

2. Response to Comments

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May 31, 2022

VIA EMAIL AND OVERNIGHT MAIL

Peyman Behvand, Planning Manager
City of Vacaville
Community Development Department
650 Merchant Street
Vacaville, California 95688
Email: peyman.behvand@cityofvacaville.com

**Re: Comments on the Draft Environmental Impact Report for The
Greentree Project (File No. 16-289; State Clearinghouse No.
2019049003)**

Dear Mr. Behvand:

We are writing on behalf of **Napa-Solano Residents for Responsible Development** ("Napa-Solano Residents") to provide comments on Draft Environmental Impact Report ("DEIR") prepared by the City of Vacaville ("City") for The Greentree Project, SCH No. 201904900 ("Project"), proposed by The Greentree Development Group, Inc ("Applicant").¹

The Project proposes the redevelopment a former golf course into a mix of commercial, residential, park/trails, and open space uses on an approximately 185-acre site west of Leisure Town Road, bisected by Sequoia Drive. The Project would include approximately 1,149 dwelling units, with approximately 950 units of higher density housing types located north of Sequoia and 199 units of detached, single-family senior housing located south of Sequoia. Commercial building capacity for north of Sequoia is estimated at up to 299,345 square feet. The Project also proposes to develop parks, a trail network, open space, and infrastructure features

¹ City of Vacaville, The Greentree Project Draft EIR ("DEIR") (April 2022) available at <https://www.ci.vacaville.ca.us/government/community-development/major-development-projects/greentree?locale=en>. 6116-003acp

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including dedication of additional land for the City's sewer pump station site, dedication of two water well sites, and improvement of storm water detention facilities.²

The Project site would be divided into two neighborhoods, including the north of Sequoia neighborhood site and the south of Sequoia neighborhood site.³ The north Sequoia site is approximately 107.5 gross acres and encompasses nine Assessor's Parcel Numbers ("APNs"), plus the existing Gilley Way right-of-way.⁴ The south Sequoia project site is approximately 77.9 gross acres and encompasses 19 APNs, plus the existing Sequoia Drive right-of-way.⁵ The Project requires several discretionary entitlements from the City, including a General Plan amendment, Master Plan/Specific Plan, Green Tree Park Policy Plan Amendment, Public Works Design Standards Exceptions, rezoning, and a tentative map for a large lot subdivision.⁶

Based upon our preliminary review of the DEIR and supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act ("CEQA").⁷ The DEIR fails to adequately analyze many of the Project's significant environmental impacts and fails to propose enforceable mitigation measures that can reduce those impacts to a less than significant level, as required by CEQA.

As explained in these comments, there is substantial evidence that the Project will result in significant unmitigated impacts relating to air quality, greenhouse gas emissions ("GHGs"), noise, transportation and biological resources. The Project also conflicts with applicable land use plans and policies, resulting in land use inconsistencies as well as significant impacts under CEQA. The City may not approve the Project until the City revises the Project's DEIR to adequately analyze the Project's significant direct, indirect and cumulative impacts, and to incorporate all feasible mitigation measures to avoid or minimize these impacts to the greatest extent feasible.

² DEIR, Project Description, pp. 4-5.

³ DEIR, p. 3-3.

⁴ DEIR, p. 3-3. APNs 133-120-190, -340; 134-020-240; 134-030-010, -370, -380, -400; 134-310-010; 134-480-110.

⁵ DEIR, p. 3-3. APNs 134-020-180, -290, -300, -310, -320, -330, -340, -350, -360, -380, -450, -460; 134-180-030, -040; 134-181-130, -140; 134-183-140, -150; 134-332-100, -180.

⁶ DEIR, Project Description, p. 2.

⁷ Pub. Resources Code, §§ 21000 et seq.; 14 Cal. Code Regs. ("C.C.R.") §§ 15000 et seq. ("CEQA Guidelines").

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We reviewed the DEIR and its technical appendices with the assistance of traffic and transportation expert Daniel T. Smith Jr., P.E., of Smith Engineering;⁸ noise expert Derek Watry of Wilson Ihrig;⁹ environmental health, air quality and GHG expert Paul E. Rosenfield, PhD. and hazardous materials expert Matt Hagemann, P.G., C.Hg. of Soil Water Air Protection Enterprise ("SWAPE");¹⁰ and biological resources expert Shawn Smallwood, PhD.¹¹ We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.¹²

I. STATEMENT OF INTEREST

Napa-Solano Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public impacts associated with Project development. Napa-Solano Residents includes Vacaville residents Nichole Camara, Eric Revty, Greg Simon, Alec Stouwie, Cody Stouwie, and Kurt Wheeler, as well as the International Brotherhood of Electrical Workers Local 180, Plumbers & Steamfitters Local 343, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families, and other individuals that live and/or work in the City of Vacaville and Solano County. Napa-Solano Residents has a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members.

Individual members of Residents live, work, recreate, and raise their families in the City, in Solano County, and in the surrounding communities. Accordingly, 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 be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by

⁸ Mr. Smith's technical comments and curricula vitae are attached hereto as Exhibit A.

⁹ Mr. Watry's technical comments and curricula vitae are attached hereto as Exhibit B.

¹⁰ SWAPE's technical comments and curricula vitae are attached hereto as Exhibit C.

¹¹ Mr. Smallwood's technical comments and curricula vitae are attached hereto as Exhibit D.

¹² 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.

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making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.¹³ The EIR is a critical informational document, the “heart of CEQA.”¹⁴ “The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”¹⁵

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.¹⁶ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”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 As the CEQA Guidelines explain, “[t]he EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”¹⁹

¹³ PRC § 21100.

¹⁴ 14 C.C.R. § 15003(a); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of Cal.* (1988) 47 Cal.3d 376, 392, (“*Laurel Heights*”).

¹⁵ *Laurel Heights*, 47 Cal.3d at 390 (internal quotations omitted).

¹⁶ Public Resources Code § 21061; 14 C.C.R. §§ 15002(a)(1); 15003(b)–(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

¹⁷ *Citizens of Goleta Valley*, 52 Cal.3d at 564, quoting *Laurel Heights*, 47 Cal.3d at 392.

¹⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions before they are made).

¹⁹ 14 C.C.R. § 15003(b).

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Second, 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.²⁰ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”²¹ 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.”²²

While courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”²³ As the courts have explained, a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.”²⁴ “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”²⁵

²⁰ 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.

²¹ 14 C.C.R. § 15002(a)(2).

²² 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.

²³ *Berkeley Jets*, 91 Cal.App.4th 1344, 1355 (emphasis added), quoting *Laurel Heights*, 47 Cal.3d at 391, 409, fn. 12.

²⁴ *Berkeley Jets*, 91 Cal.App.4th at 1355; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

²⁵ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, quoting *Laurel Heights*, 47 Cal.3d at 405.

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III. THE DEIR FAILS TO ADEQUATELY DISCLOSE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.²⁶ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.²⁷

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by law.²⁸ Challenges to an agency's failure to proceed in the manner required by law, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.²⁹ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will 'determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.'³⁰

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Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'³¹

A. The DEIR Underestimates and Fails to Substantiate the Project's Criteria Air Pollutant and GHG Emissions

The DEIR concludes that the Project's construction and operational criteria air pollutant emissions will be less than significant. The DEIR also estimates that the Project would generate net annual GHG emissions of 13,575 MT CO₂e/year.³²

²⁶ 14 CCR § 15064(b).

²⁷ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

²⁸ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

²⁹ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

³⁰ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

³¹ *Berkeley Jets*, 91 Cal.App.4th at 1355.

³² DEIR, pg. 4.11-18, Table 4.11-6.
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These conclusions rely on emissions estimates calculated with CalEEMod 2016.3.2 modeling software.³³ As will be demonstrated below, the DEIR's emissions modeling contains several errors and omissions which render the analysis incorrect and unsupported. In particular, SWAPE reviewed the DEIR's CalEEMod analysis and found that several modeling inputs were either unsubstantiated, or inconsistent with information disclosed elsewhere in the DEIR. As a result, the Project's emissions of criteria pollutants during construction and operation, and the Project's GHG emissions, are underestimated. An updated DEIR should be prepared and recirculated to adequately assess the potentially significant criteria air pollutant and GHG impacts that construction and operation of the proposed Project may have on the environment.

i. The DEIR Relies on Unsubstantiated Input Parameters to Estimate Project Emissions

SWAPE's review of the CalEEMod output files demonstrates that the "Greentree Vacaville Operations" model includes unsubstantiated changes to the default *on-road percent paved* values. The default value represents that 94% of the Project site roads are paved. The DEIR revises this value to assume that 100% of the roads are paved, effectively reducing levels particulate matter and other air emissions that would result from use of unpaved roads. Second, the DEIR's "Greentree Vacaville Operations" model includes unsubstantiated changes to the default *silt loading* value. The DEIR changes the silt loading value from 0.1 to 0.

But the DEIR fails to provide substantial evidence supporting either of these revisions. This presents an issue, as CalEEMod uses the road-dust input parameters to calculate the fugitive emissions from paved and unpaved roads.³⁴ SWAPE explains that by failing to substantiate on-road percent paved and silt loading values, the model underestimates the Project's mobile-source operational emissions and should not be relied upon to determine Project significance.³⁵

³³ DEIR, pg. 4.6-12.

³⁴ "CalEEMod User's Guide." California Air Pollution Control Officers Association (CAPCOA), May 2021, available at: <https://www.aqmd.gov/caleemod/user-s-guide>, p. 39.

³⁵ SWAPE, pg. 3.
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ii. The DEIR Underestimates the Number of Daily Operational Vehicle Trips

According to the DEIR, the Project is expected to generate 15,898 net new Project trips.³⁶ Operational vehicle trip rates are used to calculate the emissions associated with the operational on-road vehicles.³⁷ As such, the DEIR's CalEEMod analysis should model vehicle emissions based on this number of vehicle trips. However, SWAPE's review of the CalEEMod output files demonstrates that the "Greentree Vacaville Operations" model includes only 9,096.87 weekday, Saturday, and Sunday vehicle trips.³⁸ As a result, the weekday, Saturday, and Sunday daily vehicle trips used in the DEIR's emissions modeling are underestimated by approximately 6,801 trips.³⁹ The DEIR provides no explanation for the reduction in vehicle trips used to calculate on-road vehicle emissions, nor is there a reasonable basis to explain this calculation error. Consequently, by relying on an underestimated number of operational vehicle trips, the DEIR's model underestimates the Project's mobile-source emissions, resulting in an unsupported conclusion that the Project's on-road emissions are less than significant when, in fact, they are simply undercalculated. The DEIR's analysis and conclusions regarding operations on-road vehicle emissions are thus not supported by substantial evidence, and must be corrected in a recirculated EIR.

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iii. The DEIR Relies on Unsubstantiated Changes to Wastewater Treatment System Percentages

The DEIR explains that project would be connected to and discharged into the existing public sanitary sewer system for the City of Vacaville, which is serviced by the Easterly Valley Wastewater Treatment Plant.⁴⁰

SWAPE's review of the CalEEMod output files demonstrates that the "Greentree Vacaville Operations" model includes several changes to the default wastewater treatment system percentages. Specifically, the City's model assumes that the Project's wastewater would be treated 100% aerobically, whereas the default industry calculation for aerobic wastewater is 87.46%.⁴¹ The DEIR's changes to these default values are both incorrect and unsupported. SWAPE's

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³⁶ Appendix 4.19-2, pg. 21

³⁷ SWAPE, pg. 3.

³⁸ SWAPE, pg. 3.

³⁹ *Id.*

⁴⁰ DEIR, pgs. 4.10-14, 4.21-4.

⁴¹ SWAPE, pg. 4.

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review of publicly available information about operations of the Easterly Wastewater Treatment Plant reveals that the plant uses *anaerobic* bacteria in the digesters phase of treatment.⁴² As such, the assumption that the Project's wastewater would be treated 100% aerobically is incorrect. Since different wastewater treatment systems have different GHG emissions, the City's models underestimate the Project's GHG emissions. The DEIR's conclusions are thus not supported by substantial evidence, and must be corrected in a recirculated EIR.

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B. The DEIR Fails to Require All Feasible GHG Mitigation

The DEIR concludes that the proposed Project's GHG emissions would be significant-and-unavoidable.⁴³ Despite the errors in the DEIR's air quality analysis described above, the DEIR contains substantial evidence demonstrating that the Project's emissions would result in a significant GHG impact (albeit an underestimate impact). The DEIR goes on to propose the adoption of a statement of overriding considerations to approve the Project based on a conclusion that all feasible mitigation measures have been incorporated to reduce the Project's GHG emissions to the greatest extent feasible. SWAPE's review of the DEIR's proposed mitigation plan demonstrates that the DEIR fails to require all feasible mitigation to address the Project's GHG impacts, leaving the impact significant and unmitigated. The DEIR's conclusion that GHG impacts are "significant and unavoidable" is therefore unsupported.

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In order to find that a project has "overriding considerations" which justify approving it notwithstanding remaining significant and unavoidable impacts, the City must find that all available feasible mitigation has been incorporated into the project to reduce the impact.⁴⁴ As such, an impact can only be labeled as significant-and-unavoidable after all available, feasible mitigation is considered.⁴⁵

Here, while the DEIR implements MM GHG-1, the DEIR fails to implement *all* feasible mitigation.⁴⁶ SWAPE's comments identify several cost-effective, feasible ways to incorporate lower-emitting mitigation and design features into the proposed Project above and beyond the measures included in MM GHG-1, which subsequently, would reduce emissions released during Project construction and

⁴² SWAPE, pg. 5.

⁴³ DEIR, pg. 4.11-21.

⁴⁴ Pub. Resources Code § 21081; 14 CCR § 15093.

⁴⁵ *Id.*; *Covington v GBUAPCD* (2019) 43 Cal.App.5th 867, 879-883.

⁴⁶ DEIR, pg. 4.11-21.

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operation.⁴⁷ Before the City can conclude that the Project's GHG impacts are unavoidable, the City must consider these measures as feasible GHG reduction measures in updated and recirculated EIR.

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C. The DEIR Fails to Adequately Disclose, Analyze, And Mitigate Potentially Significant Noise Impacts

The DEIR fails to disclose all potentially significant construction and operational noise impacts of the Project and does not implement all feasible mitigation to reduce those impacts to less than significant levels, in violation of CEQA.

i. The DEIR's Construction Noise Analysis Fails to Address Vacaville's Quantitative Noise Standards

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When evaluating the significance of the Project's construction noise impacts, the DEIR states that "[c]onstruction noise is not considered to be a significant impact if construction is limited to daytime hours and construction equipment is adequately maintained and muffled."⁴⁸ Thus, the DEIR relies on a qualitative construction noise threshold which does not consider any quantifiable noise level to be a significant impact.

Mr. Watry's comments explain that the DEIR fails to analyze consistency with noise standards in the Vacaville Municipal Code. Such analysis is required because Appendix G of the CEQA Guidelines provides that a project would normally have a significant effect on the environment if the project would "[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect."⁴⁹ Here, the Vacaville standards for allowable non-transportation noise levels are established in Vacaville Municipal Code Table 14.09.127.04 sets specific interior and exterior noise levels which, if violated, result in Code violations.⁵⁰

⁴⁷ SWAPE, pg. 7-9.

⁴⁸ DEIR, pg. 4.15-14.

⁴⁹ CEQA Guidelines, Appendix G, subd. X (b).

⁵⁰ Reproduced in the DEIR at Table 4.15-2.

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TABLE 4.15-2 NON-TRANSPORTATION NOISE LEVEL STANDARDS, DBA Table 14.09.127.04

Land Use Category	Noise Level Descriptor	Exterior Noise Levels		Interior Noise Levels	
		Daytime (7 am – 10 pm)	Nighttime (10 pm – 7 am)	Daytime (7 am – 10 pm)	Nighttime (10 pm – 7 am)
Residential	Hourly Leq	50	45	45	35
Residential	Maximum Level dBA	70	65	—	—
Transient Lodging	Hourly Leq	—	—	45	35
Hospitals/Nursing Homes	Hourly Leq	50	45	45	35

The Municipal Code sets numeric thresholds ranging from 35-45 Hourly LEQ limits for interior noise levels, and maximum levels of 65-70 dBA and Hourly LEQ of 45-50 for exterior noise levels. The Code expressly states that these standards apply to construction equipment:

Non-Transportation Sources. Non-transportation noise sources include noise from activities or uses such as industrial operations, outdoor recreation facilities, loading docks, and construction equipment.⁵¹

In some instances, the Municipal Codes allows for higher levels if the existing ambient noise levels exceed the limits in DEIR Table 4.15-2. The operative regulation states:

The noise standards for non-transportation sources shall not apply . . . [to] new uses if the ambient noise levels exceed the hourly Leq or the maximum level of the proposed noise generator, unless the additional noise generated would increase the projected, combined noise levels a minimum of three decibels.⁵²

However, the DEIR fails to measure the Project's impacts against this standard, thus failing to establish whether the Project would be exempted from compliance with Code-mandated noise limits at any point during Project construction. The DEIR therefore lacks support for its conclusion that construction noise levels will not result in significant impacts. The construction noise analysis must be revised to address the Municipal Code requirements and recirculated for additional public comment in a revised EIR.

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⁵¹ V.M.C. Section 14.09.127.120.C.4; DEIR pg. 4.15-8.

⁵² V.M.C. Section 14.09.127.120.C.4.a; DEIR pg. 4.15-9.
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ii. The DEIR Fails to Disclose that Construction Noise Standards Will Be Exceeded by 25 dBA or More

As stated above, the DEIR fails to measure the Project's impacts against thresholds in the Vacaville Municipal Code, which is required by Appendix G of the CEQA Guidelines.⁵³ Mr. Watry analyzed the Project's impacts against the correct thresholds in his comments. Mr. Watry's analysis relies on (1) the City's ambient noise measurements around the Project site, (2) the DEIR's statement that "existing sensitive receptors could be located as close as 100 feet from construction activities,"⁵⁴ and (3) the DEIR's reference noise levels for common heavy construction equipment.⁵⁵ Data the DEIR does not provide is the estimated total hourly average (Leq) noise levels at the receptor locations, so Mr. Watry generated these estimates using reasonable equipment for the construction phases shown, reference noise levels from the DEIR, and utilization values from the FHWA Roadway Construction Noise Model.⁵⁶

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Mr. Watry found that that a reasonable characterization of the existing ambient noise levels at residences near and surrounded by the project site are 50 to 54 dBA.⁵⁷ By V.M.C. Section 14.09.127.120.C.4, this range is the effective limit for construction equipment noise. However, the total hourly average (Leq) noise levels at the receptor locations with the Project's construction noise would be 79 to 82 dBA.⁵⁸ These noise levels exceed the limit of 54 dBA by 25 to 28 dBA. An exceedance of this magnitude is substantial evidence that the Project would have a more significant noise impact than is disclosed or mitigated in the DEIR. The DEIR must be revised and recirculated to address these significant noise impacts.

iii. The DEIR's Construction Noise Mitigation Would Not Reduce Impacts to a Less-Than-Significant Level

The DEIR states that noise impacts are potentially significant before mitigation, and contains five mitigation measures related to construction noise.⁵⁹ Mr. Watry explains that none of these measures would effectively reduce the noise levels estimated above.

⁵³ CEQA Guidelines, Appendix G, subd. X (b).

⁵⁴ DEIR, pg. 4.15-14.

⁵⁵ DEIR, pg. 4.15-14.

⁵⁶ Watry, pg. 4.

⁵⁷ Watry, pg. 4.

⁵⁸ Watry, pg. 4.

⁵⁹ DEIR, pg. 4.15-21.

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Mitigation Measure NOI-1 provides that “[a]ll construction equipment shall be properly maintained and muffled to minimize noise generation at the source.”⁶⁰ Mr. Watry explains that this would not reduce the estimated construction noise levels because the reference noise levels used in the noise calculations are for modern equipment that is already muffled.⁶¹

Mitigation Measure NOI-2 provides that “[n]oise-producing equipment shall not be operating, running, or idling while not in immediate use by a construction contractor.”⁶² Mr. Watry states that this requirement is accounted for in the calculations by the utilization factor.⁶³

Mitigation Measure NOI-3 provides that “[a]ll noise-producing construction equipment shall be located and operated, to the extent possible, at the greatest possible distance from noise-sensitive land uses.” Mr. Watry explains that much of the project property boundary is shared with existing, single-family homes, and much of the project would be built near those homes. As a result, this mitigation would not effectively reduce impacts.⁶⁴

Mitigation Measure NOI-4 states, “[l]ocate construction staging areas, to the extent possible, at the greatest possible distances from any noise-sensitive land uses.”⁶⁵ Mr. Watry explains that the efficacy of this measure is unsubstantiated, as an analysis of the staging area noise would require information that is not presented in the DEIR.⁶⁶

Mitigation Measure NOI-5 requires that “[s]igns shall be posted at the construction site and near adjacent sensitive receptors displaying hours of construction activities and the contact phone number of a designated noise disturbance coordinator.”⁶⁷ This measure serves as a means to ensure that the other mitigation measures are enforced, but does not itself not reduce noise levels.⁶⁸

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⁶⁰ DEIR, pg. 4.15-21.

⁶¹ Watry, pg. 5.

⁶² DEIR, pg. 4.15-21.

⁶³ Watry, pg. 5.

⁶⁴ Watry, pg. 6.

⁶⁵ DEIR, pg. 4.15-21.

⁶⁶ Watry, pg. 6.

⁶⁷ DEIR, pg. 4.15-21.

⁶⁸ Watry, pg. 6.

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Mr. Watry explains that the only effective mitigation would be a temporary sound barrier wall between the construction site and the residences. He estimates that this wall would around 10 feet tall could reasonably be expected to provide 7 to 10 dB of noise reduction.⁶⁹

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CONT'D

Overall, the noise mitigation measures identified in the DEIR do not effectively mitigate the Project's significant construction noise impacts. The City must recirculate an EIR that discloses the significant impact, and includes the necessary mitigation.

D. The Cumulative Traffic Noise Analysis Fails to Identify The Project's Considerable Contribution to a Cumulative Impact

The DEIR presents its cumulative traffic noise analysis on pages 4.15-23 and 4.15-24, but fails to make the necessary determinations. Proper analysis of cumulative impacts requires the lead agency to (1) determine if there is a cumulative impact, and (2) if there is, determine if the project's contribution to that impact is "considerable."⁷⁰ The DEIR fails to make these determinations, instead conducting the same analysis as it did for determining the project's individual impact, using future with and without project traffic noise levels. This approach obscures the cumulative contributions of the other projects.

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Mr. Watry employed the data presented in the City's Acoustical Analysis to conduct the correct analysis. He first determined that there would be a cumulative impact using the standard established for individual projects:

"... for the purpose of this analysis, a significant impact was assumed to occur if traffic noise levels were to increase by 3 dB at sensitive receptor locations where noise levels already exceed the City's applicable noise level standards (without the project), as 3 dB generally represents the threshold of perception in change for the human ear.

The City's exterior noise level standard for residential land uses is 60 dB CNEL.⁷¹

⁶⁹ Watry, pg. 5.

⁷⁰ Watry, pg. 7.

⁷¹ DEIR at pg. 4.15-15.

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Mr. Watry determined that this standard would be exceeded at eight of the analyzed residences – meaning there will be a cumulative traffic noise impact.⁷² He explains that at all but one receptor (R-6), the existing noise level is over 60 dBA and the increase is 3 dB. At R-6, the existing level is below 60 dBA and the increase is 5 dB. For that receptor, the noise level will cease to be Normally Acceptable.⁷³

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CONT'D

Having determined that there will be a cumulative impact, Mr. Watry next determined that the project's contribution would be considerable.⁷⁴ At four of the eight residence groups at which there will be a cumulative noise impact, the project contributes 1/3 of the increase – around 1 dB.⁷⁵ Because this single Project contributes 1/3 of the total cumulative impact, the Project's contribution to the cumulative impact is considerable. The DEIR's cumulative impacts analysis and conclusions must be revised in a recirculated EIR.

E. The DEIR Fails to Adequately Disclose, Analyze, And Mitigate Potentially Significant Transportation Impacts

The DEIR fails to disclose all potentially significant transportation impacts of the Project and does not implement all feasible mitigation to reduce those impacts to less than significant levels, in violation of CEQA.

i. The DEIR Fails to Require All Feasible Mitigation for VMT Impacts

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The DEIR states that the Project would have a significant and unavoidable VMT impact. But Mr. Smith explains that the DEIR's characterization of this impact as "unavoidable" was not supported by consideration of measures that reduce VMT impacts. CEQA Guidelines Section 15093 provides that an impact can only be labeled as significant-and-unavoidable after all available, feasible mitigation is considered. Here, even if the Project cannot achieve VMT levels below VMT significance thresholds, it is the obligation of the City to require implementation of all feasible mitigation. Hence, the DEIR must include a robust discussion of VMT mitigation measures and require implementation of all feasible measures that make meaningful progress toward lowering VMT as much as possible to below the VMT significance threshold.

⁷² Watry, pg. 7.

⁷³ Watry, pg. 7.

⁷⁴ Watry, pg. 8.

⁷⁵ Watry, pg. 8.

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Mr. Smith discusses additional feasible measures in his comments that the City must consider before identifying the VMT impact as "unavoidable." These include measures described in the CAPCOA publication Quantifying Greenhouse Gas Mitigation Measures.⁷⁶ Such measures also include neighborhood-based carpool matching, school based and youth-activity based carpool matching as well as dissemination of transit and ride-share information through community organizations.⁷⁷ The City could also organize and implement on a city-wide basis measures including park-and-ride/park-and-pool sites near major interchanges, improved local transit and improved local-to-regional transit links. These measures and others must be considered in a revised EIR.

Under Trans-5, the DEIR describes the impact "VMT attributable to the commercial portion of the proposed development would exceed applicable thresholds under cumulative conditions" as "unavoidable" without indication the City considered all feasible mitigation measures. The DEIR states that the Project "contains several measures to minimize VMT, including placement of higher density residential uses in close proximity of local commercial services, incorporation of complete streets, and pedestrian walkways and bicycle/pedestrian trails connecting the commercial area with the entire project."⁷⁸ However, Mr. Smith explains that these measures would not result in meaningful reductions in VMT because the actual VMT analysis already assumed a considerable level of trip internalization within the Project area, including internal trips that would generate zero VMT.⁷⁹

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CONT'D

Mr. Smith also explains that the "overriding considerations" identified in the DEIR's discussion are flawed. One of the overriding considerations is the claim that the Project site is an 'infill site' that abuts an established residential neighborhood to the west and commercial development to the north.⁸⁰ However, Mr. Smith explains that it is misleading to characterize a 185+ acre site as "infill" when it also abuts active agricultural lands and rural residential development to the east.⁸¹ Thus, this consideration is not supported by substantial evidence.

The City cannot adopt a statement of overriding considerations until it adopts all feasible mitigation to reduce VMT impacts to the greatest extent feasible, and until the City identifies supportable overriding considerations authorized by

⁷⁶ Smith, pg. 5.

⁷⁷ Smith, pg. 5.

⁷⁸ DEIR, pg. 2-36.

⁷⁹ Smith, pg. 6.

⁸⁰ Smith, pg. 6.

⁸¹ Smith, pg. 6.

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CEQA, such as the provision of employment opportunities for highly trained workers.”⁶²

ii. The DEIR Fails to Adequately Mitigate Level of Service Impacts

Public Resources Code Section 21099, enacted by SB 743, provides that Level of Service (“LOS”) impacts are not considered significant environmental impacts under CEQA. However, the statute specifies in Sections 21099(b)(4) that “[t]his subdivision does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements pursuant to the police power or any other authority.” Further, Section 21099(e) provides: “[t]his section does not affect the authority of a public agency to establish or adopt thresholds of significance that are more protective of the environment.”

DEIR Appendix 4.19-2 discloses mitigation measures for the Project’s short term and cumulative impacts that it states are identified in the City’s Traffic Impact Fee (“TIF”) studies, and with theoretical LOS analyses estimates that the measures would satisfactorily mitigate the impacts disclosed. However, Mr. Smith explains that it is not clear if the City is committed to implementing these measures, whether implementation would be timely with respect to the Project’s impacts, and whether it is sufficient for the Project to just pay standard TIF fees.⁶³ EIRs must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.”⁶⁴ The DEIR’s traffic mitigation fails to meet this standard. Therefore, the DEIR lacks substantial evidence to conclude that significant impacts are fully mitigated.

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CONT'D

iii. The DEIR Fails to Disclose Impacts of Queue Overspills

Appendix 4.19-2 of the DEIR presents an analysis of queuing at the 25 intersections included in the analysis. In the “Cumulative + Project” scenario, even with the mitigation improvements as identified in the Appendix document, there are 4 intersections and 10 movements where projected queues continue to significantly exceed queue storage capacity.⁶⁵ Mr. Smith explains that these queue

⁶² Pub. Res. Code § 21081(a)(3), (b).

⁶³ Smith, pg. 2.

⁶⁴ CEQA Guidelines, § 15126.4, subd. (a)(2).

⁶⁵ Smith, pg. 3.

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overspills, even after implementation of proposed mitigation improvements, remain significant in at least two ways.

Mr. Smith first explains that, when turning queues overspill into through traffic lanes or when through queues extend into upstream intersections, a hazardous traffic safety situation is created.⁸⁶ He explains that this impact is not addressed in the DEIR's consideration of Impact Issue Trans-3, which states: "The project would not substantially increase hazards due to a geometric design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment), nor would the project result in inadequate emergency access."⁸⁷ As a result, the DEIR's conclusion that the Project would have less than significant impact and that no mitigation measures are required for Issue Trans-3 is not supported by substantial evidence. The City must provide further analysis and mitigation of the queue issues that remain evident even after the DEIR's current intersection mitigation improvements are implemented in a recirculated EIR.

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CONT'D

Mr. Smith also explains that the City's analysis underestimates actual delays and LOS gradations. The City's calculation methodology assumes that all intersection approach lanes will be unobstructed so that traffic can efficiently utilize the green time on all approach lanes. However, when queues exceed the storage lane length and overspill into other lanes, the flow in the other lanes is not unobstructed and full efficiency is not achieved.⁸⁸ Hence, actual delays and LOS gradations will be worse than calculated, constituting a significant impact that the DEIR fails to disclose and mitigate. Mr. Smith states that mitigation directed at providing greater queue storage is required, such as lengthened queue storage lanes, double turning lanes or more through lanes.⁸⁹

⁸⁶ Smith, pg. 4.

⁸⁷ Smith, pg. 4.

⁸⁸

⁸⁹ Smith, pg. 4.

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F. The DEIR Fails To Adequately Establish The Environmental Setting For Biological Resources And Fails To Adequately Disclose, Analyze, And Mitigate Potentially Significant Impacts On Biological Resources

1. The DEIR Fails To Adequately Establish The Environmental Setting

CEQA requires that a lead agency include a description of the physical environmental conditions in the vicinity of the Project as they exist at the time environmental review commences.⁹⁰ As numerous courts have held, the impacts of a project must be measured against the “real conditions on the ground.”⁹¹ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project’s impacts.⁹² Use of the proper baseline is critical to a meaningful assessment of a project’s environmental impacts.⁹³ An agency’s failure to adequately describe the existing setting contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting.

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Baseline information on which a lead agency relies must be supported by substantial evidence.⁹⁴ The CEQA Guidelines define “substantial evidence” as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.”⁹⁵ “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts ... [U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous ... is not substantial evidence.”⁹⁶

⁹⁰ CEQA Guidelines, § 15125, subd. (a).

⁹¹ *Save Our Peninsula Com. v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 246.

⁹² CEQA Guidelines, § 15125, subd. (a).

⁹³ *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Ca.4th 310, 320.

⁹⁴ *Id.* at 321 (stating “an agency enjoys the discretion to decide [...] exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence”); see *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁹⁵ CEQA Guidelines §15384.

⁹⁶ Pub. Resources Code § 21082.2(c).
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**a. The DEIR Fails to Provide Sufficient Detail About Its
Biological Surveys**

The DEIR's environmental setting was based on surveys conducted by Moore Biological.⁹⁷ Dr. Smallwood states that the DEIR did not include clear information about the surveys that is necessary for adequate review and interpretation of Moore Biological's survey outcomes.⁹⁸ Such missing information includes the surveys' start times, time on site, and names of biologists who performed each survey. Such information would help explain, for example, why Dr. Smallwood's surveys yielded >4 times the number of new species detections per survey than did Moore Biological.⁹⁹

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**b. Substantial Evidence Demonstrates the Presence of
Additional Special Species at the Project Site**

Dr. Smallwood presents substantial evidence from his own site surveys demonstrating that the Project site currently hosts several species, including special-status species, which the DEIR's surveys failed to detect due to poor or unsupported survey methods.¹⁰⁰

Dr. Smallwood conducted five surveys at the Project site. His observations increased the total number of vertebrate wildlife detected on the site from 56 (DEIR) to 77 (Smallwood). Several of the species he detected included special status wildlife such as burrowing owl, peregrine falcon, and Swainson's hawk. Dr. Smallwood modeled the pattern in species detections during the surveys he conducted to estimate the average number of species that actually occur at the site, but were undetected during the DEIR's surveys. His models statistically demonstrate that the DEIR surveys missed dozens of species that are likely to occur on the Project site.¹⁰¹ Dr. Smallwood's modeling demonstrates that the DEIR's environmental setting is incomplete and mischaracterizes the richness of wildlife on the Project site. Dr. Smallwood's modeling results also constitute substantial evidence that the Project's impacts on wildlife present on the site are greater than analyzed. In summary, Dr. Smallwood concludes, based on the evidence gathered in his surveys, that the Project site provides habitat for numerous special status species that would be adversely impacted by the loss of habitat resulting from the

⁹⁷ Smallwood, pg. 12.

⁹⁸ Smallwood, pg. 12.

⁹⁹ Smallwood, pg. 12.

¹⁰⁰ Smallwood, pg. 12-15.

¹⁰¹ Smallwood, pg. 13.

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Project. The results of his surveys also demonstrate the deficiencies in the DEIR's limited survey methods. Dr. Smallwood explains that "[t]here is no question that a larger survey effort would result in a longer list of species documented to use the project site, thereby improving our understanding of the current environmental setting."¹⁰²

Dr. Smallwood states that a more realistic representation of species richness at the site could be obtained by implementing multiple survey methods and by repeating visual-scan surveys on various dates through the year. As a result of its deficient site surveys, the DEIR lacks substantial evidence to support its analysis of biological baseline conditions. The DEIR must be revised and recirculated to include a legally adequate baseline analysis.

a. The Burrowing Owl Surveys Did Not Meet CDFW Standards

The DEIR includes surveys for burrowing owls at the Project site. But Dr. Smallwood explains that the surveys for burrowing owls at the site did not meet most of the minimum standards of the CDFW (2012) survey guidelines, which the legally accepted industry standard for burrowing owl analysis and mitigation.¹⁰³ Moore Biological reportedly implemented the CDFW protocols, but Dr. Smallwood states that few of the standards of the CDFW (2012) guidelines were achieved.

To begin with, Moore Biological's December and January surveys were inappropriate for the purpose of identifying breeding pairs. Dr. Smallwood opines that this error indicates that that Moore Biological was not sufficiently familiar with burrowing owl ecology.¹⁰⁴

Conclusions that the site offers only poor quality habitat to burrowing owls were speculative and inconsistent with the owls' production of chicks.¹⁰⁵

The reporting of the burrowing owl surveys also fell short of CDFW's (2012) standards regarding the habitat assessment. Dr. Smallwood states that the diskings

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CONT'D

¹⁰² Smallwood, pg. 14.

¹⁰³ Smallwood, pg. 16-17; see *Rialto Citizens For Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899.

¹⁰⁴ Smallwood, pg. 16.

¹⁰⁵ Smallwood, pg. 17.
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of the grassland on site was mentioned, but little else was. No history of the past use of the site was summarized. Thus, basic reporting standards were not met.¹⁰⁶

The breeding season surveys met none of the standards of the CDFW (2012) guidelines.¹⁰⁷ As a result, it is unknown how many pairs of burrowing owls bred at the project site in 2021, and this number remains unknown in 2022. Without this information, the DEIR lacks substantial evidence for its analysis of impacts on burrowing owls. And the DEIR's formulation of mitigation to those impacts is similarly based on incomplete information.

As a result, the DEIR's environmental setting lacks substantial evidence.¹⁰⁸ The DEIR's surveys need to be repeated by qualified biologists and presented in a revised EIR.

c. The Swainson's Hawk Surveys Did Not Meet CDFW Standards

Dr. Smallwood states that surveys for Swainson's hawks were inconsistent with CDFW (2000) guidelines because Moore Biological's characterization of Swainson's hawk foraging habitat was too narrow. Specifically, all 189.4 acres of the project site should be regarded as Swainson's hawk foraging habitat.¹⁰⁹ Also, Moore Biological (2021) found one Swainson's hawk nest site, but at least 3 nest sites occur there this year. The nest site reported last year is still in use this year, but so is a site to the south and most likely an additional site to the northwest.¹¹⁰ Overall, the DEIR's environmental setting is flawed and lacks the support of substantial evidence.

d. The City Failed to Consult All Available Biological Resources Databases to Establish the Environmental Setting

The City relied on California Natural Diversity Data Base ("CNDDB") for determining occurrence likelihoods of special-status species. The City failed to consult other major databases such as eBird and iNaturalist. Dr. Smallwood

¹⁰⁶ Smallwood, pg. 17.

¹⁰⁷ Smallwood, pg. 17.

¹⁰⁸ *Communities for a Better Environment* at 321; see *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

¹⁰⁹ Smallwood, pg. 17.

¹¹⁰ Smallwood, pg. 17.

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reviewed these databases, and discovered the actual of list of potentially-occurring species is higher than the DEIR's.¹¹¹

Sole reliance on CNDDB for desktop review is not supported by substantial evidence. The California Department of Fish and Wildlife cautions that sole reliance on CNDDB is inappropriate as a basis for narrowing a list of potentially occurring species:

"We work very hard to keep the CNDDB and the Spotted Owl Database as current and up-to-date as possible given our capabilities and resources. However, we cannot and do not portray the CNDDB as an exhaustive and comprehensive inventory of all rare species and natural communities statewide. Field verification for the presence or absence of sensitive species will always be an important obligation of our customers..."¹¹²

The DEIR thus fails to set forth an accurate biological baseline, which is necessary to correctly evaluate the Project's impacts.

ii. The DEIR Fails to Adequately Analyze the Project's Habitat Loss Impacts; Substantial Evidence Shows the Project's Impacts Are Potentially Significant

Dr. Smallwood's comments demonstrate that habitat loss is a potentially significant impact not disclosed by the DEIR. He explains that habitat loss not only results in the immediate numerical decline of wildlife, but also in permanent loss of productive capacity.¹¹³ His comments include calculations demonstrating the impacts of loss of the Project site would have on productive capacity. This predicted loss would be substantial, and would qualify as a significant impact that has yet to be addressed by the City of Vacaville. The EIR needs to be revised to appropriately analyze potential project impacts to wildlife.

¹¹¹ Smallwood, Pg. 17-18.

¹¹² California Natural Diversity Database, "About the CNDDB," <https://wildlife.ca.gov/Data/CNDDB/About>

¹¹³ Smallwood, pg. 25.
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iii. **The DEIR Fails to Adequately Analyze the Project's Traffic Collision Impacts; Substantial Evidence Shows the Project's Impacts Are Potentially Significant**

The DEIR also provides no analysis of wildlife-traffic collision mortality that would result from the project. The DEIR predicts annual vehicle miles traveled (VMT) of 32,676,963, which is many miles that would put wildlife at dire risk of collision mortality along all reaches of roadway leading traffic to and from the project site.¹¹⁴ Vehicle collisions have accounted for the deaths of many thousands of amphibian, reptile, mammal, bird, and arthropod fauna, and the impacts have often been found to be significant at the population level.¹¹⁵ Dr. Smallwood calculates that the project's traffic over 50 years would accumulate 895,250 wildlife fatalities.¹¹⁶ Therefore, substantial evidence demonstrates that the Project would have significant wildlife collision impacts.

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iv. **The DEIR Fails to Adequately Mitigate the Project's Impacts on Biological Resources**

Dr. Smallwood analyzed the Project's mitigation measures and determined that they are ineffective at mitigating the Project's impacts on biological resources.

Mitigation Measure BIO-1 provides compensation for Swainson's hawk habitat loss. Dr. Smallwood states that the payment of a per-acre mitigation fee to a conservation bank would contribute to the conservation of Swainson's hawk but the proposed 1:1 ratio would result in a net loss of Swainson's hawks.¹¹⁷ The receiving site of the mitigation fee is not going to produce any more Swainson's hawks than already live there.

Mitigation Measure BIO-2, 4, 5, 6, and 9 require preconstruction take-avoidance surveys. These measures do not mitigate the Project's habitat loss impacts, which are significant impacts that CEQA requires mitigated.

Mitigation Measure BIO-3, which provides compensation for burrowing owl habitat loss, does not adequately mitigate impacts on this special status species, as it is unknown how many burrowing owls actually breed on site, and if the DEIR's

¹¹⁴ Smallwood, pg. 25.

¹¹⁵ Smallwood, pg. 25.

¹¹⁶ Smallwood, pg. 27.

¹¹⁷ Smallwood, pg. 28.

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characterization of the acres of habitat is accurate. Dr. Smallwood suggests the burrowing owls at the project site might be the last breeding burrowing owls between Solano and Yolo Counties other than the population that occurs at Dixon National Radio Transmission Facility.¹¹⁸ Thus, more certainty in the effectiveness of the mitigation is required.

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CONT'D

Overall, the DEIR's mitigation measures fail to mitigate the aforementioned habitat loss and road mortality impacts, among others discussed in Dr. Smallwood's comments. The expanded measures must be included in a recirculated EIR.

G. The DEIR Fails to Adequately Disclose, Analyze, And Mitigate Potentially Significant Public Services Impacts

Under CEQA, a significant environmental impact could result if implementation of the proposed project would increase demand for police protection services to the extent that the construction of new or physically altered police protection facilities would be needed.¹¹⁹

The City lacks substantial evidence to support its conclusion that the Project would not impact emergency response times and would not require new police facilities. In 2018, the City of Vacaville employed a firm to conduct an independent audit of the City's police force.¹²⁰ The Police Report in part states that:

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Although the Department has experienced considerable success in keeping the overall incidents of crime down in Vacaville, I found that for the past several years, the Vacaville Police Department has been operating on very thin staffing margins. For the purpose of maintaining continued low crime levels, and enhancing officer safety, the City and Police Department should be focusing on the restoration of both civilian and sworn staffing levels; at a minimum, there should be an ongoing effort to bring staffing and services back to levels that the organization was at 10 years ago.¹²¹

Furthermore, in a 2019-2021 operational goals memorandum released by the Police Department, the City states that "[o]ne of the greatest challenges in public

¹¹⁸ Smallwood, pg. 28.

¹¹⁹ CEQA Appendix G, Section XIV.

¹²⁰ Vacaville Police Department Organization Analysis and Performance Review (hereinafter "Police Report") (February 12, 2018) available at <https://www.ci.vacaville.ca.us/home/showpublisheddocument/16337/637302570207700000>

¹²¹ Police Report, p. 10.

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safety today is recruiting, hiring and training ... first responders.”¹²² The Police Memorandum goes on to state that the Police and Fire Departments are determining the feasibility of operating a citywide training facility, however no additional details are given in the Memorandum and additional information on said facility are nonexistent in the public record.

Despite the clear message from auditors and from the Police Department itself that staffing is an ongoing issue even at current City population levels, the City’s Police Department offered the following information in response to the City’s request for information on response times for the new residents at the Project:

“I have reviewed the preliminary map for Greentree online. As far as the police department goes, there will not be any new facilities needed because of this development. I do not foresee the development having an impact on response times. I really feel like this is a fire questions since they are beholden to ISO response time standards.”¹²³

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CONT'D

The Police Department’s response includes no additional information or analysis supporting the lieutenant’s assertion that he does not “foresee” any issues with the Project. This is not the substantial evidence required by CEQA.

Updated information on the Police Department’s ability to respond to calls for service was not made available for review with the DEIR, leaving the public, and decisionmakers, without the necessary information to judge whether the Police Department had adequately analyzed the specific needs created by adding 2,963 residents to the City.¹²⁴

Additionally, the proposed Project is nearly 6 miles away from Vacaville’s only police station located at 660 Marchant St., leaving open the question whether additional police facilities may be needed to service the large increase in population along the City’s eastern border.

¹²² Vacaville Police Department 2019-2021 Operation Goals Memorandum (undated) available at <https://www.ci.vacaville.ca.us/home/showpublisheddocument/16335/637302569855970000>

¹²³ Email from Lt. Dave Kellis, Vacaville Police Department to Christina Love, Senior Planner, City of Vacaville Advanced Planning Division, RE: Greentree: project analysis for environmental impacts related to PD (September 2, 2021) available at <https://www.ci.vacaville.ca.us/home/showpublisheddocument/20371/637870982477630000>.

¹²⁴ DEIR, p. 3-20.

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A revised EIR must be prepared and recirculated that includes a detailed analysis of the police services required to serve the Project site. Based on available evidence, it appears additional police stations may be required to safely serve future occupants of the Project site. If so, the DEIR must disclose this as a significant public services impact and provide mitigation to increase available police services for the Project. Alternatively, the City must provide substantial evidence supporting the existing unsupported conclusion that the proposed Project would not impact emergency response time and would not require new police facilities.

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H. The DEIR Fails to Adequately Disclose, Analyze, And Mitigate Potentially Significant Land Use Impacts

The City cannot make the required findings for the Project's required entitlements including the General Plan Amendment, Green Tree Park Policy Plan Amendment, Master Plan, Rezoning, and Vesting Tentative Map because the Project will conflict with land use plans, policies, and regulations adopted for the purpose of avoiding or mitigating an environmental effect, including the following policies:

- Policy COS-P12.8: Evaluate residential development or other projects with sensitive receptors proposed within the buffer distances identified by the California Air Resources Board's Air Quality and Land Use Handbook to ensure sensitive receptors would not be exposed to an increased cancer risk or to ground-level concentrations of non-carcinogenic toxic air contaminants.¹²⁵ The DEIR fails to adequately assess the Project's health impact on sensitive receptors.
- Action COS-A9.2: Continue to provide alternative fuel infrastructure throughout the city, such as electric vehicle charging stations, and conduct periodic studies to ensure that there is demand for such facilities as technologies change.¹²⁶ The Project does not demonstrate compliance with this policy, and lacks supporting studies to ensure that adequate electric vehicle infrastructure will be provided throughout the life of the Project.
- Policy COS-P1.3: Protect the existing wildlife movement corridors within the designated Vacaville-Fairfield Greenbelt area and create new wildlife corridors, including creek corridors and utility easements, where feasible, to

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¹²⁵ General Plan, p. COS-32.

¹²⁶ General Plan, p. COS-28.
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enable free movement of animals, to minimize wildlife-urban conflicts, and to establish open space linkages.¹²⁷ Dr. Smallwood demonstrates that the DEIR fails to require adequate mitigation to protect wildlife habitat and corridors that will be lost from Project construction. The DEIR therefore fails to comply with this mandatory policy.

- Policy COS-P1.5: Require new development proposals to provide baseline assessments prepared by qualified biologists. The assessment shall contain sufficient detail to characterize the resources on, and adjacent to, the development site. The assessment shall also identify the presence of important and sensitive resources, such as wetlands, riparian habitats, and rare, threatened, or endangered species affected by the development.¹²⁸ As explained by Dr. Smallwood, the DEIR lacks adequate biological baseline studies, thus failing to comply with this policy.

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The Project's failure to comply with mandatory land use plans and policies result in both significant land use impacts and significant impacts under CEQA.¹²⁹

I. The DEIR Fails to Adequately Describe and Analyze the Development Agreement

The DEIR notes that approval of a Development Agreement between the City and the Applicant would be one of the Project's required approvals. We previously commented that the City violated CEQA when it failed to attach the proposed Development Agreement to the DEIR and failed to describe its terms.¹³⁰ The DEIR fails to contain any analysis of the potential environmental impacts that may be

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¹²⁷ General Plan, p. COS-9.

¹²⁸ General Plan, p. COS-9.

¹²⁹ *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732; *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. (14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).) A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).)

¹³⁰ DEIR, p. 2-9.

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caused by implementation of the Development Agreement.¹³¹ The DEIR's failure to describe this critical component of the Project, and failure to analyze its impacts, as required by CEQA results in the public's, and decisionmakers' inability to analyze the potential environmental impacts of the Development Agreement.

A development agreement is a contract between an agency and a developer establishing certain development rights with any person having a legal or equitable interest in the property at issue. The purpose of a development agreement is generally to extend the life of the entitlements in exchange for the provision of public benefits and to reduce the economic risk of development.¹³² While a development agreement must advance an agency's local planning policies, it may also contain provisions that vary from otherwise applicable zoning standards and land use requirements as long as the project is consistent with the general plan and any applicable specific plan.¹³³ For this reason, it is critical that the terms of a proposed development agreement be disclosed to the public and analyzed during the Project's CEQA review in order to determine whether the development agreement may have potentially significant impacts that are not otherwise inherent in the project.

When a development agreement is required to implement a project, it is considered part of the project under CEQA.¹³⁴ Development agreements must be enacted in accordance with the Government Code and applicable local planning codes, and must undergo environmental review at the time of adoption. Therefore, any development agreement for the Project must be described in the EIR and considered by the City's decision makers at the same time as the rest of the Project approvals.

The DEIR fails to disclose any of the terms being considered for inclusion in the Development Agreement including the length of time the Development Agreement will be in effect. The DEIR must be revised to correct this omission. In particular, the public must be allowed to consider whether the proposed Development Agreement will have significant impacts in addition to the impacts disclosed in the DEIR *before* the City enters into a contract with the Applicant which could guarantee the long-term existence of those impacts during the life of the contract. It is conceivable that, by extending the Project's land use entitlements,

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¹³¹ FEIR, pp. 2-374 – 2-375.

¹³² Gov. Code §§ 65864-65869.5.

¹³³ *Id.*

¹³⁴ See Gov. Code § 65864; 14 CCR §§15352(a), (b), 15378; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.

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the mitigation measures implemented for the Project will cease to be effective over the term of the Development Agreement, resulting in new significant environmental impacts from the Project. In addition, it is possible that the Development Agreement could have further significant environmental impacts not analyzed in the DEIR.

Because the Development Agreement was not included in the DEIR's analysis of the Project, the DEIR must be revised and recirculated in order to give the public an opportunity to comment on the Project's adverse impacts or mitigation measures that are changed by the terms of the Agreement.¹³⁶

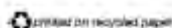
Additionally, the public must have an opportunity to evaluate the specific public benefits conferred by the Agreement, as the City has great discretion in determining what constitutes a public benefit and must be given an opportunity to evaluate and comment on the Agreement. The City and the public must consider what public benefits would warrant providing the Applicant a guarantee on the Project's entitlements. Examples of public benefits could include community workforce or skilled and trained workforce requirements, funds or community services provided to the City to offset air quality, traffic, GHG, noise, and biological impacts associated with the Project. City residents and other members of the public must be given a meaningful opportunity to provide input to the City on what public benefits the City should require.

The City must evaluate the environmental impacts of the Project in light of the Development Agreement prior to approval of the Project. The City must also recirculate the EIR to include analysis of the environmental impacts of the Development Agreement's terms.

J. The DEIR Lacks Substantial Evidence to Support the Required Findings Under the Subdivision Map Act

The Subdivision Map Act requires a lead agency to make findings that a proposed subdivision is consistent with the general plan/specific plan, and does not have any detrimental environmental or public health effects. The City is unable to make these mandatory findings because the Project has unmitigated, adverse impacts in both of these areas. Moreover, the DEIR fails to provide substantial evidence to meet either of these legal standards.

¹³⁶ 14 CCR §15088.5(a); *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 6118-003acp



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As discussed in our comments above, the Project will conflict with elements of the City's adopted General Plan. Additionally, there is substantial evidence demonstrating that the Project will result in significant impacts related to air quality, GHGs, noise, transportation, and biological resources that the City has not sufficiently analyzed or mitigated. These conflicts cannot be ignored and necessarily contravene the findings required to approve the Project under the Map Act.

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The City must revise the DEIR and address the Project's potentially significant impacts and implement additional mitigation to address those impacts before it is able to make the findings required under the Map Act.

K. The Statement of Overriding Consideration Must Consider Whether the Project Provides Employment Opportunities for Highly Trained Workers

As previously stated, the City concludes in the DEIR that the Project will have significant and unavoidable environmental impacts related to operational air quality emissions and traffic impacts. Therefore, in order to approve the Project, CEQA requires the City to adopt a statement of overriding considerations, providing that the Project's overriding benefits outweigh its environmental harm.¹³⁶ An agency's determination that a project's benefits outweigh its significant, unavoidable impacts "lies at the core of the lead agency's discretionary responsibility under CEQA."¹³⁷

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The City must set forth the reasons for its action, pointing to supporting substantial evidence in the administrative record.¹³⁸ This requirement reflects the policy that public agencies must weigh a project's benefits against its unavoidable environmental impacts, and may find the adverse impacts acceptable only if the benefits outweigh the impacts.¹³⁹ Importantly, a statement of overriding considerations is legally inadequate if it fails to accurately characterize the relative harms and benefits of a project.¹⁴⁰

¹³⁶ CEQA Guidelines, § 15043.

¹³⁷ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.

¹³⁸ Pub. Resources Code, § 21081, subd. (b); CEQA Guidelines, § 15093, subds. (a) and (b); *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 357.

¹³⁹ Pub. Resources Code, § 21081(b); CEQA Guidelines, § 15093, subds. (a) and (b).

¹⁴⁰ *Woodward Park Homeowners Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 717, 6116-003acp.

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In this case, the City must find that the Project's significant, unavoidable impacts are outweighed by the Project's benefits to the community. CEQA specifically references employment opportunities for highly trained workers as a factor to be considered in making the determination of overriding benefits.¹⁴¹ Currently, there is not substantial evidence in the record showing that the Project's significant, unavoidable impacts are outweighed by benefits to the community. For example, the Applicant has not made any commitments to employ graduates of state approved apprenticeship programs or taken other steps to ensure employment of highly trained and skilled craft workers on Project construction. Other proposed "overriding considerations" identified in the DEIR, such as the creation of infill housing, are not supported by substantial evidence. Therefore, the City would not fulfill its obligations under CEQA if it adopted a statement of overriding considerations and approved the Project as currently proposed.

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CONTO

We urge the City to prepare and circulate a revised EIR which identifies the Project's potentially significant impacts, requires all feasible mitigation measures and analyzes all feasible alternatives to reduce impacts to a less than significant level. If a Statement of Overriding Considerations is adopted for the Project, we urge the City to consider whether the Project will result in employment opportunities for highly trained workers.

IV. CONCLUSION

The DEIR is inadequate and must be withdrawn. We urge the City to prepare and circulate a revised DEIR which accurately sets for the existing environmental setting, discloses all of the Project's potentially significant impacts, and requires all feasible mitigation measures to reduce the Project's significant environmental impacts. We thank you for the opportunity to provide these comments on the DEIR.

Sincerely,



Aidan Marshall
Kevin Carmichael

Attachment
APM:acp

¹⁴¹ Pub. Resources Code, § 21081, subds. (a)(3) and (b).
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