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*Via E-mail*

September 9, 2021

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and Commissioners  
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**Re: Comment on the Initial Study/Negative Declaration for the 9500 Pico Mixed-Use Project (ENV-2020-5838)**

Dear President Millman and Planning Commissioners:

I am writing on behalf of **Supporters Alliance For Environmental Responsibility ("SAFER")** regarding the Initial Study and Negative Declaration ("IS/ND") prepared for the 9500 Pico Mixed-Use Project (ENV-2020-5838), including all actions related or referring to the proposed construction, use, and maintenance of a six-story mixed-use building with a total of 108 residential dwelling units and a total of 3,250 square feet of commercial space (1,000 square-foot restaurant and 2,250 square feet of retail) and 134 parking spaces provided within two levels of subterranean parking, located at 9500 - 9530 W. Pico Boulevard in the City of Los Angeles ("Project").

After reviewing the IS/ND, we conclude the IS/ND fails as an informational document, and that there is a fair argument that the Project may have adverse environmental impacts. Therefore, we request that the City of Los Angeles ("City")

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prepare an environmental impact report (“EIR”) for the Project pursuant to the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000, et seq.

This comment has been prepared with the assistance of Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, and environmental consulting firm Soil/Water/Air Protection Enterprise (“SWAPE”). Mr. Offerman’s comment and curriculum vitae are attached as Exhibit A hereto and is incorporated herein by reference in its entirety. SWAPE’s comment and the consultants’ curriculum vitae are attached as Exhibit B hereto and are incorporated herein by reference in their entirety.

## **I. PROJECT DESCRIPTION**

The Project proposes the demolition of a car wash, food stand, and office building for the construction, use, and maintenance of a six-story mixed-use building with a total of 108 residential dwelling units and a total of 3,250 square feet of commercial space (1,000 square-foot restaurant and 2,250 square feet of retail). The Project Site consists of ten parcels in the City of Los Angeles, on the south side of Pico Boulevard, between Beverly Drive and Reeves Street. The Project’s total floor area would consist of 96,871 square feet resulting in a floor area ratio of 3.75:1. Up to 12,600 square feet of open space would be provided, consisting of common open space and private balconies. Additionally, a total of 134 parking spaces would be provided within two levels of subterranean parking.

The 9500 W Pico LLC (the “Applicant”) is requesting the following discretionary approvals: (1) Pursuant to LAMC Section 12.22 A.25, a Density Bonus Compliance Review to permit a mixed-use housing development with 108 units and 3,250 square feet of commercial space, and with the following four Off-Menu Density Bonus Incentives/Waivers: (a) an increase in FAR from 1.5:1 to a maximum of 3.75:1, (b) an increase in height from 45 feet and 3 stories to 72 feet and 6 stories, (c) to provide 52 percent of the residential parking stalls as compact stalls, and (d) to waive the required commercial loading space; (2) Pursuant to LAMC Section 12.24 U.26, a Conditional Use Permit to allow a 50 percent density increase, in exchange for reserving 17 percent of the base density as very low income units (13 units); and (3) Pursuant to LAMC Section 16.50, Site Plan Review for a proposed residential building creating more than 50 net dwelling units.

The properties surrounding the Project Site include a mix of commercial uses (including restaurants and retail), multi-family residential, hotel, and office uses. These land uses range in height from one- to eight-stories above grade.

## **II. LEGAL STANDARD**

As the California Supreme Court has held “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order

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preparation of an EIR.” *Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 (*CBE v. SCAQMD*) (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505). “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” Pub. Res. Code (“PRC”) § 21068; see also 14 CCR § 15382. An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” *No Oil, Inc.*, 13 Cal.3d at 83. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Env’t v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 109 (*CBE v. CRA*).

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

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

However, mitigation measures may not be construed as project design elements or features in an environmental document under CEQA if such a mischaracterization is significant. See *Lotus vs. Department of Transportation* (2014) 223 Cal.App.4th 645. A “mitigation measure” is a measure designed to minimize a project’s significant environmental impacts, PRC § 21002.1(a), while a “project” is defined as including “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the

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environment.” CEQA Guidelines § 15378(a). Unlike mitigation measures, project elements are considered prior to making a significance determination. Measures are not technically “mitigation” under CEQA unless they are incorporated to avoid or minimize “significant” impacts. PRC § 21100(b)(3).

To ensure that the project’s potential environmental impacts are fully analyzed and disclosed, and that the adequacy of proposed mitigation measures is considered in depth, mitigation measures that are not included in the project’s design should not be treated as part of the project description. *Lotus*, 223 Cal.App.4th at 654-55, 656 fn.8. Mischaracterization of a mitigation measure as a project design element or feature is “significant,” and therefore amounts to a material error, “when it precludes or obfuscates required disclosure of the project” environmental impacts and analysis of potential mitigation measures.” *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 185.

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

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

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

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or

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extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273–74. The Courts have explained that “it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo, with a preference for resolving doubts in favor of environmental review.” *Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).

For over forty years the courts have consistently held that an accurate and stable project description is a bedrock requirement of CEQA—the *sine qua non* (that without which there is nothing) of an adequate CEQA document:

Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185 at 192–93. CEQA therefore requires that an environmental review document provide an adequate description of the project to allow for the public and government agencies to participate in the review process through submitting public comments and making informed decisions.

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

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

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

### III. DISCUSSION

#### A. There is Substantial Evidence of a Fair Argument that the Project Will Have a Significant Health Risk Impact from its Indoor Air Quality Impacts.

Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, has conducted a review of the proposed Project and relevant documents regarding the Project’s indoor air emissions. Indoor Environmental Engineering Comments (September 4, 2021) (Exhibit A). Mr. Offermann concludes that it is likely that the Project will expose residents and commercial/industrial employees of the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is a leading expert on indoor air quality and has published extensively on the topic. Mr. Offermann’s expert comments and curriculum vitae are attached as Exhibit A.

Mr. Offermann explains that many composite wood products used in building materials and furnishings commonly found in offices, warehouses, residences, and hotels contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, “The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particleboard. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.” Ex. A, p. 3.

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that future residents and employees of the restaurant and retail businesses will be exposed to a cancer risk from formaldehyde of approximately 120 per million, assuming all materials are compliant with the California Air Resources Board’s formaldehyde airborne toxics control measure. *Id.* at 4. This exceeds the South Coast Air Quality Management District’s (“SCAQMD”) CEQA significance threshold for airborne cancer risk of 10 per million. *Id.*

Mr. Offermann also notes that the high cancer risk that may be posed by the Project’s indoor air emissions likely will be exacerbated by the additional cancer risk that exists as a result of the Project’s location near roadways with moderate to high traffic (i.e. Pico Boulevard, Reeves Street, Beverly Drive, Alcott Street, etc.) and the high levels of PM 2.5 already present in the ambient air. Ex. A, pp. 12-15. No analysis has been conducted of the significant cumulative health impacts that will result to future employees of the Project.

Mr. Offermann concludes that these significant environmental impacts should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id.* at 5. Mr. Offermann identifies mitigation measures that are available to reduce these significant health risks, including the installation of air filters and a requirement that the applicant use only composite wood materials (e.g. hardwood

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plywood, medium density fiberboard, particleboard) for all interior finish systems that are made with CARB approved no-added formaldehyde (NAF) resins or ultra-low emitting formaldehyde (ULEF) resins in the buildings' interiors. *Id.* at 12-13.

The City has a duty to investigate issues relating to a project's potential environmental impacts, especially those issues raised by an expert's comments. See *Cty. Sanitation Dist. No. 2 v. Cty. of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98 (“under CEQA, the lead agency bears a burden to investigate potential environmental impacts”). In addition to assessing the Project's potential health impacts to residents and employees, Mr. Offermann identifies the investigatory path that the City should be following in developing an EIR to more precisely evaluate the Projects' future formaldehyde emissions and establishing mitigation measures that reduce the cancer risk below the BAAQMD level. Ex. A, pp. 6-9. Such an analysis would be similar in form to the air quality modeling and traffic modeling typically conducted as part of a CEQA review.

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

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

The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the environment that must be addressed in an environmental review. “Section 21083(b)(3)'s express language, for example, requires a finding of a ‘significant effect on the environment’ (§ 21083(b)) whenever the ‘environmental effects of a project will cause

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substantial adverse effects *on human beings*, either directly or indirectly.” *CBIA*, 62 Cal.4th at 800 (emphasis in original). Likewise, “the Legislature has made clear—in declarations accompanying CEQA’s enactment—that public health and safety are of great importance in the statutory scheme.” *Id.*, citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d). It goes without saying that the future residents and employees of the Project are human beings and the health and safety of those residents and workers is as important to CEQA’s safeguards as nearby residents currently living near the project site.

Because Mr. Offermann’s expert review is substantial evidence of a fair argument of a significant environmental impact to future users of the project, an EIR, or at least a MND with adequate mitigation measures, must be prepared to disclose and mitigate those impacts.

**B. There is Substantial Evidence of a Fair Argument that the Project Will Have Significant Soil Contamination Impacts.**

The IS/ND contains substantial evidence of a fair argument that the Project may have significant health and environmental impacts due to contaminated soil, and the evidence in the record does not support that the potential impacts will be mitigated to a level of significance.

First, the IS/ND fails to adequately evaluate the significant health and environmental risk impacts from releases of total petroleum hydrocarbons as gasoline (TPHg), and volatile organic compounds (VOCs; namely benzene, toluene, ethylbenzene [BTEX], and fuel oxygenates) due to the fact that the Project Site that is located on highly contaminated soil. Second, the IS/ND imposes mitigation measures on the Project to mitigate soil contamination impacts, which are improperly treated as project design elements and/or features. Third, the IS/ND fails to determine baseline conditions for soil contamination impacts, and defers mitigation measures intended to address such impacts. Therefore, CEQA requires an EIR to adequately evaluate the significant health risks and environmental impacts that the Project will likely to have from contaminated soil, or, at a minimum, a MND to mitigate the Project’s soil contamination impacts.

- i. The IS/ND fails to rebut the substantial evidence from LARWQCB that the Project will have significant soil contamination impacts.

The Project Site is currently occupied by Century West Car Wash (“CWCW”) for commercial use. According to the IS/ND, the car wash property was identified as an underground storage tank (UST), leaking UST (LUST), Enforcement Action Listing (ENF), Historic Hazardous Waste & Substances Site (Hist Cortese), Facility and Manifest Data (HAZNET) and EDR Historic Auto Station site in the regulatory database report. IS/ND, p. 106.



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In response to the identification of contaminated soils on the Project Site, a total of 64,759 pounds of total petroleum hydrocarbons were removed using a soil vapor extraction (SVE) system from April 2001 to March 2004. *Id.* at p. 107. The LARWQCB issued a No Further Action letter for soil remediation on September 17, 2008. *Id.* However, the LARWQCB has made clear that its No Further Action letter in 2008 “is conditioned on the present commercial land uses and soil conditions,” and therefore does not apply to the [Project’s] proposed development.” *Id.*

The LARWQCB stated in its March 5, 2021 correspondence that “[b]enzene and other petroleum hydrocarbon concentrations in soil and groundwater at the Site could pose a risk of vapor intrusion into on-site buildings,” see IS/ND, Attachment A, Appendix E.2, which the IS/ND denies. See IS/ND, p. 58 (“[V]apor intrusion is not considered a concern at the site.”) Although the IS/ND contradicts itself, stating that these “concentrations of petroleum hydrocarbons in soil remaining at 25 feet bgs slightly exceed the human health screening levels for dermal contact, inhalation, and ingestion at residential properties.” *Id.* at p. 58.

Accordingly, the LARWQCB has indicated that due to the planned site redevelopment/land use change from commercial to residential, “a soil vapor assessment needs to be completed at the [Project Site] to determine the risk of vapor intrusion into the proposed future building at the Site” and “CWCW is required to submit a soil vapor assessment work plan for the installation of soil vapor probes and collection of soil vapor samples at the Site.” *Id.* at p. 107. This required action by the LARWQCB is substantial evidence of a fair argument that the Project involves significant risks to public health and the environment from soil contamination. Furthermore, the IS/ND’s inclusion of a number of mitigation measures addressing the potential significant impacts from the contaminated soil at the Project Site, including vapor control systems, also provides substantial evidence that the Project could cause significant health and environmental impacts. See *id.* at pp. 58-59.

Thus, the Project requires an EIR under CEQA, or at a minimum, a MND that includes adequate mitigation measures as discussed in the subsequent section.

- ii. The IS/ND imposes mitigations for soil contamination on the Project that do not qualify as “project design elements,” and therefore, a MND, at a minimum, is required.

The IS/ND imposes a number of mitigation measures for soil contamination throughout the documents that cannot be defined as “project design elements.” Such mitigation measures are detailed in the following excerpts from the IS/ND:

The proposed building is planned to be constructed with an active depressurization system beneath the foundation due to elevated methane gas and a subterranean ventilated parking structure. **Based on these vapor control systems, the exposure route of possible vapor intrusion from off-gassing**

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**contaminated soil or groundwater, if any, has been eliminated.** *Id.* at p. 58 (emphasis added).

... the subterranean parking structure will be constructed with a ventilation system that will include exhaust fans as well as fresh air intake fans designed to protect occupants from inhalation of vehicle exhaust. In accordance with the LADBS requirements, the ventilation system will ensure at least four air exchange rates per hour for the lowest level of the parking structure. *Id.* at pp. 58-59.

As concluded in the Qualitative Health Risk Assessment, residual concentrations of VOCs in soil vapor, if present, would be much lower than the measured methane gas concentrations and expected exhaust fumes that the **ventilation systems are designed to mitigate.** The use of the **proposed ventilation systems would eliminate any exposure route of VOCs** to occupants of the site. *Id.* at p. 59 (emphases added).

In addition, LARWQCB's requirement that "a soil vapor assessment" be completed at the Project Site and for the CWCW to submit a "a soil assessment work plan" in the IS/ND are mitigation measures that fail to qualify as project design elements. IS/ND, p. 107. "These are plainly mitigation measures and not part of the [P]roject itself." See *Lotus*, 223 Cal.App.4th at 656, fn.8.

The *Lotus* court explained that the chief purpose of the distinction between elements of a project and mitigation measures is to enable the determination of whether other more effective mitigation measures than those proposed should be considered. *Lotus*, 223 Cal.App.4th at 654– 55, 656 fn.8. In *Lotus*, the court found that the mischaracterization of mitigation measures as part of the project, in the form of a project design element or feature, compounded a significant omission in the EIR—i.e., the failure to apply a standard of significance to impacts on the root systems of old growth redwood trees. *Id.* at 654–55. The court explained that:

Absent a determination regarding the significance of the impacts to the root systems of the old growth redwood trees, it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered. Should Caltrans determine that a specific tree or group of trees will be significantly impacted by proposed roadwork, that finding would trigger the need to consider a range of specifically targeted mitigation measures, including analysis of whether the project itself could be modified to lessen the impact. [Citation.] . . . Simply stating that there will be no significant impacts because the project incorporates 'special construction techniques;' is not adequate or permissible.

*Id.* at 656-657.

Here, the IS/ND omits any adequate analysis of predictable soil contamination impacts from the project, particularly the impacts to public health and the environment

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from soil contaminated by petroleum hydrocarbon concentrations and VOCs, and compounds this admission by “incorporating the proposed mitigation measures into its description of the project and then concluding that any potential impacts from the project will be less than significant.” *Id.* at 656. These “avoidance, minimization, and/or mitigation measures,” as they are characterized in the IS/ND, are not “part of the project.” Instead, they are mitigation measures designed to reduce or eliminate the significant public health risks and environmental impacts of soil contamination that likely could be caused by the Project.

In “compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA.” *Id.* Thus, a new MND that lists the significant impacts of soil contamination and specific mitigation measures to address adverse impacts must be prepared at a minimum.

iii. The IS/ND fails to determine baseline conditions for soil contamination impacts, and improperly relies on deferred mitigation measures.

CEQA requires that an environmental document include a description of the project’s environmental setting or “baseline” at the time environmental review commences. CEQA Guidelines § 15063(d)(2). Every CEQA document must start from a “baseline” assumption. The CEQA “baseline” is the set of environmental conditions against which to compare a project’s anticipated impacts. (*Communities for a Better Environment v. So Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321.) Section 15125(a) of the CEQA Guidelines (14 C.C.R., § 15125(a)) states in pertinent part that a lead agency’s environmental review under CEQA:

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

(See, *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 (“*Save Our Peninsula.*”) As the court of appeal has explained, “the impacts of the project must be measured against the ‘real conditions on the ground,’” and not against hypothetical permitted levels. (*Save Our Peninsula*, 87 Cal.App.4th 99, 121-123.) As the court has explained, using such a skewed baseline “mislead(s) the public” and “draws a red herring across the path of public input.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711.)

However, the IS/ND fails to consider baseline conditions for soil vapor. See IS/ND, p. 107 (“To meet the LARWQCB requirement, soil gas sampling is planned to be completed after site excavation to determine baseline conditions.”). Thus, the IS/ND relies on a baseline for soil contamination that will exist sometime in the future, rather

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than the current baseline of heavily contaminated conditions. Therefore, the IS/ND for the Project is in violation of CEQA.

In addition, the IS/ND relies on deferred mitigation of soil contamination impacts. The IS/ND states that to meet LARWQCB's requirement that "soil gas sampling *is planned to be completed after site excavation*" to determine baseline conditions. IS/ND, p. 107; see *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331-332 ("*CREED*") (holding that an agency may not rely on a corrective action plan to mitigate potential impacts of site contamination when the plan's mitigation measures for contaminated soil are not disclosed in the record). Therefore, the Project relies for mitigation on measures that are not set forth in the IS/ND and not required as mitigation measures. See CEQA prohibits this type of "deferred mitigation."

A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.

[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.

The IS/ND relies on such "tentative plans for future mitigation" that were rejected in the cases of *CREED*, *Sundstrom*, and *CBE v. Richmond*. As such, the IS/ND fails to comply with CEQA. Thus, a new document must be prepared setting forth base conditions and specific mitigation measures that will be implemented.

### **C. Contrary to the IS/ND, the Project Will Cause a Wasteful, Inefficient, and Unnecessary Consumption of Natural Gas.**

CEQA requires that mitigation measures should include measures to reduce wasteful, inefficient, and unnecessary consumption of energy. Pub Res C §21100(b)(3). However, the IS/ND states that the Project is estimated to cause a substantial increase in the total natural gas demand (960,025 kBTU/yr<sup>2</sup>) compared to the existing demand (233,507 kBTU/ yr<sup>2</sup>). IS/ND, p. 75. Although the IS/ND states that the project's natural gas needs are anticipated to fall within Southern California Gas' ("*SCG*") current storage capacity, this factor in itself does not mean the project is not causing wasteful, inefficient, or unnecessary consumption of natural gas. IS/ND, p. 84.

Starting in 2019 with the City of Berkeley, numerous cities throughout the state of California have adopted bans or restrictions on the amount of natural gas hookups in new construction.<sup>1</sup> As of August 5, 2021, 49 cities had adopted a commitment to gas-free buildings.<sup>2</sup> In the “Findings and Purpose” section of its ordinance, Berkeley explains that its prohibition on natural gas infrastructure was based on the “scientific evidence [] establish[ing] that natural gas combustion, procurement and transportation produce significant greenhouse gas emissions that contribute to global warming and climate change.” Berkeley Municipal Code § 12.80.010 (A). It also cited concerns about sea level rise because of its proximity to the water, and concerns about the asthma and other health conditions of its citizens that would be exacerbated by the combustion of natural gas. *Id.* at (B)(1)-(2), (C).

Although the City of Los Angeles has yet to enact a ban on new natural gas hookups, there are still measures that this project could take that could reduce its dependency on natural gas, and the City should at least prepare an MND to address and mitigate this substantial increase in natural gas use of over 960,000 kBtu/ yr<sup>2</sup> as compared to current use and analyze the feasibility of requiring this Project to be all electric without natural gas.

**D. The IS/ND Relied on Unsubstantiated Input Parameters to Estimate Project Emissions and Thus the Project May Result in Significant Air Quality Impacts.**

Matt Hagemann, P.G., C.Hg., and Dr. Paul E. Rosenfeld, Ph.D., of the environmental consulting firm SWAPE reviewed the IS/ND’s analysis of the Project’s impacts on air quality, health risk, and greenhouse gases. SWAPE’s comment letter and CVs are attached as Exhibit B and their comments are briefly summarized here.

SWAPE found that the IS/ND incorrectly estimated the Project’s construction and operational emissions and therefore cannot be relied upon to determine the significance of the Project’s impacts on local and regional air quality. The ND relies on emissions calculated from the California Emissions Estimator Version CalEEMod.2016.3.2 (“CalEEMod”). IS/ND, p. 50. This model, which is used to generate a project’s construction and operational emissions, relies on recommended default values based on site specific information related to a number of factors. Ex. B, p. 1. CEQA requires any changes to the default values to be justified by substantial evidence. *Id.* at 1-2.

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<sup>1</sup> “A Furious Industry Backlash Greets Moves by California Cities to Ban Natural Gas in New Construction,” *Inside Climate News* (March 5, 2021) <https://insideclimatenews.org/news/05032021/gas-industry-fights-bans-in-homes-businesses/>.

<sup>2</sup> “California’s Cities Lead the Way to a Gas-Free Future,” *Sierra Club* (July 22, 2021; updated August 5, 2021) <https://www.sierraclub.org/articles/2021/07/californias-cities-lead-way-gas-free-future>.

SWAPE reviewed the IS/ND's CalEEMod output files and found that the values input into the model were inconsistent with information provided in the ND. Ex. B, p. 2. As a result, the IS/ND's air quality analysis cannot be relied upon to determine the Project's emissions.

Specifically, SWAPE found that the following values used in the IS/ND's air quality analysis were either inconsistent with information provided in the IS/ND or otherwise unjustified:

1. Unsubstantiated Reduction to Parking Land Use Size. Ex. B, p. 2.
2. Unsubstantiated Changes to Individual Construction Phase Lengths. Ex. B, p. 3.
3. Unsubstantiated Change to Gas Fireplaces Value. Ex. B, p. 5.
4. Incorrect Application of Construction-Related Mitigation Measure. Ex. B, p. 5.
5. Incorrect Application of Operational Mitigation Measures. Ex. B, p. 7.

Significantly, SWAPE points out that the IS/ND "fails to incorporate or require any mitigation for the proposed Project whatsoever," but uses mitigation measures for its model, thereby "artificially reduc[ing]" its emissions estimates. Ex. B., p. 8. Further, SWAPE states that project design features ("PDFs") that are not formally included as mitigation measures "may be eliminated from the Project's design altogether," rendering it impossible to guarantee whether the operational measures discussed in the IS/ND would be implemented, monitored, or enforced. *Id.*

As a result of these errors in the IS/ND, the Project's construction and operational emissions were underestimated and cannot be relied upon to determine the significance of the Project's air quality impacts.

**E. An Updated Air Model Analysis Found that the Project Will have a Significant Air Quality Impact.**

To more accurately determine the Project's construction and operational emissions, SWAPE prepared an updated CalEEMod model using more site-specific information and corrected input parameters. See Ex. B, p. 9. SWAPE's updated analysis demonstrates that the Project's construction-related VOC and operational NO<sub>x</sub> emissions increased by approximately 1,446% and 1,018%, respectively, and exceed the applicable SCAQMD significance thresholds. *Id.* Thus, 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 IS/ND. An EIR should be prepared to adequately assess and mitigate the potential air quality impacts that the Project may have on the surrounding environment.

**F. There is Substantial Evidence of a Fair Argument that the Project May Have a Significant Health Impact as a Result of Diesel Particulate Emissions.**

One of the primary emissions of concern regarding health effects for land development projects is diesel particulate matter (“DPM”), which can be released during Project construction and operation. DPM consists of fine particles with a diameter less than 2.5 micrometers including a subgroup of ultrafine particles (with a diameter less than 0.1 micrometers). Diesel exhaust also contains a variety of harmful gases and cancer-causing substances. Exposure to DPM is a recognized health hazard, particularly to children whose lungs are still developing and the elderly who may have other serious health problems. According to the California Air Resources Board (“CARB”), DPM exposure may lead to the following adverse health effects: aggravated asthma; chronic bronchitis; increased respiratory and cardiovascular hospitalizations; decreased lung function in children; lung cancer; and premature deaths for those with heart or lung disease.<sup>3</sup>

The IS/ND failed to conduct a quantified construction or operational health risk analysis (“HRA”) emissions, resulting in an inadequate health risk emissions analysis. IS/ND, p. 53-57. The IS/ND stated that based on its short-term construction schedule of 24 months, it would not result in long-term TAC emissions and that health risks associated with DPM during construction would be less than significant. *Id.* at 57. It also states that because the project is a mixed-use residential and commercial development, it “would not support any land uses or activities that would involve the use, storage, or processing of carcinogenic or non-carcinogenic toxic air contaminants.” *Id.* at 58. SWAPE identifies four main reasons for why the IS/ND’s evaluation of health risk impacts and less-than-significant conclusion is incorrect.

First, the IS/ND’s localized significance threshold (“LST”) only assesses impacts of pollutants at a local level, and therefore can only evaluate impacts from criteria pollutants. The LST therefore does address impacts from DPM and renders the IS/ND inadequate.

Second, the IS/ND fails to quantitatively evaluate construction-related and operational toxic air contaminants (“TACs”) or make a reasonable effort to connect emissions to health impacts. Ex. B, p. 11. SWAPE identifies potential emissions from both the exhaust stacks of construction equipment and daily vehicle trips. *Id.* In failing to connect TAC emissions to potential health risks to nearby receptors, the Project fails to meet the CEQA requirement that projects correlate increases in project-generated emissions to adverse impacts on human health cause by those emissions. Ex. B, p. 11; See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 510.

Third, the California Department of Justice recommends the preparation of a quantitative HRA pursuant to the Office of Environmental Health Hazard Assessment (“OEHHA”), the organization responsible for providing guidance on conducting HRAs in

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<sup>3</sup> See CARB Resources - Overview: Diesel Exhaust & Health, available at <https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health>).

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California, as well as local air district guidelines. OEHHA released its most recent guidance document in 2015 describing which types of projects warrant preparation of an HRA. See “Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments.” OEHHA, February 2015, *available at*: [http://oehha.ca.gov/air/hot\\_spots/hotspots2015.html](http://oehha.ca.gov/air/hot_spots/hotspots2015.html). OEHHA recommends that projects lasting at least 2 months be evaluated for cancer risks to nearby sensitive receptors, a time period which this Project easily exceeds. Ex. B, p.11. The OEHHA document also recommends that if a project is expected to last over 6 months, the exposure should be evaluated throughout the project using a 30-year exposure duration to estimate individual cancer risks. *Id.* Based on its extensive experience, SWAPE reasonably assumes that the Project will last at least 30 years, and therefore recommends that health risk impacts from the project be evaluated. *Id.* An EIR is therefore required to analyze these impacts. *Id.*

Fourth, the IS/ND’s claim that there will be a less than significant impact without having conducted a qualified construction or operational HRA for nearby sensitive receptors also fails under CEQA requirements. An EIR or at least an MND should be prepared to quantify the cumulative excess cancer risk posed by the Project’s construction and operation to nearby, existing receptors, and compare it to the SCAQMD threshold of 10 in one million. *Id.*

SWAPE prepared a screening-level HRA to evaluate potential impacts from Project construction. SWAPE used AERSCREEN, the leading screening-level air quality dispersion model. SWAPE applied a sensitive receptor distance of 25 meters and analyzed impacts to individuals at different stages of life based on OEHHA and SCAQMD guidance utilizing age sensitivity factors. *Id.* at 12-15.

SWAPE found that the excess cancer risks at a sensitive receptor located approximately 25 meters away over the course of Project construction are approximately 47.8 in one million for infants and 14.9 in one million for children. *Id.* at 15. Moreover, **the excess lifetime cancer risk over the course of a Project operation of 30 years is approximately 69.9 in one million.** *Id.* The risks to infants, children, and lifetime residents appreciably exceed SCAQMD’s threshold of 10 in one million.

SWAPE’s analysis constitutes substantial evidence that the Project may have a significant health impact as a result of diesel particulate emissions. A health risk assessment must be prepared disclosing the health risk impacts from toxic air contaminants.

#### **G. The IS/ND Failed to Adequately Analyze the Project’s Greenhouse Gas Impacts and Thus the Project May Result in Significant Greenhouse Gas Emissions.**

The IS/ND estimates that the Project would generate net annual GHG emissions of 318.26 metric tons of carbon dioxide equivalent per year (“MT CO<sub>2</sub>e/year”), and that



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installment of fixtures such as energy efficient lighting, low flow plumbing features, and a recycling program will reduce GHG emissions. IS/ND, p. 97-98. It also states that this falls below the SCAQMD proposed nonindustrial screening threshold of 3,000 MT CO<sub>2</sub>e/year, which the IS/ND states is further evidence that the GHG impacts of the project are less than significant. *Id.* at 97. However, SWAPE states that the IS/ND's conclusion about a less-than-significant greenhouse gas impact is incorrect for several reasons.

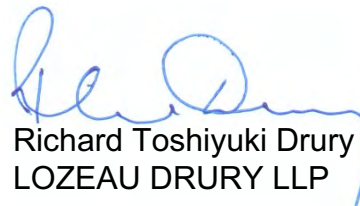
First, the IS/ND's analysis of GHG impacts is based on a flawed air model, as discussed in the Air Quality section of SWAPE's comments. This resulted in an underestimation of GHG emissions, and therefore does not provide a reliable assessment of the Project's significance. Ex. B, p. 17. Second, SWAPE states that the IS/ND relies on features that are not included as mitigation measures, and SWAPE can therefore not verify that the measures would be implemented, monitored, and enforced on the project site. *Id.*

SWAPE's analysis demonstrated a potentially significant health risk impact from the project that necessitates mitigation, and it proposes that the Project's product design features be implemented as formal mitigation measures. In addition to implementing these measures, the EIR or MND should include an updated air quality, health risk, and GHG analysis.

#### **IV. CONCLUSION**

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

Sincerely,



Richard Toshiyuki Drury  
LOZEAU DRURY LLP