05

* We, along with CARB and BAAQMD, recommend using the more updated and health protective 2015 OEHHA guidance, which includes ASFs.

An agency must include an analysis of health risks that connect the Project’s air emissions with the health risk posed by those emissions.¹¹⁴ SWAPE’s screening-level health risk analysis demonstrates that construction and operation of the Project could result in a potentially significant health risk impact, when correct exposure assumptions and up-to-date, applicable guidance are used.¹¹⁵ Consistent with recommendations set forth by OEHHA, SWAPE assumed residential exposure begins during the third trimester stage of life.¹¹⁶ The Analysis’ CalEEMod output files indicate that construction activities will generate approximately 188 pounds of DPM over the 343-day construction period.¹¹⁷

SWAPE determined, as demonstrated in the table above, the excess cancer risk to adults, children, infants, and during the 3rd trimester of pregnancy at the MEIR located approximately 125 meters away, over the course of Project construction and operation, with ASFs, are approximately 3.6, 23, 51, and 4.1 in one

¹¹⁴ SWAPE Comments, p. 21; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 525.

¹¹⁵ SWAPE Comments, p.21

¹¹⁶ *Id.* at 19.

¹¹⁷ *Id.*

million, respectively. We estimate an excess cancer risk of approximately 82 in one million over the course of a residential lifetime (30 years), utilizing age sensitivity factors. The infant, child, and lifetime cancer risks exceed the BAAQMD threshold of 10 in one million, thus resulting in a potentially significant impact not previously addressed or identified by the Analysis.¹¹⁸

Therefore, since our screening-level health risk analysis indicates a potentially significant impact, the City should prepare an EIR with a health risk analysis which makes a reasonable effort to connect the Project's air quality emissions and the potential health risks posed to nearby receptors.¹¹⁹ Thus, the City should prepare an updated, quantified air pollution model as well as an updated, quantified refined HRA which adequately and accurately evaluates health risk impacts associated with both Project construction and operation.¹²⁰

The Project is subject to PM_{2.5} concentrations that exceed the threshold of 0.3 ug/m³.¹²¹ In addition, the project site is located approximately 380 feet from a stationary source.¹²² The CEQA Analysis states that "cumulative conditions and project-level impacts related to the emissions of TACs during project operations would be significant and unavoidable."¹²³ Further, the CEQA Analysis states that "[t]here are no known feasible technologies or site planning considerations that have been shown to reduce risks of gaseous TACs."¹²⁴ Therefore, impacts related to gaseous TACs would be significant and unavoidable, since SCA requirements are not sufficient to reduce the risk to acceptable levels."¹²⁵ This statement is not supported by substantial evidence. Mitigation measures could and should have been considered as feasible to reduce the impacts to less than significant.

The WOSP EIR identifies SCAs to minimize impacts to air quality, but recognizes that they cannot with certainty reduce risks to an acceptable level.¹²⁶ CEQA requires that mitigation measures be "fully enforceable through permit conditions, agreements, or other legally binding instruments."¹²⁷ Further,

¹¹⁸ SWAPE Comments, p. 22.

¹¹⁹ *Id.* at 21.

¹²⁰ *Id.* at 21.

¹²¹ CEQA Analysis, p. 45.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ CEQA Analysis, p. 45.

¹²⁶ CEQA Analysis, p. 45.

¹²⁷ CEQA Guidelines, § 15126.4(a)(2).
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mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.¹²⁸ The SCA proposed to reduce air quality impacts to less than significant are so vague and undefined that it is impossible to evaluate their effectiveness, they are therefore inadequate. An EIR is required to adequately mitigate impacts to air quality from construction and operation of the Project.

5. Diesel-Powered Emergency Generator Impacts Have Not Been Adequately Addressed or Mitigated

The Project may include an emergency diesel generator.¹²⁹ Diesel-powered generators emit diesel particulate matter (“DPM”), a toxic air contaminant (“TAC”). The CEQA Analysis determined that the project-level impacts related to emissions of TACs during project operations would be significant and unavoidable, consistent with WOSP Air-9, and thus no further analysis is required. This statement is not supported by substantial evidence. The WOSP EIR requires mitigation measure AIR-9 for applicants for projects that would include backup generators to prepare a Risk Reduction Plan for City review and approval.¹³⁰ The Risk Reduction Plan “shall reduce cumulative localized cancer risks to the maximum feasible extent.”¹³¹ The Project’s reliance on the Risk Reduction Plan for WOSP is misplaced. The Applicant must prepare a Risk Reduction Plan for City review and approval for *this* Project.

The CEQA Analysis relies on SCA-AIR-5 which requires that Applicants prepare a Health Risk Assessment (“HRA”) in accordance California Air Resources Board (CARB) and Office of Environmental Health and Hazard Assessment requirements to determine the health risk associated with proposed stationary sources of pollution in the project.¹³² Alternatively, the SCA requires the Applicant to implement health risk reduction measures including the selection of non-diesel generators or the use of diesel generators with an EPA-certified Tier 4 engine.¹³³ The CEQA analysis provides that this is required, but then states that “[e]xisting and new diesel generators shall meet CARB’s Tier 4 emission standards, if

¹²⁸ *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

¹²⁹ CEQA Analysis, p. 44.

¹³⁰ CEQA Analysis, p. D-2; West Oakland Specific Plan Environmental Impact Report (“WOSP EIR”), p. 4.2-44.

¹³¹ WOSP EIR, p. 2-13.

¹³² WOSP EIR, p. 4.2-44.

¹³³ CEQA Analysis, p. A-8.

feasible.”¹³⁴ This does not constitute a mandatory mitigation measure. “Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.”¹³⁵ Further, CEQA prohibits deferring identification of mitigation measures when there is uncertainty about the efficacy of those measures.¹³⁶ An agency may only defer formulation of mitigation measures when there is a clear commitment to mitigation that will be measured against specific performance criteria.¹³⁷

The CEQA Analysis is therefore inconsistent with the WOSP because it fails to incorporate all mitigation required under the WOSP to reduce health risks to the surrounding community. In addition, the health risk impact disclosed by SWAPE from DPM emissions during construction presents new information showing a significant impact, which the WOSP explained could not have been known at the Project level, and which was not discussed in the WOSP EIR.¹³⁸ Therefore, an EIR is required for the Project and the City may not rely on the CEQA Analysis for Project approval.

6. The CEQA Analysis Fails to Implement All Feasible Mitigation to Reduce Odor Impacts

The CEQA Analysis determined that odor impacts are significant and unavoidable. SWAPE determined that the impacts are significant. But the statement that the odor impacts are unavoidable is not supported by substantial evidence. Mitigation is available to reduce odor impacts including: zoning to provide buffer from receptors; establishment of zoning buffer zones, such as vegetated areas or wall barriers, around mobile sources; operational hour limitations for truck deliveries and others addressed in SWAPE’s expert comments.

¹³⁴ *Id.* at p. 10.

¹³⁵ CEQA Guidelines, § 15126.4(a)(2).

¹³⁶ 14 C.C.R. § 15126.4(a)(1)(B); *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 366; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308–309.

¹³⁷ *POET, LLC v. California Air Res. Bd.* (2013) 218 Cal.App.4th 681, 736, 739–740, as modified on denial of reh’g (Aug. 8, 2013), review denied (Nov. 20, 2013); see also *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 (EIR deficient for failure to specify performance standards in plan for active habitat management of open space preserve).

¹³⁸ SWAPE Comments, p. 21.

F. The CEQA Analysis Fails to Adequately Analyze and Mitigate Greenhouse Gas Emissions

1. The Project is Inconsistent with ECAP

The Project is inconsistent with the City of Oakland’s Energy and Climate Action Plan (“ECAP”). SWAPE reviewed the Project’s CALEEMod output files provided in CEQA Analysis Attachment F, and determined that “several of the values inputted into the model are not consistent with information disclosed in the Analysis and associated documents.”¹³⁹ The emissions calculated for the CEQA Analysis are underestimated.¹⁴⁰ As such, the determination that GHG emissions are less than significant is not supported by substantial evidence and is not consistent with the ECAP.

SWAPE conducted an updated CALEEMOD model and found the Project’s construction-related ROG and NO_x emissions exceed the applicable BAAQMD thresholds.¹⁴¹ SWAPE’s model demonstrates that the Project would result in a potentially significant air quality impact that was not previously identified or addressed in the Analysis. The figure below shows SWAPE’s calculations.

Model	ROG	NO _x
SWAPE Construction	280.4049	122.7616
BAAQMD Threshold (lbs/day)	54	54
Threshold Exceeded?	Yes	Yes

The CEQA Checklist states that the Project will implement SCAs to reduce GHGs, but also states that the WOSP EIR did not identify any mitigation measures related to GHGs, and none are required for the proposed project.¹⁴² “No GHG Reduction Plan under SCA-GHG-1: Greenhouse Gas (GHG) Reduction Plan (#42) is required.”¹⁴³ The GHG emissions from the Project are significant and unmitigated. SWAPE determined that compliance with Title 24 would not constitute sufficient

¹³⁹ SWAPE Comments, p. 4.

¹⁴⁰ SWAPE Comments, p. 4.

¹⁴¹ SWAPE Comments, p. 13.

¹⁴² CEQA Analysis, p. 59.

¹⁴³ CEQA Analysis, p. 59.

mitigation.¹⁴⁴ “Simply because the 2019 Title 24 standards expect a reduction in building energy consumption does not guarantee that any measures will be implemented and result in actual reductions locally on the Project site.” Further, “[a]bsent additional information demonstrating that these reductions would be achieved through the implementation, monitoring, and enforcement of energy-related mitigation measures, [SWAPE is] unable to verify the revised energy use values inputted into the model.”¹⁴⁵ Therefore, the CEQA Analysis provides GHG modeling that is not based on substantial evidence.

The Project likely relies on CEQA Guidelines § 15064(h)(3) in determining the less than significant impact. CEQA Guidelines § 15064(h)(3) provides that Projects that are consistent with the CAP, may be found to cause a less than significant impact under CEQA.¹⁴⁶ In *Center for Biological Diversity v. Department of Fish and Wildlife*, the California Supreme Court held that Department of Fish and Wildlife’s “failure to provide substantial evidentiary support for its no significant impact conclusion was prejudicial, in that it deprived decision makers and the public of substantial relevant information about the project’s likely impacts.”¹⁴⁷ The reliance on the ECAP without substantial evidentiary support, makes the CEQA Checklist inadequate.

Further, CEQA requires the lead agency to use scientific data to evaluate GHG impacts directly and indirectly associated with a project.¹⁴⁸ The analysis must “reasonably reflect evolving scientific knowledge and state regulatory schemes.”¹⁴⁹ In determining the significance of GHG emissions impacts, the agency must

¹⁴⁴ SWAPE Comments, p. 4.

¹⁴⁵ SWAPE Comments, p. 4-5.

¹⁴⁶ California Office of Planning and Research, General Plan Guidelines Chapter 8 Climate Change,

¹⁴⁷ (*Newhall Ranch*) (2015) 62 Cal.4th 204, 264.

¹⁴⁸ See 14 C.C.R. § 15064.4(a) (lead agencies “shall make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project); 14 C.C.R. § 15064(d) (evaluating significance of the environmental effect of a project requires consideration of reasonably foreseeable indirect physical changes caused by the project); 14 C.C.R. § 15358(a)(2) (defining “effects” or “impacts” to include indirect or secondary effects caused by the project and are “later in time or farther removed in distance, but are still reasonably foreseeable” including “effects on air”); CEQA Guidelines, Appendix G, § VIII: Greenhouse Gas Emissions (stating agencies should consider whether the project would “generate greenhouse gas emissions, **either directly or indirectly**, that may have a significant impact on the environment.”) (emphasis added).

¹⁴⁹ 14 C.C.R. § 15064.4(b); see also *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504 (holding that lead agencies have an obligation to track shifting regulations and to prepare EIRs in a fashion that keeps “in step with evolving scientific knowledge and state regulatory schemes”).

consider the extent to which the project may increase GHG emissions compared to the existing environmental setting and the “extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions.”¹⁵⁰ City of Oakland’s ECAP requires projects that exceed any CEQA threshold to implement mitigation measures and comply with the City’s standard conditions of approval (“SCAs”). However, the CEQA Checklist fails to estimate and evaluate the proposed Project’s GHG emissions based on any quantitative thresholds whatsoever. This informational deficiency violates CEQA. An EIR must be prepared.

An EIR should be prepared to include an adequate evaluation and mitigation of the proposed Project’s GHG emissions to ensure that impacts are reduced to a less than significant level.

G. The CEQA Analysis Fails to Adequately Analyze and Mitigate Impacts from Noise and Vibration

1. Acoustical Study and Vibration Reduction Plan Not Provided for Public Review Ahead of Project Approval

The CEQA Analysis states that the Applicant would submit a Vibration Reduction Plan and implement vibration reduction measures, but these measures are not available for public review to determine whether they would constitute effective mitigation. CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.¹⁵¹ 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” to the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹⁵² CEQA prohibits deferring identification

¹⁵⁰ 14 C.C.R. § 15064.4(b)(1), (3).

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

¹⁵² Public Resources Code § 21081(a)(3), (b); 14 C.C.R. §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883. 5085-002acp

of mitigation measures when there is uncertainty about the efficacy of those measures.¹⁵³

The CEQA Checklist provides that the Project would adhere to City of Oakland's SCAs and require operational noise to meet applicable noise performance standards. The courts have held that compliance with regulations, including noise ordinances, is not an adequate significance threshold because it does not foreclose the possibility of significant impacts.¹⁵⁴ Similarly, here, compliance with the SCAs does not assure that noise impacts will be less than significant.

CEQA requires mitigation measures to be enforceable through binding conditions.¹⁵⁵ CEQA also requires agencies to conclude that an impact is less than significant only after it produces rigorous analysis and concrete substantial evidence justifying the finding. The proposed measures thus violate CEQA by failing to show not only how they will achieve reduction below the threshold of significance, but what is the level of reduction they set to achieve. Moreover, many of the measures include phrases such as "where feasible", and "if such measures are feasible", making them completely unenforceable, in violation of CEQA.

A DEIR must be prepared to include enforceable mitigation measures and support with evidence the levels of noise reduction these measures will achieve.

III. CONCLUSION

As this letter and attached expert report demonstrates, the proposed Project is likely to create potentially significant impacts to air quality and public health, and from hazardous materials, GHGs, noise, and traffic. These impacts constitute new information demonstrating that the Project has new and more severe impacts than disclosed, analyzed, and mitigated in the EIR prepared for the WOSP. These impacts are not adequately mitigated by the SCAs proposed for the Project, and require full disclosure and mitigation in an EIR.

¹⁵³ 14 C.C.R. § 15126.4(a)(1)(B); *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 366; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308–309.

¹⁵⁴ *Keep our Mountains Quiet v. Santa Clara* (2015) 236 Cal.App.4th 714, 733; *CBE v. CRA* (2002) 103 Cal.App.4th 98, 115-16; *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 893, as modified on denial of reh'g (Mar. 20, 2020)

¹⁵⁵ 14 C.C.R. § 15126.4(a)(2).
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Moreover, because an EIR is required, the City cannot approve the proposed Project using a Minor CUP. And, even if the City could issue a Minor CUP in these circumstances, which it cannot, the City's findings under the general permit review criteria are not supported by substantial evidence.

To comply with the law, the City must withdraw the CEQA Analysis and direct Staff to prepare a subsequent or supplemental EIR for public review and comment, which discloses, analyzes, and mitigates these impacts, and considers a reasonable range of environmentally-superior alternatives to the proposed Project.

Thank you for considering our comments. Please place this comment letter and attachments in the record of proceedings for this matter.

Sincerely,

A handwritten signature in blue ink, reading "Kelilah D. Federman", is centered on a light green rectangular background.

Kelilah D. Federman
Associate Attorney

KDF:acp
Attachment

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