ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037
TEL: (650) 589-1660
FAX: (650) 589-5062
kfederman@adamsbroadwell.com

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

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
ANDREW J. GRAF
TANYA A. GULESSERIAN
KENDRA D. HARTMANN*
KYLE C. JONES
DARIEN K. KEY
RACHAEL E. KOSS
AIDAN P. MARSHALL
WILLIAM C. MUMBY

MARC D. JOSEPH
Of Counsel

*Not admitted in California.
Licensed in Colorado.

March 12, 2021

Via Email and Overnight Delivery

Peterson Z. Vollmann, Planner IV
Email: pvollmann@oaklandca.gov
Robert Merkamp, Zoning Manager
Email: Rmerkamp@oaklandca.gov
Catherine Payne, Development Planning Manager
Email: Cpayne@oaklandca.gov
City of Oakland
Planning and Building Department
250 Frank H. Ogawa, Suite 2114
Oakland, CA 94612

City Clerk
City of Oakland
1 Frank H. Ogawa Plaza
1st and 2nd Floors
Oakland, CA 94612
Email: cityclerk@oaklandca.gov

Re: Appeal to City Council re 1396 5th Street (Case File Number: PLN 20-101, APN 004-0069-004-00)

Dear Mr. Vollmann, Mr. Merkamp, Ms. Payne, City Clerk:

We are writing on behalf of East Bay Residents for Responsible Development ("East Bay Residents" or "Residents") to appeal the Oakland Planning Commission's March 3, 2021 approval of the 1396 5th Street Project (Application Number: PLN 20-101, APN 004-0069-004-00) ("Project") and March 4, 2021 Decision Letter, as well as the CEQA Analysis/Exemption Report ("CEQA Analysis") prepared for the Project by the City of Oakland ("City") pursuant to the California Environmental

Quality Act ("CEQA").[1] This Appeal is taken from the following actions, and is accompanied by payment of the required appeal fee of $2,685.15:

1. Planning Commission's March 3, 2021 approval of Staff's environmental determination and adoption/approval of the CEQA Findings for the Project.
2. Planning Commission's March 3, 2021 related approval of the Project, including Major Conditional Use Permit ("Major CUP"), Minor Conditional Use Permit ("Minor CUP"), and Design Review, subject the Conditions of Approval ("Conditions"), Vesting Tentative Parcel Map, and Mitigation Monitoring and Reporting Program ("MMRP").[2]
3. Planning Manager's March 4, 2021 Decision Letter.[3]

The Project, proposed by the Michaels Organization ("Applicant"), includes the proposed construction of 222 residential units in an approximately 216,666 square foot, eight-story podium style building. Without the Minor CUP, Major CUP, Tentative Parcel Map, and subsequent density bonus and waiver, the total authorized number of residential units at 1396 5th Street under existing zoning would be 171 units. The Project would include 41 vehicle parking spaces, 1 accessible space and 1 accessible van space, and 68 bicycle parking spaces.[4] The site is zoned as S-15W (Transit-Oriented Development Commercial Zone) within the West Oakland Specific Plan Subarea 2A of 7th Street Opportunity Area.[5] The Project is one block north of Interstate I-880, and 0.5 miles west of 1-980.[6] The 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

[1] Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§ 15000 et seq.
[2] March 4, 2021 Planning Commission Decision Letter for Application Number: PLN20-101; Property Location: 1396 5th Street; APN: 004-0069-004 ("Decision Letter"), Attachment A, p. 2.
[3] The Decision Letter incorrectly states that the Project was subject to a noticed public comment period, and that appeals would be limited to "issues and/or evidence presented to the Zoning Manager prior to the close of the previously noticed public comment period on the matter." Decision Letter, p. 1. The Project did not have a public comment period, and was approved by the Planning Commission, rather the Zoning Manager. Accordingly, this appeal is taken from the Planning Commission's decision.
[4] 1396 5th Street CEQA Analysis ("CEQA Analysis"), p. 9.
[5] *Id.* at p. 1.
[6] *Id.* at p. 5.

east within the City of Oakland.[7] The Project would also include a diesel-powered emergency generator.[8]

This Appeal letter, and Residents' attached March 3, 2021 comments to the Planning Commission,[9] demonstrate that the Planning Commission's decision to approve the Project violated CEQA, land use laws and the City's municipal codes, and was not supported by substantial evidence in the record.[10] Specifically, our prior comments, as well as the comments of local residents and members of the public that were submitted to the Planning Commission, identified several flaws in the City's environmental analysis, and provided new information and substantial evidence demonstrating that the Project will have new and more severe impacts than previously analyzed in the City's West Oakland Specific Plan and its Environmental Impact Report ("WOSP EIR"), the General Plan Land Use and Transportation Element and its EIR ("LUTE EIR") and the City of Oakland General Plan, and that these impacts will not be substantially or fully mitigated by the proposed Standard Conditions of Approval ("SCA"). These issues were not resolved by the Commission prior to its approval of the Project.

The City's CEQA Analysis purports to evaluate the Project's potential environmental impacts and consistency with these prior EIRs, and erroneously asserts that the Project is exempt from further CEQA review pursuant to a number of CEQA exemptions, including the Qualified In-fill Exemption under Public Resources Code Section 21094.5 and CEQA Guidelines Section 15183.3, and the Community Plan Exemption under CEQA Guidelines Section 15183. In the alternative, the CEQA Analysis asserts that it is a CEQA Addendum prepared pursuant to CEQA Guidelines Sections 15162, 15163, and 15164 to address minor technical changes and additions in the prior analysis that do not trigger the need for subsequent environmental review.[11] However, as explained more fully below, and in the comments of other local residents and members of the public that were presented to the Planning Commission, the CEQA Analysis fails to disclose, analyze, and mitigate the Project's new, peculiar, significant, and more severe

[7] CEQA Analysis, p. 5
[8] *Id*. at 44.
[9] East Bay Residents' March 3, 2021 written comments to the Planning Commission are attached hereto as **Exhibit A** and incorporate by reference.
[10] This Appeal is also accompanied with payment of the appeal fee of $2685.15 in accordance with the City of Oakland Master Fee Schedule.
[11] CEQA Analysis, p. 2.

impacts on air quality, public health, hazards and hazardous materials, greenhouse gas emissions, and noise and vibration.

The CEQA Analysis failed to adequately disclose and mitigate these impacts, in violation of CEQA and land use requirements. The Commission failed to resolve these deficiencies, and failed to remand the Project to Staff to prepare an EIR, prior to approving the Project. The Planning Commission therefore lacked substantial evidence to support its decision to approve the Project and to adopt CEQA and land use findings for the Project. As explained herein, the City Council should vacate the Planning Commission's approvals and remand the Project to Staff to prepare a legally adequate EIR, before the Project can be presented to City decision makers for approval.[12]

This appeal letter and its attachments raises the issues that are contested on appeal, and addresses "issues and/or evidence" that was previously presented to the Planning Commission prior to its approval of the Project, as specified by Sections 17.134.070, 17.136.090, 16.04.100, 17.158.210, and 17.158.220 of the Oakland Planning Code and as allowed pursuant to CEQA and State land use laws.[13] We previously filed comments on the Project on March 3, 2021 with the assistance of assistance of technical expert Matt Hagemann and Paul E. Rosenfeld, Ph.D. of Soil Water Air Protection Enterprises ("SWAPE").[14] Local residents and members of the public submitted oral and written comments to the Planning Commission regarding the Project's hazardous materials onsite, air quality impacts, and density bonus issues. Residents' prior comments are incorporated by reference herein, and support this Appeal.

East Bay Residents urges the City Council to grant this Appeal and remand the Project to City Staff to prepare an EIR for the Project. The Project should not be rescheduled for a further public hearing until these issues have been addressed. East Bay Residents reserves the right to submit supplemental comments and

[12] PRC § 21094.5(a); 14 CCR § 15164(e); see *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515.
[13] Oak. Planning Code §§ 17.134.070.A; 17.136.090; PRC § 21177(a) (allowing members of the public to submit additional evidence to the lead agency regarding a project's CEQA compliance "until the close of the final hearing on the Project.").
[14] East Bay Resident's March 3, 2021 written comments to the Planning Commission are attached hereto as **Exhibit A** and incorporate by reference.

evidence at any later hearings and proceedings related to the Project, in accordance with State law.[15]

I. STATEMENT OF INTEREST

East Bay Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts associated with Project development. The association includes City of Oakland 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 East Bay Residents and its affiliated labor organizations live, work, and raise their families in Alameda County, including in the City of Oakland. They would be directly affected by the Project's environmental and health and safety 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 East Bay Residents 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, East Bay Residents members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

II. LEGAL BACKGROUND

[15] 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.

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 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]

Further, 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 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

---

[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.

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 "ensure 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 tiering or another appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared CEQA document could be used for the project, among other purposes.[28] The initial study must accurately describe the project, identify the environmental setting, identify environmental effects and show "some evidence" to support those conclusions, and a discussion of ways to mitigate the significant effects of the project, if any.[29] CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.[30] 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."[31] If the project has potentially significant environmental effects but those effects can be reduced to a level of insignificance by mitigation measures that the project's proponent has agreed to undertake, the lead agency may prepare a mitigated negative declaration ("MND").[32]

This appeal is filed pursuant to Title 17 of the Oakland Municipal Code Chapter 17.132.020 which provides[33]:

---

[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] CEQA Guidelines § 15063(d) (emphasis added).
[30] *See, e.g.,* Pub. Resources Code § 21100.
[31] *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).
[32] Pub. Resources Code § 21080 (c)(2); 14 CCR § 15064(f)(2).
[33] Oakland Municipal Code Chapter 17.132.020.

> Within ten (10) calendar days after the date of a decision by the City Planning Commission on an administrative appeal involving the provisions of Sections 17.104.040 or 17.114.150, an appeal from said decision may be taken to the City Council by any interested party. In event the last date of appeal falls on a weekend or holiday when city offices are closed, the next date such offices are open for business shall be the last date of appeal. Such appeal shall be made on a form prescribed by the City Planning Department and shall be filed with such Department and shall be accompanied by such a fee as specified in the City fee schedule. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director or wherein his or her decision is not supported by the evidence in the record. The appeal shall be accompanied by such information as may be required to facilitate review.

The Covid-19 Pandemic prompted the issuance of Emergency Order No. 3 of the City of Oakland which provides[34]:

> Since Permit Center is not open to the public at this time, the City is altering its appeal submittal requirements to respond to the lack of onsite staff for the duration that this order remains in effect
> …
> To initiate an appeal, the appellant **must** email: : a) the case planner, b) the Development Planning Manager (cpayne@oaklandca.gov) and c) the Zoning Manager (rmerkamp@oaklandca.gov) a signed copy of the Planning Bureau's appeal application form, as well as all supporting documents, no later than 4:00 p.m. on the final appeal date stated in the City's decision letter. Failure to submit the appeal form and supporting documents in a timely manner will result in the rejection of the appeal. Additional material may not be submitted at a later date. Within one (1) business day of the appeal submittal, the project's staff planner will create the appeal record in Accela and email the appellant with the record ID and invoice numbers. Appellant will then have five (5) calendar days from the date of appeal submittal to pay the appeal fee to the City's cashier. If the fifth (5th) calendar day falls on a

[34] Emergency Order No. 3 of the City of Oakland, Interim City Administrator/Director of the Emergency Operations Center (May 13, 2020) *available at:* https://cao-94612.s3.amazonaws.com/documents/CAO-Emergency-Order-COVID-No.-3-Build_Plan-Amd-Arizona-Border-Wall-P.pdf.

weekend or City holiday, appellant will have until the end of the following City business day to pay the appeal fee.

A. Subsequent CEQA Review

When a previously approved project for which an EIR or an MND has been prepared is modified, 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;
(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.[35]

In assessing the need for subsequent or supplemental environmental review, 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 have occurred:

(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;

[35] Pub. Resources Code § 21166; CEQA Guidelines § 15162.

(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 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.[36]

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.[37] 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.[38] In any case, the decision must be supported by substantial evidence.[39]

"Substantial evidence" under CEQA means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."[40] Further, "[w]hether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence."[41] Substantial evidence "shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."[42] Here, the Planning Commission's decision to

[36] CEQA Guidelines §§ 15162(a)(1)-(3).
[37] CEQA Guidelines § 15162(b).
[38] CEQA Guidelines § 15164; CEQA Analysis, p. 9.
[39] *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).
[40] CEQA Guidelines § 15384(a).
[41] *Id.*
[42] *Id.* at § 15384(b).

approve the Project violated CEQA, land use laws and the City's municipal codes, and was not supported by substantial evidence in the record.

B. CEQA Infill Streamlining Exemptions

The City seeks to rely on narrow CEQA exemptions that allow approval of projects without an EIR in very narrow circumstances, CEQA Section 21094.5 and CEQA Guidelines Section 15183 (Community Plan) and 15183.3 (Qualified Infill)[43] (collectively, the "Infill Exemptions"). The Infill Exemptions provide that, if an EIR was previously certified for a planning level decision of a city or county, subsequent CEQA review may be limited to evaluating a project's effects on the environment that are either (A) specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) where substantial new information shows the effects will be more significant than described in the prior environmental impact report.[44] The Infill Exemptions allow a lead agency to forego preparation of an EIR if neither of these situations occur, or if the lead agency determines that uniformly applicable development policies or standards adopted by the agency will substantially mitigate the new effects. A lead agency's determination pursuant to this section must be supported by substantial evidence.[45]

III. THE COMMISSION'S RELIANCE ON PREVIOUS ENVIRONMENTAL ANALYSIS AND CEQA EXEMPTIONS VIOLATED CEQA

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

The City's reliance on CEQA Addendum and Infill Streamlining Exemptions to approve the Project without preparing an EIR is misplaced for several reasons. First, the CEQA Analysis does not simply consist of "minor changes or additions are necessary" as is allowed under the Addendum provision. Rather, it includes an entirely new substantive analysis for a large development project which was not specifically analyzed in the WOSP EIR, LUTE EIR, or General Plan. The City must discontinue this practice, which clearly violates CEQA. Moreover, as explained

[43] Decision Letter, Attachment A, p. 9.
[44] Pub. Res. Code § 21094.5(a); 14 Cal. Code Regs. § 15183.3(a), (c).
[45] Pub. Res. Code § 21094.5(a).

below, the Project will result in new or more severe significant impacts than analyzed in previous EIRs that require mitigation that is not included in the CEQA Analysis, the SCAs, or the MMRP. CEQA requires that the City's decision to forego preparation of an EIR, and reliance on an Addendum, must be supported by factual evidence in the record.[46] In this case, the City's decision not to prepare a subsequent or supplemental EIR for the Project is not supported by substantial evidence because of these unanalyzed and/or unmitigated impacts.

The City also relies on narrow CEQA exemptions that are inapplicable or not supported by substantial evidence. Specifically, the City relies on CEQA Guidelines Sections 15183 (Community Plan)[47] and 15183.3 (Qualified Infill)[48] for Project approval. 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 for three key reasons. First, the Project's health risks to local sensitive receptors from exposure to toxic air contaminants ("TAC") emissions constitute significant impacts, and the Commission failed to require binding mitigation to substantially mitigate these impacts or to reduce them to less than significant levels.[49] Second, the Project will have significant hazards and hazardous materials impacts on local sensitive receptors that the CEQA Analysis fails to disclose, and fails to adequately mitigate.[50] Third, the Project is inconsistent with allowable density. These impacts are not adequately mitigated by the SCAs from the WOSP EIR, LUTE EIR, or General Plan. In order to substantially (or fully) mitigate these impacts, the City must adopt considerably stronger and different mitigation than the measures included in the SCAs.

For these reasons, the Commission lacked substantial evidence to support its findings that the Project would not have any significant, unmitigated impacts on the environment or on the health and welfare of local residents or other members of the public. The City Council cannot uphold the Commission's unsupported findings. The City Council should vacate the Commission approvals and require the City to

[46] *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).
[47] CEQA Guidelines Section 15183.
[48] CEQA Guidelines Section 15183.3.
[49] Exhibit A, SWAPE Comments, p. 16.
[50] *Id.* at 2.

provide detailed analysis of the Project's impacts in a subsequent or supplemental EIR.

B. The Project Has Significant, Unmitigated On-Site Hazards

The CEQA Analysis concludes, without substantial evidence, that existing soil and groundwater contamination onsite is less than significant.[51] But, the site is identified as a Cleanup Program Site on the State Water Resources Control Board ("SWRCB") GeoTracker Database due to previous groundwater contamination.[52] The SWRCB cleared the site for use as a "vacant lot", but the site is not up to residential standards.[53] The site's SWRCB record shows that residual current subsurface contamination at the site exceeds residential screening levels.[54] The Applicant proposes to develop the site for residential use, despite the fact that the site fails to meet the health-based standards necessary for residential development. This is a potentially significant impact that is peculiar to the Project site which the CEQA Analysis fails to disclose or adequately mitigate.

SWAPE similarly determined that the CEQA Analysis fails to disclose significant contamination that remains on the Project site in excess of residential screening levels.[55] PAHs at existing levels found in the soil may be reasonably expected to cause cancer.[56] TPH compounds at existing levels found in the soil may affect the central nervous system while others can cause effects on the blood, immune system, lungs, skin, and eyes.[57] As SWAPE explained, the site's existing Phase II Subsurface Investigation Work Plan[58] 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.[59] The CEQA Analysis also fails to describe or comply with a critical condition of site's existing closure which requires that "if

---

[51] CEQA Analysis, p. 62.
[52] Exhibit A, Comment Letter, p. 17.
[53] Exhibit A, SWAPE Comments, p. 2.
[54] Exhibit A, Comment Letter, p. 18.
[55] Exhibit A, SWAPE Comments, p. 2.
[56] *Id.*
[57] *Id.*
[58] Citadel Environmental, Phase II subsurface Investigation Work Plan – Draft, (May 13, 2016) *available* at: https://dehpra.acgov.org/LOP/Lopinfo/ReadFile?filePath=%5C%5Cac01fs8600.acgov.org%5CLOPIMAGE%5CPDF%5CRO0002896%5CCORRES_L_2016-06-23_2.pdf.
[59] Exhibit A, SWAPE Comments, p. 2.

there is a proposed change in land use to any residential, or conservative land use, or if any redevelopment occurs," the Alameda County Department of Environmental Health ("ACDEH") must be notified for reevaluation of the Project site conditions.[60]

SWAPE concluded that, without proper agency consultation and cleanup to residential standard prior to construction, construction workers, nearby receptors, and future residents of the Project may be exposed to unhealthful levels of contamination released during the Project's disturbance of contaminated soil or groundwater, or released from vapor intrusion during Project operation.[61] SWAPE further determined that the proposed mitigation measure SCA-HAZ-1 is deficient because it fails to address the site closure standards necessary for residential development.[62] As SWAPE explained, SCA-HAZ-1 only addresses containment of contamination that is dug up during Project construction, but does not address remediation of existing contamination to residential levels.[63] Moreover, SCA-HAZ-1 would improperly allow on-site construction workers to be directly exposed to known contamination, rather than requiring contamination to be removed prior to initiating Project construction. SCA-HAZ-1 therefore fails to mitigate the potentially significant impacts posed by the site's existing soil and groundwater contamination, and fails to comply with CEQA. Far more is required to substantially mitigate the Project's potentially significant contamination impacts than the SCAs proposed by the City.

SWAPE's analysis determined that "[a]n EIR is necessary for the Project to disclose known soil and groundwater contamination at the Project site. An EIR is also necessary to document that ACDEH was notified of the Project and the proposed land use change from commercial to residential and to document their approval for redevelopment activities."[64] Once the full extent of the site's contamination is disclosed to the public in an EIR, the City must also adopt all feasible mitigation measures to reduce contamination impacts to less than significant levels before the Project can be approved.[65]

The CEQA Analysis failed to adequately disclose and mitigate hazards and hazardous waste impacts, in violation of CEQA and land use requirements. The

---

[60] *Id*. at pp. 2-3.
[61] Exhibit A, SWAPE Comments, p. 2.
[62] Exhibit A, SWAPE Comments, p. 3.
[63] Exhibit A, SWAPE Comments, p. 3.
[64] *Id.*
[65] See e.g. PRC § 21081(a)(1).
5085-004acp

Commission failed to resolve these deficiencies, and failed to remand the Project to Staff to prepare an EIR, prior to approving the Project. The Planning Commission therefore lacked substantial evidence to support its decision to approve the Project and its adoption of CEQA findings for the Project, and the CEQA Analysis fails to satisfy CEQA.

C. The Project Has Significant, Unmitigated Air Quality Impacts and Health Risk from Construction and Operational Emissions

The CEQA Analysis concludes that the Project's air quality impacts would be less than significant with implementation of SCAs. This conclusion directly contradicts the WOSP EIR's own conclusion that construction-related and operational air pollutant emissions and operational toxic air contaminants to be significant and unavoidable.[66] Further, the WOSP EIR concluded that it was not possible, at the time, to assess the significance of construction-related criteria air pollutant emissions without modeling each individual project. Thus, the CEQA Analysis admits that the Project will have significant site-specific emissions impacts that are peculiar to the Project site which were not analyzed in the WOSP EIR. This is precisely the situation in which the City's claimed CEQA exemptions do not apply. And, because the City failed to conduct a project-specific analysis of emissions in the CEQA Analysis, its conclusion that "project construction related air impacts would be less than significant consistent with the findings of the WOSP EIR"[67] is not supported by any substantial evidence.

The CEQA Analysis incorrectly relies on the WOSP EIR, LUTE EIR, and General Plan to avoid analysis and mitigation of potentially significant criteria pollutant and public health impacts. The CEQA Analysis then fails to estimate and compare the Project's emissions to the applicable BAAQMD thresholds, in violation of CEQA.[68] Thus, the CEQA Analysis' conclusion that the Project's air quality and health risk impacts are consistent with the WOSP EIR and would be less than

---

[66] CEQA Analysis, p. 42.
[67] Exhibit A, SWAPE Comments, p. 11; CEQA Analysis, p. 44.
[68] *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 525; 14 CCR § 15064.7(a); *Comtys. for a Better Env't v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 (when an impact exceeds significance threshold, e agency must disclose that the impact is significant); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"); *CBE v. SCAQMD* (2010) 48 Cal.4th at 327 (impact is significant because exceeds "established significance threshold for NOx … constitute[ing] substantial evidence supporting a fair argument for a significant adverse impact"). .

significant, is not supported by substantial evidence, and does not support approval of the Project.[69]

1. Criteria Pollutants Were Not Adequately Addressed or Mitigated

SWAPE determined that the CEQA Analysis failed to analyze the Project's construction-related and operational criteria air pollutant emissions.[70] SWAPE's review of the CEQA Analysis' CalEEMod output files used to calculate GHG emissions contains errors and unsupported input parameters. For example, SWAPE explained that the City's modeling relied on BAAQMD's criteria pollutant screening size, which only applies to operational emissions, and therefore did not analyze the Project's construction emissions.[71] SWAPE further explained that the City's modeling relied on unsubstantiated reductions in solid waste generation rates, underestimated operational vehicle trip rates, unsubstantiated changes to wastewater treatment system percentages, and failed to model emissions related to the Project's 1,600-SF of "High Turnover (Sit Down Restaurant)."[72] As a result, the CEQA Analysis' emissions analysis is unsupported by facts in the record, and its resulting conclusion that air quality impacts would be less than significant is not supported by substantial evidence.

SWAPE prepared an updated CalEEMod model which determined that the Project's construction-related ROG and NOx emissions would exceed applicable BAAQMD thresholds.[73] These are significant criteria pollutant impacts which must be disclosed and mitigated in an EIR.

2. The Project Has Significant Health Risk Impacts Which the CEQA Analysis Failed to Disclose and Mitigate

The CEQA Analysis omits a health risk analysis ("HRA") as required by SCA-AIR-4 "to reduce the potential health risk due to exposure to toxic air contaminants."[74] The CEQA Analysis therefore fails to make a reasonable effort to connect the Project's operational TAC emissions to the potential health risks posed

[69] Exhibit A, SWAPE Comments, p. 12.
[70] *Id*. at pp. 9-10.
[71] *Id*. at p. 11.
[72] *Id*. at pp. 6-11.
[73] Exhibit A, SWAPE Comments, p. 13.
[74] CEQA Analysis, Attachment A, p. A-9.

to nearby receptors, as required by CEQA.[75] As such, the CEQA Analysis is inconsistent with CEQA's requirement to correlate the increase in emissions generated by the Project with the potential adverse impacts on human health, and to disclose those impacts to the public prior to approving the Project.[76] An HRA was also not provided, as required by SCA-AIR-5 here, where a project may include an emergency diesel generator.[77]

SWAPE conducted an HRA which analyzed the health risk posed by construction-related and operational emissions, and found an excess cancer risk of approximately 82 in one million over the course of a residential lifetime (30 years), utilizing age sensitivity factors.[78] This is more than double the WOSP EIR's estimate of 32 in one million, and substantially exceeds BAAQMD's significance threshold of 10 in one million, resulting in a highly significant impact health risk impact. SWAPE's screening-level HRA demonstrated 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, which is not substantially mitigated by the SCAs.[79] SWAPE's modeling is shown in the figure below.

[75] Exhibit A, SWAPE Comments, pp. 16-17.
[76] Exhibit A, SWAPE Comments, p. 17.
[77] CEQA Analysis, p. 44.
[78] Exhibit A, SWAPE Comments, p. 19.
[79] *Id.* at p. 22.
5085-004acp

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.

The Planning Commission's finding that the Project's health risk impacts were adequately disclosed and mitigated by the CEQA Analysis was therefore not supported by substantial evidence. Since SWAPE's screening-level HRA indicates a potentially significant impact and the SCAs require HRAs, the City must prepare an EIR with an HRA which makes a reasonable effort to connect the Project's air quality emissions and the potential health risks posed to nearby receptors.[80] SWAPE further explained that the City should prepare an updated, quantified air pollution model which adequately and accurately evaluates air quality impacts associated with both Project construction and operation, since those emissions estimates provide the foundation for an accurate HRA.[81]

3. Additional Mitigation is Necessary to Reduce Health Risk Impacts from Gaseous TACs to the Greatest Extent Feasible.

The Project is subject to PM2.5 concentrations that exceed the threshold of 0.3 ug/m3.[82] In addition, the project site is located approximately 380 feet from a

[80] *Id.*
[81] *Id.*
[82] CEQA Analysis, p. 45.

stationary source.[83] 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."[84] 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,[85] and that, for this reason, impacts related to gaseous TACs would also be significant and unavoidable, since SCA requirements are not sufficient to reduce the risk to acceptable levels."[86] 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.[87] CEQA requires that mitigation measures be "fully enforceable through permit conditions, agreements, or other legally binding instruments."[88] Further, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.[89] 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.

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

The Project may include an emergency diesel generator.[90] Diesel-powered generators emit diesel particulate matter ("DPM"), a 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

[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] CEQA Analysis, p. 45.
[87] CEQA Analysis, p. 45.
[88] CEQA Guidelines, § 15126.4(a)(2).
[89] *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.
[90] CEQA Analysis, p. 44.

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.[91] The Risk Reduction Plan "shall reduce cumulative localized cancer risks to the maximum feasible extent."[92] 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 in accordance California Air Resources Board ("CARB") and Office of Environmental Health and Hazard Assessment ("OEHHA") requirements to determine the health risk associated with proposed stationary sources of pollution in the project.[93] 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.[94] 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 feasible."[95] This does not constitute a mandatory mitigation measure. "Mitigation measures must be fully enforceable though permit conditions, agreements, or other legally binding instruments."[96] Further, CEQA prohibits deferring identification of mitigation measures when there is uncertainty about the efficacy of those measures.[97] 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.[98]

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

---

[91] CEQA Analysis, p. D-2; West Oakland Specific Plan Environmental Impact Report ("WOSP EIR"), p. 4.2-44.
[92] WOSP EIR, p. 2-13.
[93] WOSP EIR, p. 4.2-44.
[94] CEQA Analysis, p. A-8.
[95] *Id.* at p. 10.
[96] CEQA Guidelines, § 15126.4(a)(2).
[97] 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.
[98] *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).
5085-004acp

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.[99] Therefore, an EIR is required for the Project and the Planning Commission's reliance on the CEQA Analysis for Project approval was not supported by substantial evidence.

5. 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 concurred that odor impacts are significant.[100] But the statement that the odor impacts are unavoidable is not supported by substantial evidence.[101] 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.[102] These mitigation measures were not adequately considered by the Commission prior to approving the Project. The City's determination that odor impacts are significant and unavoidable is not supported by substantial evidence. Therefore, the Planning Commission's decision to approve the Project violated CEQA and was not supported by substantial evidence in the record.

6. The City Failed to Adopt All Feasible Mitigation to Reduce Significant Health Risk Impacts to the Greatest Extent Feasible

The CEQA Analysis failed to adequately mitigate significant health risk impacts.[103] Due to the WOSP EIRs' finding that health risk impacts would be significant and unavoidable, and the Project's exacerbating factors, including the Project's use of a diesel backup generator, and proximity to the I-880 and approximately 380 feet from a stationary source, the City was required not only to substantially mitigate the Project's health impacts (which the SCAs fail to do), but

[99] Exhibit A, SWAPE Comments, p. 21.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 22.
[103] *Id.*

to adopt all feasible mitigation to reduce the Project's health risk to the greatest extent feasible.[104]

SWAPE determined that the CEQA Analysis' conclusion that the Project's health risk impacts are significant and unavoidable is "unsubstantiated."[105] To comply with CEQA, the City should have required additional mitigation to reduce health impacts to people living at and near the Project site. SWAPE determined that additional, feasible mitigation, implemented at other Southern California projects adjacent to freeways, could be required for the Project to further reduce health risk impacts. The measures include[106]:

- 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.

SWAPE identified additional mitigation measures that were not analyzed or included in the CEQA Analysis that may further reduce significant health risk impacts to less than significant, including:

- 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);

[104] PRC § 21081(a); see 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.
[105] Exhibit A, SWAPE Comments, p. 16.
[106] *Id.* at 18.

- 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.

SWAPE concluded that 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.[107] The Planning Commission failed to respond to any of these proposed measures.

CEQA requires mitigation measures to be enforceable through binding conditions.[108] 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 SCAs 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.[109]

Due to unanalyzed and unmitigated health risk impacts, the Planning Commission's decision to approve the Project without preparing a subsequent EIR for the Project was contrary to law and not supported by substantial evidence.

D. The Project Has Significant, Unmitigated Greenhouse Gas Emissions Impacts

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."[110] The emissions calculated for the CEQA Analysis are underestimated.[111] 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 NOx emissions exceed the applicable BAAQMD thresholds.[112] SWAPE's model demonstrates that the Project would result in a

---

[107] Exhibit A, SWAPE Comments, pp. 23-24.
[108] 14 CCR § 15126(a)(2).
[109] CEQA Analysis, pp. A-22 – A-23.
[110] Exhibit A, SWAPE Comments, p. 4.
[111] *Id.*
[112] Exhibit A, SWAPE Comments, p. 13.

potentially significant air quality impact that was not previously identified or addressed in the Analysis. The figure below shows SWAPE's calculations[113].

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.[114] "No GHG Reduction Plan under SCA-GHG-1: Greenhouse Gas (GHG) Reduction Plan (#42) is required."[115] The GHG emissions from the Project are significant and unmitigated. SWAPE determined that compliance with Title 24 would not constitute sufficient mitigation.[116] "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."[117] Therefore, the CEQA Analysis provides GHG modeling that is not based on substantial evidence, and its conclusion that the Project's potentially significant GHG impacts do not require mitigation is not supported by substantial evidence.

The City may be relying on CEQA Guidelines Section 15064(h)(3) in determining the less than significant impact. CEQA Guidelines Section 15064(h)(3) provides that Projects that are consistent with the CAP, may be found to cause a less than significant impact under CEQA.[118] 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

[113] *Id.*
[114] CEQA Analysis, p. 59.
[115] CEQA Analysis, p. 59.
[116] Exhibit A, SWAPE Comments, p. 4.
[117] Exhibit A, SWAPE Comments, p. 4-5.
[118] California Office of Planning and Research, General Plan Guidelines Chapter 8 Climate Change.

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."[119] However, the City's 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.[120] The analysis must "reasonably reflect evolving scientific knowledge and state regulatory schemes."[121] In determining the significance of GHG emissions impacts, the agency must 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."[122] City of Oakland's ECAP requires projects that exceed any CEQA threshold to implement mitigation measures and comply with the City's SCAs. However, the CEQA Checklist fails to estimate and evaluate the proposed Project's GHG emissions based on any quantitative thresholds. This informational deficiency violates CEQA. An EIR must be prepared.

An EIR must 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. Absent an EIR, the Planning Commission's decision to approve the Project violated CEQA, and was not supported by substantial evidence in the record.

---

[119] *(Newhall Ranch)* (2015) 62 Cal.4th 204, 264.
[120] 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).
[121] 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").
[122] 14 C.C.R. § 15064.4(b)(1), (3).

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

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.[123] 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."[124] CEQA prohibits deferring identification of mitigation measures when there is uncertainty about the efficacy of those measures.[125]

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.[126] 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.[127] 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

---

[123] 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.
[124] 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.
[125] 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.
[126] *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)
[127] 14 C.C.R. § 15126.4(a)(2).

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 substantial evidence the levels of noise reduction these measures will achieve. Absent substantial evidence in the record, the Planning Commission's decision to approve the Project violated CEQA.

F. The Project is Inconsistent with the Density Established by Existing Zoning and Does Not Qualify for the Infill Streamlining Exemptions

In order to qualify for the Infill Exemptions identified in the CEQA Analysis, projects must be consistent with existing zoning. The Project fails to meet this requirement because the Project's exceeds allowable zoning density.

The 1396 5th St. Parcel is zoned for a density of development that would authorize 171 units, with a maximum building height of 100 feet.[128] 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.[129] As discussed above, the Applicant is 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. The Applicant is also requesting 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 Applicant also requests Regular Design Review for new construction, and a Tentative Parcel Map.

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

[128] *Id.* at 18.
[129] CEQA Analysis, p. 10.

the time the project application is submitted, not based on speculative future approvals.[130]

CEQA also requires lead agency to analyze the 'whole' of the project – this includes all foreseeable discretionary approvals.[131] For example, in *Laurel Heights Improvement Association v. Regents of University of California*[132] 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."[133] 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.[134] 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 additional density bonus units would not have a specific adverse impact upon public health and safety or the physical environment.[135]

---

[130] 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).
[131] 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")*
[132] *Laurel Heights I, supra,* 47 Cal.3d 376.
[133] *Laurel Heights I, supra,* 47 Cal.3d at p. 388.
[134] *Laurel Heights I, supra,* 47 Cal.3d at p. 396.
[135] Gov. Code, § 65589.5(d)(2); see also OPC, §§ 17.107.100.B; 17.107.095.A.1.
5085-004acp

The City may be attempting to rely on *Wollmer v. City of Berkeley*[136] 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 and community plan exemptions relied on here, at CEQA Guidelines, Sections 15183 and 15183.3. 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, Sections 15183 and 15183.3 contain no such language, and do 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.[137]

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…."[138] 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."[139] 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.'"[140] 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."[141]

---

[136] *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329 ("*Wollmer*").
[137] CEQA Guidelines section 15183 allows Project consistency to be determined based on "uniformly applied development policies." 14 CCR § 15183(g). Density bonuses are not uniformly applied standards. They require case-by-case application, and are applicable only to projects providing affordable housing.
[138] *Wollmer, supra,* 193 Cal.App.4th at p. 1345.
[139] *Wollmer, supra,* 193 Cal.App.4th at p. 1345.
[140] *Wollmer, supra,* 193 Cal.App.4th at p. 1345, citing the Berkley General Plan.
[141] *Wollmer, supra,* 193 Cal.App.4th at p. 1345.

The Supreme Court, as well as the Courts of Appeal, have held that CEQA exemptions must be narrowly construed and "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language."[142] The Supreme Court has also consistently held that CEQA exemptions are not to be implied,[143] 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.[144]

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.[145] 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 Exemptions.

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 Exemptions. 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,

---

[142] *Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 125 ("*Mountain Lion*").
[143] *Wildlife Alive v. Chickering*, 18 Cal.3d at 195-198, 202.
[144] *Bozung v. Local Agency Formation Comm*. (1975) 13 Cal.3d 263, 274.
[145] Gov. Code sec. 65915; OPC Chapter 17.107 (Density Bonus and Incentive Procedure).

analyzes, and mitigates the proposed Project's impacts, and considers environmentally-superior alternatives.

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.[146] 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 herein, there is substantial evidence demonstrating that the Project is likely to have significant and unmitigated impacts on public health from excess construction TAC emissions, as well as significant environmental impacts on air quality, hazardous materials, and from GHGs. Because the City failed to prepare an EIR for the Project, these impacts have not been fully disclosed or mitigated, as required by CEQA.[147]

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."[148] 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 CEQA infill exemptions and density bonus unless and until the City prepares an EIR to fully disclose and mitigate these impacts to the greatest extent feasible.[149]

---

[146] See OPC, §§ 17.107.100(B); 17.107.095.A.1.
[147] Pub. Res. Code §§ 21002.1(a), 21100(b)(3).
[148] See OPC, sec. 17.107.100(B).
[149] 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).)
5085-004acp

G. 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 or parcel, are new or more significant than previously analyzed, are potentially significant off-site or cumulative impacts, or cannot be substantially mitigated by uniformly applicable development policies or standards.[150]

The Project fails to meet these requirements because the site is highly contaminated and could pose a significant health and safety risk to construction workers, nearby residents, and off-site receptors which was not fully disclosed or analyzed under the WOSP EIR, LUTE EIR, or General Plan. Furthermore, as discussed above and in SWAPE's Comments, the Project's health risks from TAC emissions during construction are highly significant and unmitigated.

The Community Plan exemption does not apply to the Project because neither the WOSP EIR, nor any of the other planning documents relied on in the CEQA Analysis, actually quantified project-level health risks. The WOSP EIR therefore did not fully address the Project's peculiar and more significant impacts related to soil and groundwater contamination, and from TAC emissions, and there is substantial evidence demonstrating that the SCAs would not substantially mitigate these significant impacts, or reduce them to the greatest extent feasible, as required by CEQA.[151] The absence of any previous project-specific analysis renders the City's determination that SCAs would mitigate the impact unsupported. 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.

The Project will have new or more severe significant impacts than previously analyzed in the WOSP EIR, LUTE EIR, or General Plan. 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.

---

[150] 14 CCR § 15183(a)-(c).
[151] PRC § 21081(a).

H. The City Cannot Make the Findings Required Under the Subdivision Map Act to Approve the Project's Tentative or Final Parcel Map.

The Project requires a Tentative Parcel Map under the Subdivision Map Act ("Map Act") to merge the Project site's existing lots into one lot. The Commission's approval of the Project's Tentative Parcel Map violated the Map Act and City municipal codes[152] because, *inter alia*, the Project (1) is inconsistent with the applicable specific plan; (2) is not suitable site for type and density of development proposed; (3) has significant environmental impacts; and (4) has significant public health impacts.

The purpose of the Map Act is to regulate and control design and improvement of subdivisions with proper consideration for their relation to adjoining areas, to require subdividers to install streets and other improvements, to prevent fraud and exploitation, and to protect both the public and purchasers of subdivided lands.[153] Before approving a tentative map, the Map Act requires the agency's legislative body to make findings that the proposed subdivision map, together with the provisions for its design and improvement, is consistent with the general plan and any specific plan.[154] The Map Act also requires the agency's legislative body to deny a proposed subdivision map in any of the following circumstances:

> (a) the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.
> (b) the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.
> (c) the site is not physically suitable for the type of development.
> (d) the site is not physically suitable for the proposed density of development.
> (e) the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
> (f) the design of the subdivision or type of improvements is likely to cause serious public health problems.
> (g) the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of,

[152] See OMC § 16.04.100.
[153] *Pratt v. Adams* (1964) 229 Cal.App.2d 602.
[154] Gov Code § 66473.5.

> property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.[155]

Residents' experts have provided substantial evidence demonstrating that the Project is likely to have significant, unmitigated impacts on air quality, public health, and from hazardous materials and GHGs. The Project's proposed density also exceeds the allowable residential density under the WOSP, Resulting in a significant land use impact. These impacts demonstrate that the Project, as analyzed in the CEQA Analysis, fails to comply with the WOSP, is "likely to cause substantial environmental damage," and "is likely to cause serious public health problems." These unmitigated impacts render the Project inconsistent with Map Act requirements. The Map Act therefore required the City to deny the Project's Tentative Map pursuant to Government Code Sections 66473.5 and 66474(a), (b), (d), (e), and (f), and the Commission lacked substantial evidence to find that the Project complies with the Map Act.

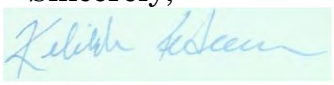
IV. CONCLUSION

For the reasons stated herein, we urge the City Council to vacate the Planning Commission's approval of the Project, and remand the Project to Staff to prepare a revised environmental analysis in an EIR, as required by CEQA. The new analysis must identify and implement all feasible mitigation measures available to reduce the Project's potentially significant site-specific impacts to less than significant levels before the City reconsiders approving the Project.

[155] Gov. Code § 66474 (emphasis added).

Thank you for your attention to these comments. Please include them in the City's record of proceedings for the Project.

Sincerely,



Kelilah D. Federman
Associate Attorney

KDF:acp
Attachments

5085-004acp