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Re: **Appeal of the Environmental Determination - Addendum to the Downtown Strategy 2040 Final Environmental Impact Report for Eterna Tower Mixed-Use Development (File No. H20-026)**

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

We are writing on behalf of Silicon Valley Residents for Responsible Development ("Silicon Valley Residents") to appeal the San Jose Planning Director's August 24, 2022 environmental clearance determination for and approval of the Eterna Tower Mixed-Use Development Project (File No. H20-026) ("Project"),[1] based on the Addendum ("Addendum") to the Downtown Strategy 2040 Final Environmental Impact Report ("Downtown Strategy 2040 FEIR") for the Project prepared by the City of San Jose ("City") pursuant to the California Environmental Quality Act ("CEQA").[2]

[1] City of San Jose, Planning, Building and Code Enforcement, Planning Director Hearing (August 24, 2022) Action Minutes. Available at: https://www.sanjoseca.gov/home/showpublisheddocument/88897.
[2] Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§ 15000 et seq.

This Appeal is accompanied by payment of the required appeal fee of $250 in accordance with the City of San Jose's Planning Application Filing Fee Schedule.[3]

The Project, proposed by ROYGBIV Real Estate Development LLC ("Applicant") includes construction of a 26-story, 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.[4] The Project would include 192 residential units and approximately 5,217 square feet of office space on the second floor. 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 Inventory[5]; both are proposed for demolition.

The Project is within the DC Downtown Primary Commercial Zoning District, and the Downtown General Plan Designation.[6] 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.[7] Construction of the Project would occur over a period of 29 months.[8] The Project would include a diesel-powered backup generator.[9]

This Appeal letter, and Silicon Valley Residents' attached August 23, 2022 comments to the Planning Director,[10] demonstrate that the Planning Director's decision to approve the Project violated CEQA, land use laws and the City's municipal codes, and was not supported by substantial evidence in the record. Specifically, our prior comments, and the comments of our expert consultant James Clark of Clark & Associates identified several flaws in the City's environmental analysis, and provided new information and substantial evidence demonstrating that the Addendum fails as an informational document under CEQA and is

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[3] City of San Jose, Planning Application Filing Fee Schedule, Effective August 15, 2022. Available at: https://www.sanjoseca.gov/home/showdocument?id=24803.
[4] 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) (hereinafter "Addendum").
[5] Addendum, Appendix B, Historical Evaluation, p. 1; City of San Jose, Planning, Building & Code Enforcement, Historic Resources Inventory.
[6] San Jose Zoning Code § 20.70.100.
[7] City of San Jose, Site Development Permit (H20-026) p. 10 of 28.
[8] Addendum p. 6.
[9] *Id.* at 1.
[10] Silicon Valley Residents for Responsible Development's August 23, 22 written comments to the Planning Director are attached hereto as **Exhibit A** and incorporated by reference.

inappropriate under CEQA because it identifies significant environmental impacts not discussed in the Downtown Strategy 2040 FEIR, fails to comply with the requirements for tiering from a program-level environmental impact report, fails to evaluate the project-level impacts in the areas of public health, air quality, contaminant hazards and historical resources, and lacks substantial evidence to support the City's environmental conclusions.

This Appeal is "based upon issues that were raised previously either orally or in writing" to the Planning Director prior to approval of the Project, as specified by Section 21.04.140 subdivision (E)(3) of the San Jose Municipal Code and as allowed pursuant to CEQA and State land use laws.[11] This Appeal is based on the issues raised in Silicon Valley Residents' August 23, 2022 comments, and in oral comments at the August 24, 2022 Planning Director Hearing.[12]

Silicon Valley Residents urges the City Council to grant this Appeal and remand the Project to City Staff to prepare a Subsequent EIR for the Project. Silicon Valley Residents reserves the right to submit supplemental comments and evidence at any later hearings and proceedings related to the Project, in accordance with State law.[13]

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

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[11] San Jose Muni. Code § 21.04.140 subd. (E)(3) (providing that "[n]o appeal shall be considered unless it is based upon issues that were raised previously either orally or in writing to a recommending body or a decision-making body at or prior to a public hearing whenever the underlying project is considered at a public hearing.")

[12] Exhibit A.

[13] 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.

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. 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.[14] The EIR is the "heart" of this requirement.[15] 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."[16]

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and reflect a good faith effort at full disclosure."[17] An adequate EIR must contain facts and analysis, not just an agency's conclusions.[18] CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.[19]

Further, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by

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[14] 14 Cal. Code Regs. ("CCR") § 15002(a)(1); *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.
[15] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.
[16] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[17] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[18] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[19] PRC § 21100(b)(1); 14 CCR § 15126.2(a).

requiring the consideration of environmentally superior alternatives.[20] If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[21] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[22] 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.[23] A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[24] This approach helps "ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[25]

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**

[20] 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.
[21] PRC §§ 21002.1(a), 21100(b)(3).
[22] *Id*., §§ 21002-21002.1.
[23] 14 CCR § 15126.4(a)(2).
[24] *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).
[25] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

was certified as complete, becomes available.[26]

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

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

[26] PRC, § 21166 (emphasis added).

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.[27]

Only where ***none*** of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an addendum or no further documentation.[28] For addenda specifically, CEQA allows an addendum to a previously certified EIR if "some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred."[29] The City's decision not to prepare a Subsequent EIR and to instead rely on an addendum must be supported by substantial evidence.[30]

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 (and proposes mitigation measures) with respect to air quality, soil and groundwater hazards, and noise and vibration—impacts and mitigation that were not addressed in the 2040 Downtown Strategy EIR. This fact alone makes an addendum inappropriate under CEQA and requires preparation of an EIR or mitigated negative declaration ("MND") to be circulated for public review and comment.

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 or MND that adequately addresses all of the Project's potentially significant impacts and proposes appropriate mitigation measures.[31]

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[27] 14 CCR, § 15162(a)(1)-(3) (emphasis added).
[28] 14 CCR, § 15162(b).
[29] 14 CCR, § 15164.
[30] *Id*. §§ 15162 (a), 15164(e), and 15168(c)(4).
[31] 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.").

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 (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. Tiering refers to "using the analysis of general matters contained in a broader EIR…with later EIRs or negative declarations" and is appropriate when the sequence of analysis is from a program EIR to a site-specific EIR or negative declaration.[32] The CEQA Guidelines only recognize the use of an EIR or a negative declaration, not an addendum, to tier from a program EIR. The Addendum is not an appropriate environmental review document to tier from the Downtown Strategy 2040 EIR.

Moreover, 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

[32] 14 CCR, § 15152(a) and (b).

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.[33] CEQA requires lead agency to analyze the 'whole' of the project – this includes all foreseeable discretionary approvals.[34] For example, in *Laurel Heights Improvement Association v. Regents of University of California*[35] the California Supreme Court rejected an EIR where the agency failed to consider the whole of the project. The agency defined the project as involving "only the acquisition and operation of an existing facility and negligible or no expansion of use of existing use at that facility."[36] 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.[37] 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

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[33] 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).
[34] 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")*
[35] *Laurel Heights I, supra,* 47 Cal.3d 376.
[36] *Laurel Heights I, supra,* 47 Cal.3d at p. 388.
[37] *Laurel Heights I, supra,* 47 Cal.3d at p. 396.

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.[38] 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 AIR QUALITY IMPACTS NOT ANALYZED IN THE DOWNTOWN STRATEGY 2040 EIR

A. The Air Quality Impacts of the Project Would Result in Unacceptable Negative Effects on Adjacent Properties

Project construction may result in significant emissions of diesel particulate matter and dust which will cause unacceptable negative effects on adjacent sensitive receptors, including the future 19 North Second Street Affordable Senior Housing project to the northeast of the Project site.[39] The City should not have approved the Site Development Permit for the Project, because the City could not support a finding that:

> The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor 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.

The dust and diesel particulate matter emissions from the Project are significant under CEQA and result in an unacceptable negative effect on adjacent properties.[40] 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. 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

[38] Gov. Code, § 65589.5(d)(2).
[39] Clark Comments, p. 2; Addendum p. 54.
[40] Clark Comments, p. 5.

10 in one million for cancer risk.[41] 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 did not have substantial evidence to make the necessary findings to approve the Site Development Permit. The City must adequately analyze and mitigate the Project's significant air, dust, and health risk impacts in a Subsequent EIR to comply with CEQA.

B. 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 to "equip all construction equipment, diesel trucks, and generators with Best Available Control Technology for emission reductions of NOx and PM."[42]

New information which was not known and could not have been known at the time of preparation of the Downtown Strategy 2040 EIR shows that the Best Available Control Technology for emission reductions of NOx and PM is through the use of Tier 4 Final Emission standard engines.[43] The Downtown Strategy 2040 EIR does not require the use of Tier 4 final engines. The Addendum likewise does not require Tier 4 Final engines. 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 PM2.5), 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.[44]

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[41] *Id.*
[42] City of San Jose, Downtown Strategy 2040 Integrated Final EIR, p. 64.
[43] Clark Comments, p. 5.
[44] Addendum p. 59.

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 safe levels.[45] Dr. Clark explains that Tier 3 equipment would put out substantially more particulate matter (PM_{10} and $PM_{2.5}$) than Tier 4 Interim and Tier 4 Final equipment.[46] Tier 3 equipment puts out 80% to 89% more PM_{10} than Tier 4 Interim equipment and 85% to 91% more PM_{10} 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.[47] 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 environment, but the project proponents decline to adopt the mitigation measure or alternative.[48] Here, the Addendum fails to incorporate the Best Available Control Technology in the form of Tier 4 Final engines. A subsequent EIR must be prepared because Tier 4 Final mitigation measures are considerably different from those analyzed in the previous EIR and would substantially reduce one or more significant effects on the environment, but the project proponents declined to adopt the mitigation measure. The City should grant this Appeal and require the preparation of a subsequent EIR to be circulated for public review in compliance with CEQA.

C. The Addendum Relies on Inaccurate Air Quality Modeling

The Addendum is inadequate under CEQA for failing to accurately analyze the Project's Air Quality impacts. 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

[45] Clark Comments, p. 5.
[46] Clark Comments, p. 6.
[47] *Id.*
[48] 14 CCR, § 15162(a)(1)-(3) (emphasis added).

EIR.[49] 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.[50] An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.[51]

The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.[52] 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.[53] 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."[54] Here, the City's failure to provide accurate air modeling associated with the Tier 4 Final mitigation is a failure to disclose information about the Project's environmental effects and 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 and includes a requirement to utilize Tier 4 Final Emission standards for Project Construction before the Project can be approved.

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

The Project will utilize a stand-by diesel engine backup generator, which will be located on the basement level.[55] The Addendum states that the Generator would be operated for testing and maintenance purposes, with a maximum of 50 hours per year of nonemergency operation under normal conditions.[56] The Addendum and the

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[49] *Id.* at 5.
[50] 14 CCR § 15064(b).
[51] *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.
[52] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
[53] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[54] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[55] Addendum, p. 1; 54.
[56] *Id.* at 55.

Downtown Strategy 2040 FEIR failed to analyze the Project's potential use of the backup generator for 200 hours per year or more, as described in Dr. Clark's comments.

As such, 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. 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.[57] The Addendum must be revised to quantify and analyze the full extent of 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 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.[58]

During a PSPS event, the use of stationary generators is permitted as an emergency use.[59] For every PSPS or extreme heat event, significant GHG emissions i.e., carbon dioxide equivalents and diesel particulate matter ("DPM") will be released.[60] DPM has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including forty known cancer-causing organic substances.[61] Dr. Clark notes that the California Air Resources Board found that the 1,810 additional stationary generators during a PSPS in October 2019 generated 126 tons of NOx, 8.3 tons of particulate matter, and 8.3 tons of DPM.[62] 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.[63] The failure to analyze is a failure to proceed in a manner required by law.[64] Challenges to an agency's failure to

[57] Clark Comments, p. 9.
[58] Clark Comments, p. 9.
[59] 17 CCR 93115.4(a)(30)(A)(2).
[60] Clark Comments, p. 9.
[61] *Id.*
[62] 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.
[63] Clark Comments, p. 9.
[64] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

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.[65] 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."[66] 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.'"[67]

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

V. 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

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]

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[65] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[66] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[67] *Berkeley Jets*, 91 Cal.App.4th at 1355.
[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).

The Project risks exacerbating hazardous contamination in soil and groundwater by bringing development and people to the area affected. 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.[70] The Project is also within the 41st percentile for toxic releases from facilities.[71] 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.[72] 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.[73] 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.[74]

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

"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.' "[75] Here, MM HAZ-1 would require additional analysis and provide mitigation measures that should have been included in an EIR. The Addendum fails as an informational document for impermissibly deferred analysis and mitigation.

Mitigation Measure HAZ-1 is inadequate because it constitutes impermissibly deferred analysis. The formulation of mitigation measures in the

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[70] CalEnviroScreen 3.0 Results (June 2018 Update) Available at: https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30.
[71] *Id.*
[72] Addendum p. 124.
[73] *Id.*
[74] Addendum p. 124.
[75] *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.

proposed Site and Groundwater Management Plan is deferred until some future time in violation of CEQA.[76] "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."[77] 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.[78]

> MM HAZ-1 provides:
> The project applicant shall retain a qualified consultant to conduct a Phase II analysis consisting of focused sampling and analysis for contamination of soil, soil vapor, and/or groundwater on-site prior to issuance of any grading, building, or demolition permits. Sampling on the site shall be under the regulatory oversight from the Santa Clara County Department of Environmental Health's (SCCDEHs) Voluntary Cleanup Program, or an equivalent program by another oversight agency, to address soil and groundwater contamination discovered on the property. *Removal and off-site disposal of the soil at appropriate landfills during construction of the basement level will likely constitute the mitigation required; however, the oversight agency will approve the proposed mitigation, or determine if additional groundwater sampling and mitigation is necessary*. Based on the results of the contamination levels at the site, the project applicant shall prepare, under the guidance of the oversight agency, a Site and Groundwater Management Plan (SGMP) or equivalent report. The *SGMP or equivalent report must establish and implement remedial measures and/or soil management practices to ensure construction worker safety and the health of future workers and visitors*. The results of Phase II investigation and evidence of regulatory oversight, if required, and the appropriate plan such as an SGMP or equivalent document shall be provided to the Director of Planning, Building and Code Enforcement or the Director's designee.

The CEQA Guidelines provide that "[t]he specific details of a mitigation measure…may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review…"[79] The Addendum does not state why conducting a Phase II site assessment or

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[76] 14 CCR 15126.4(a)(1)(B).
[77] *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 915-916.
[78] Addendum p. 126-127.
[79] 14 CCR § 15126.4(a)(1)(B).

preparing a SGMP or identifying necessary 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 the time the EIR was certified."[80] The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.[81] 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.[82] 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.[83] The City should grant this Appeal and remand the Project to City Planning Staff to prepare a legally adequate subsequent EIR which fully analyzes and mitigates the Project's hazards and hazardous contamination impacts to satisfy CEQA.

VI. THE HOUSING ACCOUNTABILITY ACT WOULD NOT PRECLUDE ADDITIONAL CEQA REVIEW

At the August 23, 2022 Planning Director's Hearing, a representative of YIMBY (Yes In My Backyard) Law stated that the Project is subject to the Housing Accountability Act ("HAA"), and that YIMBY Law would legally challenge any action by the City to disapprove the Project.

Upholding Silicon Valley Residents' Appeal and remanding the Project to City Staff to draft a Subsequent EIR would not be "disapproving" the Project within the meaning of the HAA.[84] Conducting additional and proper CEQA review prior to

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[80] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.
[81] *Id.*
[82] *Endangered Habitats League, Inc. v. County of Orange,* (2005) 131 Cal.App.4th 777, 794.
[83] *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.
[84] Gov. Code, § 65589.5, subd. (h)(6) ("Disapprove the housing development project" includes any instance in which a local agency does either of the following: (A) Votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit. (B) Fails to comply with the time periods specified in subdivision (a) of Section 65950. An extension of time pursuant to Article 5 (commencing with Section 65950) shall be deemed to be an extension of time pursuant to this paragraph.

a final decision on the Project is a reasonable, and good-faith exercise of the City's discretion. As detailed below, the City would not be subject to liability under the HAA for directing Staff to prepare a Subsequent EIR.

The HAA does not relieve the City of its obligations to comply with CEQA. HAA Subdivision (e) provides that nothing "in this section be construed to relieve the local agency from making one or more of the findings required pursuant to [CEQA]."[85] The legislative report on SB 2011 states that "[t]he bill provides an exception for…CEQA." The legislature specifically carved out the CEQA to ensure that the HAA is not used to circumvent it.[86]

As the court of appeal explained:

> "[T]he Housing Accountability Act has no provision automatically approving EIRs if local action is not completed within a specific period. It [ ] was enacted after CEQA, but there is no indication that the legislature meant to modify or accelerate CEQA's procedures. Again, the indication is to the contrary. The Housing Accountability Act expressly states that "Nothing in this section shall be construed… to relieve the local agency from making one or more of the findings required pursuant to Section 210118… or otherwise complying with the California Environmental Quality Act…" But it specifically pegs its applicability to the approval, denial or conditional approval of a "housing development project" which, as previously noted, can occur only after the EIR is certified."[87]

The HAA and subsequent caselaw upheld local agencies' duty to comply with CEQA, even if the Project is subject to the HAA. Here, the City's action to remand the Project to Staff to prepare a Subsequent EIR is required by CEQA and would not violate the HAA.

VII. CONCLUSION

For the reasons stated herein, we urge the City Council to vacate the Planning Director's environmental clearance determination and approval of the

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[85] Gov. Code, § 65589.5, subd. (e).
[86] California Renters Legal Advocacy and Education Fund et. al. v. City of Sonoma, Case No. SCV-262716, Order After Hearing, https://carlaef.org/legal-case/149-fourth-st-sonoma/documents/order-after-hearing/ (Superior Court of California, County of Sonoma).
[87] *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1262.

Project, and to remand the Project to Staff to prepare a revised environmental analysis in a Subsequent EIR as required by CEQA. The new analysis must identify and implement all feasible mitigation measures available to reduce the Project's potentially significant site-specific impacts to less than significant levels before the City reconsiders approving the Project.

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

Sincerely,

Kelilah D. Federman

Attachments
KDF:acp

5622-007acp

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NOTICE OF ENVIRONMENTAL APPEAL

TO BE COMPLETED BY PLANNING STAFF

FILE NUMBER	RECEIPT #
TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX)	AMOUNT DATE BY

TO BE COMPLETED BY PERSON FILING APPEAL

PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.

THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION:

Addendum to the Downtown Strategy 2040 Final EIR for Eterna Tower Mixed-Use Development

REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):
See Attachment 1.

PERSON FILING APPEAL

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SIGNATURE	DATE
Kelilah Federman	8/26/22

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(IF DIFFERENT FROM PERSON FILING APPEAL)

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