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August 23, 2022

Via Email and Overnight Mail

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Re: Comments on the Eterna Tower Mixed-Use Development Project (H20-026) Agenda Item 4.a.

Dear Ms. Blanco, Ms. Meiners, Mr. Manford, and Mr. Burton:

On behalf of **Silicon Valley Residents for Responsible Development** (“Silicon Valley Residents” or “Commenters”), we submit these comments on the Initial Study/Addendum (“Addendum”) to the Downtown Strategy 2040 Final Environmental Impact Report (“Downtown Strategy 2040 FEIR”) for the Eterna Tower Mixed-Use Development Project (“Project”) proposed by ROYGBIV Real Estate Development LLC (“Applicant”).¹ We are providing these comments in advance of the August 24, 2022 Director’s Hearing on the Project.

The Project requires a Site Development Permit, and may require a Demolition Permit, Public Works Clearances including Grading Permit, Building Permit, and Lot Line Adjustment to allow demolition of the existing two-story buildings on the site and to allow construction of a 26-story, approximately 184,667-gross square foot mixed-use building on the approximately 0.18-acre site at 17 and 29 East Santa Clara Street in downtown San José. The Project would include 192

¹ City of San Jose, Addendum to the Downtown Strategy 2040 Final Environmental Impact Report for Eterna Tower Mixed-Use Development, File No. H20-026 (August 5, 2022). Available at: <https://www.sanjoseca.gov/home/showpublisheddocument/88603/637958100844470000> (hereinafter “Addendum”).

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residential units and approximately 5,217 square feet of office space on the second floor. The Project would provide 22 percent of the residential units at Below Market Rate. The Project site is currently occupied by a pair of two-story buildings, one of which (17 East Santa Clara Street) is an identified Structure of Merit on the City's Historic Resources Inventory²; both are proposed for demolition. The Project would retain the street facing façade and parapet of the existing building at 17 East Santa Clara Street, which would be integrated into the new project.

The proposed building would have a height of just over 273 feet and would consist of a main lobby, 50 first floor long-term parking spaces for bicycles, 192 residential units, and a basement-level to house utilities for the building. Proposed common outdoor area for the building consists of a rooftop terrace. Private open space would be provided by balconies for most units. In addition, the project proposes to reserve approximately 5,438 square feet of the basement and floor level areas for an access point to the future BART/VTA station. The project would also install a backup generator that would be located on the basement level.

The Project is within the DC Downtown Primary Commercial Zoning District, and the Downtown General Plan Designation.³ The Project is also located within the Downtown Employment Priority Area, which requires a minimum 4.0 FAR of commercial use within residential / commercial mixed-use projects.⁴ Construction of the Project would occur over a period of 29 months.⁵

We have reviewed the Addendum, its technical appendices, and reference documents with assistance of Commenters' expert consultant James J.J. Clark of Clark & Associates.⁶ Dr. Clark's comments are attached to this letter along with his curriculum vitae. Based on our review of the Addendum, it is clear that the Addendum fails as an informational document under CEQA and is inappropriate under CEQA because it identifies significant effects not discussed in the previous

² Addendum, Appendix B, Historical Evaluation, p. 1; City of San Jose, Planning, Building & Code Enforcement, Historic Resources Inventory, available at: <https://www.sanjoseca.gov/your-government/departments/planning-building-code-enforcement/planning-division/historic-preservation/historic-resources-inventory>.

³ San Jose Zoning Code § 20.70.100.

⁴ City of San Jose, Site Development Permit (H20-026) p. 10 of 28.

⁵ Addendum p. 6.

⁶ See Letter from James J.J. Clark, Clark & Associates, to Kelilah Federman re: Comments On Addendum to the San Jose Downtown Strategy 2040 Final Environmental Impact Report (SCH # 2003042127), H20-026 – 17 and 29 East Santa Clara Street, Eterna Tower Mixed-Use Development Project, August 23, 2022 (hereinafter, "Clark Comments"), **Attachment A**.

EIR,, fails to comply with the requirements for program-level environmental review, fails to evaluate the project-level impacts in the areas of public health, air quality, contaminant hazards and historical resources, and lacks substantial, if any, evidence to support the City's environmental conclusions.

I. STATEMENT OF INTEREST

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, along with their members, their families, and other individuals who live and work in the City of San José.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City 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, Silicon Valley 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 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 has two basic purposes, neither of which is satisfied by the Addendum. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the

environment.⁷ The EIR is the “heart” of this requirement.⁸ 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.”⁹

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹⁰ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.¹¹ CEQA requires an EIR to disclose all potential direct, indirect, and cumulative significant environmental impacts of a project.¹²

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.¹³ If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹⁴ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹⁵ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁶ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or

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

⁸ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

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

¹¹ *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

¹² PRC, § 21100(b)(1); 14 CCR, § 15126.2(a).

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

¹⁴ PRC, §§ 21002.1(a), 21100(b)(3).

¹⁵ *Id.*, §§ 21002-21002.1.

¹⁶ 14 CCR, § 15126.4(a)(2).

feasibility.¹⁷ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁸

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, or determine whether a previously prepared EIR could be used with the project, among other purposes.¹⁹ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.²⁰ A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project “would not have a significant effect on the environment.”²¹

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

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.²²

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events occur:

¹⁷ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

¹⁸ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

¹⁹ 14 CCR, §§ 15060, 15063(c).

²⁰ *See, e.g.*, PRC, § 21100.

²¹ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

²² PRC, § 21166.

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) **The project will have one or more significant effects not discussed in the previous EIR or negative declaration;**
 - (B) **Significant effects previously examined will be substantially more severe than shown in the previous EIR;**
 - (C) **Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or**
 - (D) **Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.²³**

Only where *none* of the conditions described above calling for preparation of

²³ 14 CCR, § 15162(a)(1)-(3) (emphasis added).

a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an addendum or no further documentation.²⁴ For addenda specifically, CEQA allows an addendum to a previously certified EIR if minor changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.²⁵ The City's decision not to prepare a Subsequent EIR must be supported by substantial evidence.²⁶

Here, the City lacks substantial evidence for its decision not to prepare a Subsequent EIR because at least one of the triggering conditions in Section 15162 has occurred. As explained below, substantial evidence shows that the Project may have one or more significant effects not discussed in the Downtown Strategy 2040 EIR. Specifically, the Project may have significant impacts associated with, air quality and public health, as described by Dr. Clark. Moreover, the Addendum specifically recognizes potentially significant impacts with respect to air quality, soil and groundwater hazards, and noise and vibration that were not addressed in the 2040 Downtown Strategy EIR. This fact alone makes an addendum inappropriate under CEQA.

Accordingly, Dr. Clark's substantial evidence, and the City's own recognition of potentially significant impacts not previously addressed, require that the City prepare and circulate for public comment a Subsequent EIR that adequately addresses all of the Project's potentially significant impacts and proposes appropriate mitigation measures.²⁷

III. THE CITY IMPROPERLY RELIED ON AN ADDENDUM

An addendum to an EIR is only appropriate if some changes or additions to the prior EIR are necessary, but none of the conditions described in Guidelines section 15162 have occurred. Where, as here, the project will have one or more significant impacts not discussed in the previous EIR, an addendum is inappropriate. The Addendum specifically identifies several potentially significant impacts not discussed in the Downtown Strategy 2040 EIR, including Impact AQ-1

²⁴ 14 CCR, § 15162(b).

²⁵ 14 CCR, § 15164.

²⁶ *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

²⁷ 14 CCR, § 15162 (“no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]”); § 15164 (“The [agency’s] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.”).

(infant cancer risk from exposure to diesel particulate matter during project construction), Impact HAZ-1 (exposure of construction workers and the public to soil and groundwater contaminants), Impact NSE-1 (construction noise in excess of the City's General Plan thresholds) and Impact NSE-2 (vibrations from construction exceeding the City's General Plan thresholds).

As to each of these impacts, the Addendum also purports to adopt mitigation measures to address these impacts. None of these Project-specific impacts or mitigation measures were disclosed, analyzed or considered in the Downtown Strategy 2040 EIR. CEQA requires that these impacts and proposed mitigation measures be included in an EIR and circulated for public review and comment. Because the City has identified potentially significant impacts (and proposed mitigation measures) not discussed in the previous EIR, the Addendum is not appropriate and the City must prepare and circulate a subsequent EIR pursuant to Guidelines section 15162.

In addition, the City seeks to rely on CEQA Guidelines Section 15152 to tier from the Downtown Strategy 2040 EIR. The Downtown Strategy 2040 EIR does not contemplate the use of density bonuses to inflate the size and impacts of Projects tiering from it. The City's reliance on anticipated density bonus approvals to claim that the Project is currently "consistent" with existing zoning and land use plans so as to rely on an addendum to the Downtown Strategy 2040 EIR is entirely unsupported and contrary to CEQA.

CEQA requires that the lead agency determine the appropriate form of CEQA review at the time the project application is submitted, not based on speculative future approvals.²⁸ CEQA requires lead agency to analyze the 'whole' of the project – this includes all foreseeable discretionary approvals.²⁹ For example, in *Laurel Heights Improvement Association v. Regents of University of California*³⁰ the California Supreme Court rejected an EIR where the agency failed to consider the

²⁸ CEQA Guidelines, § 15063 (timing and process of initial study); Pub. Resources Code, §§ 21003.1 (early identification of environmental effects), 21006 (CEQA is integral to agency decision making).

²⁹ Pub. Resources Code, § 21082.2(a) ("The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record"); CEQA Guidelines, § 15003(h) ("The lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect" and citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 401 ("*Laurel Heights I*")

³⁰ *Laurel Heights I, supra*, 47 Cal.3d 376.

whole of the project. The agency defined the project as involving “only the acquisition and operation of an existing facility and negligible or no expansion of use of existing use at that facility.”³¹ However, the Court found that future expansion of the project was a reasonably foreseeable consequence of the project and would likely change the scope or nature of the initial project or its environmental effects.³² Here, approval of the Project’s requested density bonus is a reasonably foreseeable consequence of the Project. The City therefore has a duty to analyze the impacts of the increase in density (and other associated impacts) that would result from approval of the density bonus.

When viewed as a whole, there is no dispute that the Project exceeds applicable zoning, density and height requirements, and does not qualify for approval under the City’s Design Review and Historic Preservation requirements. Rather, the Project requires a conditional use permit (“CUP”), and must undergo applicable CUP permitting requirements.

By ignoring the Project’s facial inconsistency with City land use requirements, the potentially significant impacts associated with those inconsistencies escape environmental review. As a result, the City has failed to comply with its CEQA obligations to disclose the nature and severity of the Project’s impacts, and the City lacks substantial evidence to support its density bonus findings that the Project’s proposed floor area ratio (“FAR”) waiver and additional density bonus units would not have a specific adverse impact upon public health or safety, the environment, or harm historical property.³³ The Project’s FAR waiver and density bonus may exacerbate the Project’s impacts from air quality, public health, greenhouse gas emissions, and harm to historical property.

IV. THE PROJECT RESULTS IN SIGNIFICANT UNMITIGATED IMPACTS TO HISTORICAL RESOURCES

The Project site at 17 E. Santa Clara Street is listed as a Structure of Merit on the City of San Jose’s local inventory.³⁴ San Jose Municipal Code provides that Structures of Merit are structures determined to be a resource through evaluation

³¹ *Laurel Heights I, supra*, 47 Cal.3d at p. 388.

³² *Laurel Heights I, supra*, 47 Cal.3d at p. 396.

³³ Gov. Code, § 65589.5(d)(2).

³⁴ Addendum, Appendix B, Historical Evaluation, p. 1; City of San Jose, Planning, Building & Code Enforcement, Historic Resources Inventory, available at: <https://www.sanjoseca.gov/your-government/departments/planning-building-code-enforcement/planning-division/historic-preservation/historic-resources-inventory>.

by the Historic Landmarks Commission's Historic Evaluation Criteria and which preservation should be a high priority. A Structure of Merit (Defined in the San Jose 2040 General Plan is “An important historic property or feature of lesser significant, and that does not qualify as a City Landmark or for the California or National Registers but attempts should be made for preservation to the extent feasible under the 2040 General Plan goals and policies.”³⁵ The Downtown Strategy 2040 EIR in Policy LU-14.4 provides that the City should “Discourage demolition of any building or structure listed on or eligible for the Historic Resources Inventory as a Structure of Merit by pursuing the alternatives of rehabilitation, re-use on the subject site, and/or relocation of the resource.”³⁶ That the Project only preserves the Art Deco façade as a Structure of Merit, because it “contributes to the historical layers of downtown” per Historic Landmarks Commission (HLC) Design Review Committee recommendation, is insufficient to fully preserve the historical resources onsite.³⁷ The City must make all feasible efforts to preserve the Structure of Merit at the Project site, and analyze the significant detrimental effect of Project construction on historical resources in a subsequent EIR.

V. THE PROJECT RESULTS IN SIGNIFICANT AIR QUALITY IMPACTS NOT ANALYZED IN THE DOWNTOWN STRATEGY 2040 EIR

A. The Project Fails to Implement Feasible Mitigation to Reduce Construction Air Emissions

The Downtown Strategy 2040 EIR includes measures that may reduce air quality impacts, but the Addendum fails to implement them. The Downtown Strategy 2040 EIR provides that additional measures that would reduce emissions include “equip all construction equipment, diesel trucks, and generators with Best Available Control Technology for emission reductions of NO_x and PM.”³⁸

New information shows that the Best Available Control Technology for emission reductions of NO_x and PM is through the use of Tier 4 Final Emission standard engines.³⁹ The Downtown Strategy 2040 EIR does not require the use of

³⁵ City of San Jose Historic Resources Inventory, Classification of Resources, available at: <https://www.sanjoseca.gov/home/showdocument?id=75623>.

³⁶ City of San Jose, Downtown Strategy 2040 Integrated Final EIR, p. 97.

³⁷ City of San Jose, Site Development Permit (H20-026) p. 2 of 28.

³⁸ City of San Jose, Downtown Strategy 2040 Integrated Final EIR, p. 64.

³⁹ Clark Comments, p. 5.

Tier 4 final engines. The Addendum likewise does not require Tier 4 Final engines. But Mitigation Measure (“MM”) AQ-1 provides:

1. All construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total shall meet U.S. EPA Tier 4 emission standards for particulate matter (PM₁₀ and PM_{2.5}), if feasible, otherwise,
 - a. If use of Tier 4 equipment is not available, alternatively use equipment that meets U.S. EPA emission standards for Tier 3 engines and include particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a minimum of 50 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment.
 - b. Use of alternatively fueled or electric equipment.⁴⁰

Dr. Clark concluded that, not only is MM AQ-1 not the Best Available Control Technology, but that Tier 4 Interim emissions and Tier 3 emissions standards would not adequately reduce the Project’s construction emissions to less than significant levels.⁴¹ Dr. Clark concludes that Tier 3 equipment would put out substantially more particulate matter (PM₁₀ and PM_{2.5}) than Tier 4 Interim and Tier 4 Final equipment.⁴² Tier 3 equipment puts out 80% to 89% more PM₁₀ than Tier 4 Interim equipment and 85% to 91% more PM₁₀ than Tier 4 Final equipment. Tier 3 equipment puts out 81% to 89% more PM_{2.5} than Tier 4 Interim equipment and 85% to 92% more PM_{2.5} than Tier 4 Final equipment.⁴³ Substantial evidence presented herein, and in Dr. Clark’s comments, that the Project’s air quality impacts may be reduced through the use of Tier 4 Final Mitigation, but such measures were not implemented in the Addendum nor the Downtown Strategy 2040 EIR.

A subsequent EIR must be prepared, as here, when mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the

⁴⁰ Addendum p. 59.

⁴¹ Clark Comments, p. 5.

⁴² Clark Comments, p. 6.

⁴³ *Id.*

environment, but the project proponents decline to adopt the mitigation measure or alternative.⁴⁴ Here, the Addendum fails to incorporate the Best Available Control Technology in the form of Tier 4 Final engine. A subsequent EIR must be prepared because Tier 4 Final mitigation measures are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative. A subsequent EIR must be prepared and circulated for public review in compliance with CEQA.

B. The Addendum Relies on Inaccurate Air Quality Modeling

Dr. Clark concluded that the Addendum relies on modeling which assumes the use of Tier 4 Final emission standards, but Tier 4 Final engines are not required by the Addendum or the Downtown Strategy 2040 EIR.⁴⁵ This results in the artificial reduction of the Project's construction air emissions. Inaccurate modeling may not be relied on for determining the significance of air quality impacts. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁴⁶ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁴⁷

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁴⁸ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.⁴⁹ 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."⁵⁰

Even when the substantial evidence standard is applicable to agency

⁴⁴ 14 CCR, § 15162(a)(1)-(3) (emphasis added).

⁴⁵ *Id.* at 5.

⁴⁶ 14 CCR § 15064(b).

⁴⁷ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁴⁸ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁴⁹ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁵⁰ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

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.’⁵¹ Here, the City’s failure to provide accurate air modeling associated with the Tier 4 Final mitigation results in a failure to proceed in the manner required by CEQA. A subsequent EIR must be prepared which accurately analyzes and mitigates the Project’s air emissions associated.

C. The Project Fails to Mitigate Air Quality Impacts Associated with Project Operation and the Backup Generator

The Addendum’s discussion of air quality impacts fails to comply with CEQA. First, the Addendum fails to analyze the full extent of the Project’s operational air emissions by failing to accurately model the backup generators’ air emissions. The Addendum fails to analyze any emissions associated with the backup generator during Project operation. According to SCAQMD Rules 1110.2, 1470, back-up generators are allowed to operate for up to 200 hours per year and maintenance cannot exceed more than 50 hours per year.⁵² The Addendum must be revised to quantify and analyze the necessary maintenance and testing period for the generators onsite.

Second, the Addendum fails to analyze the Project’s use of backup generator during a power outage. According to Commenters’ air quality consultant Dr. Clark, it is more likely that the Backup Generators would need to be used more than 150 hours per year, due to increasing Public Safety Power Shutoff (“PSPS”) events and extreme heat events.⁵³

During a PSPS event, the use of stationary generators is permitted as an emergency use.⁵⁴ For every PSPS or extreme heat event, significant GHG emissions i.e., carbon dioxide equivalents and diesel particulate matter (“DPM”) will be released.⁵⁵ DPM has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including forty known cancer-causing organic substances.⁵⁶ Dr. Clark notes that the California Air Resources Board

⁵¹ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁵² Clark Comments, p. 9.

⁵³ *Id.*

⁵⁴ 17 CCR 93115.4(a)(30)(A)(2).

⁵⁵ Clark Comments, p. 9.

⁵⁶ *Id.*

found that the 1,810 additional stationary generators during a PSPS in October 2019 generated 126 tons of NO_x, 8.3 tons of particulate matter, and 8.3 tons of DPM.⁵⁷ Therefore, the GHG, air quality, and DPM emission impacts associated with the use of the Backup Generator are significant, but the Addendum fails to adequately analyze or mitigate such impacts.⁵⁸ The failure to analyze is a failure to proceed in a manner required by law.⁵⁹ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required 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.⁶⁰ 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."⁶¹ 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."⁶²

The Addendum must be withdrawn, and the City must circulate a subsequent EIR for public review to adequately analyze impacts associated with emissions from the Backup Generators.

⁵⁷ California Air Resources Board, Potential Emissions Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020). Available at: https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf.

⁵⁸ Clark Comments, p. 9.

⁵⁹ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁶⁰ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁶¹ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁶² *Berkeley Jets*, 91 Cal.App.4th at 1355.

VI. THE PROJECT RESULTS IN SIGNIFICANT HAZARDS AND HAZARDOUS MATERIALS IMPACTS NOT ANALYZED IN THE DOWNTOWN STRATEGY 2040 EIR

A. The Addendum Fails to Adequately Analyze the Impacts of Hazardous Contamination

The Project risks exacerbating hazardous contamination in soil and groundwater. According to the Office of Environmental Health Hazard Assessment (OEHHA), on behalf of the California Environmental Protection Agency (CalEPA), the Project site is within the 91st percentile in terms of groundwater threats.⁶³ The Project is also within the 41st percentile for toxic releases from facilities.⁶⁴ The Project site is adjoined on its northeastern corner by a site listed as an open Spills, Leaks, Investigations, and Cleanup (SLIC) release case in the regulatory database.⁶⁵ The site is contaminated with halogenated volatile organic compounds (HVOCs), including PCE, in soil, soil-gas, indoor air, and shallow groundwater at concentrations above their respective regulatory screening criteria at this site.⁶⁶ In addition, elevated HVOC levels have been detected in soil, soil-gas, groundwater, and indoor air samples collected from the properties located north/northeast of the Project site.⁶⁷

CEQA requires EIRs to analyze any significant environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected.⁶⁸ Both CEQA and the CEQA Guidelines require an analysis of a project's effects on the environment and human health. CEQA also provides that the EIR should evaluate any potentially significant direct, indirect, or cumulative environmental impacts of locating development in areas susceptible to hazardous conditions, including both short-term and long-term conditions.⁶⁹

The Addendum fails to analyze the Project's risk of exacerbating existing environmental conditions and bringing people to the area affected, in violation of

⁶³ CalEnviroScreen 3.0 Results (June 2018 Update) Available at: <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>.

⁶⁴ *Id.*

⁶⁵ Addendum p. 124.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 14 CCR 15126.2(a); *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 388.

⁶⁹ 14 CCR 15126.2(a).

CEQA. The Addendum must be withdrawn, and a Subsequent EIR pursuant to CEQA Guidelines Section 15162 must be prepared and circulated for public review.

B. The Addendum Fails to Mitigate the Impacts of Hazardous Contamination

Mitigation Measure HAZ-1 is inadequate because it constitutes impermissibly deferred analysis. CEQA Guidelines § 15126.4(a)(1)(B) provide that formulation of mitigation measures shall not be deferred until some future time.⁷⁰ “Impermissible deferral of mitigation measures occur when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR.”⁷¹ Here, the Addendum states that a Phase II Environmental Site Assessment will be conducted after Project approval, at which time additional groundwater sampling and mitigation may be proposed.⁷²

“An EIR is inadequate if ‘[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.’ ”⁷³ Here, MM HAZ-1 would require additional analysis and provide mitigation measures that should have been included in an EIR, rather than an Addendum which is not required to be circulated for public review. The Addendum fails as an informational document for impermissibly deferred analysis and mitigation.

The CEQA Guidelines provide that “[t]he specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review...”⁷⁴ The Addendum does not state why specifying the Phase II site assessment and additional mitigation measures were impractical or infeasible at the time the Addendum was drafted. In *Preserve Wild Santee v. City of Santee*, the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures “was impractical or infeasible at

⁷⁰ 14 CCR 15126.4(a)(1)(B).

⁷¹ *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 915-916.

⁷² Addendum p. 126-127.

⁷³ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

⁷⁴ 14 CCR § 15126.4(a)(1)(B).

the time the EIR was certified.”⁷⁵ The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.⁷⁶ Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.⁷⁷ Here, the fact that the Site and Groundwater Management Plan will be approved later by the Director of Planning, Building and Code Enforcement or the Director’s designee does not cure the informational defects in this Addendum.⁷⁸

VII. THE CITY CANNOT MAKE THE NECESSARY FINDINGS TO APPROVE THE SITE DEVELOPMENT PERMIT

In order to approve a Site Development Permit, the City must make all the following findings⁷⁹:

1. The site development permit, as approved, is consistent with and will further the policies of the general plan and applicable specific plans and area development policies.
2. The site development permit, as approved, conforms with the zoning code and all other provisions of the San José Municipal Code applicable to the project.
3. The site development permit, as approved, is consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency.
4. The interrelationship between the orientation, location, and elevations of proposed buildings and structures and other uses on-site are mutually compatible and aesthetically harmonious.
5. The orientation, location and elevation of the proposed buildings and structures and other uses on the site are compatible with and are aesthetically harmonious with adjacent development or the character of the neighborhood.
6. The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor

⁷⁵ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.

⁷⁶ *Id.*

⁷⁷ *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794.

⁷⁸ *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.

⁷⁹ San Jose Zoning Code § 20.100.630.

which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.

7. Landscaping, irrigation systems, walls and fences, features to conceal outdoor activities, exterior heating, ventilating, plumbing, utility and trash facilities are sufficient to maintain or upgrade the appearance of the neighborhood.
8. Traffic access, pedestrian access and parking are adequate.

The director, the planning commission, or the city council shall deny the application where the information submitted by the applicant or presented at the public hearing fails to satisfactorily substantiate such findings.

The Addendum fails to analyze the Project's nonconformance with the Site Development Permit requirements with respect to the air quality, dust, and odor impacts associated with Project construction and operation of the Project. As Dr. Clark noted in his comments, the impacts from construction emissions and the backup generator may result in significant unacceptable negative effects on the adjacent property and properties. Additionally, absent the use of Tier 4 Final engines, the project will result in unacceptable negative effects associated with diesel particulate matter. These impacts will adversely impact sensitive receptors at adjacent properties. These include the future 19 North Second Street Affordable Senior Housing project to the northeast of the project site.⁸⁰ The maximum excess residential cancer risks at these locations would be 17.19 per million for infant risk, which is greater than the BAAQMD significance threshold of 10 in one million for cancer risk.⁸¹ The dust from construction may negatively affect the sensitive receptors within adjacent properties, but the Addendum fails to adequately analyze and mitigate such impacts. As such, the City cannot make the necessary findings to approve the Site Development Permit, absent the circulation of a Subsequent EIR which adequately analyzes and mitigate the Project's significant air, dust, and health risk impacts.

VIII. CONCLUSION

For the reasons discussed above, the Addendum remains wholly inadequate under CEQA. The City must prepare a Subsequent EIR pursuant to CEQA Guidelines Section 15162 to provide legally adequate analysis of, and mitigation for,

⁸⁰ Addendum p. 54.

⁸¹ *Id.*

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all of the Project's potentially significant impacts. Until a subsequent EIR is circulated for public review, the City may not lawfully approve the Project, nor the Site Development Permit.

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

Sincerely,



Kelilah D. Federman

Attachments
KDF:acp

