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April 30, 2024

Via Email and Overnight Mail

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Via Email Only

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Re: Comments on Agenda Item 3.a: Initial Study/Mitigated Negative Declaration for 865 Embedded Way Industrial Project (H22-022, ER22-113)

Dear Mr. Tu and Ms. Shah:

We are writing on behalf of **Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”)** to provide comments on May 1, 2024 Planning Director Hearing Agenda Item 3.a, regarding the Site Development Permit and Initial Study/Mitigated Negative Declaration (“MND”) prepared by the City of San Jose (“City”) for the 865 Embedded Way Industrial Project (“Project”) (H22-022, ER22-113) (“Project”) proposed by Oppidian, Inc. (“Applicant”).

The Project consists of a Site Development Permit to allow the construction of a one-story, 121,400-square foot industrial/manufacturing warehouse on a vacant 10.17-acre project site. The Project would include a connection to an existing 26-foot-wide drive aisle that extends from the eastern Embedded Way driveway through the adjacent eastern industrial property and currently terminates at the southeastern boundary of the project site. A total of 300 parking spaces would be provided in the surface parking lot surrounding the proposed building. The project would include the removal of 11 trees on-site, 2 of which are ordinance-size.

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Based on our review of the MND and available supporting documents, we conclude that the MND fails to comply with the requirements of the California Environmental Quality Act¹ (“CEQA”). The MND lacks a clear project description, fails to disclose and analyze the Project’s potentially significant environmental impacts and fails to identify enforceable measures that can reduce those impacts to a less than significant level.

As explained in these comments, there is more than a fair argument that the Project will result in potentially significant air quality and public health impacts from construction and operational emissions and transportation impacts. The City may not approve the Project until it prepares an environmental impact report (“EIR”) that adequately analyzes all of the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts. The MND’s flaws also preclude the City from making the findings necessary to approve the Project’s Site Development Permit.

These comments were prepared with the assistance of air quality expert James Clark, PhD² and transportation expert Norman Marshall.³ Dr. Clark and Mr. Marshall provide substantial evidence supporting a fair argument of potentially significant impacts that have not been adequately disclosed, analyzed, or mitigated in the MND. Dr. Clark and Mr. Marshall’s technical comments are attached hereto and are submitted to the City, in addition to the comments in this letter.

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 health and environmental impacts of the Project. The association includes: the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and District Council of Ironworkers and their members and their families; and other individuals that live and/or work in the City of San Jose and Santa Clara County. Accordingly, they would be directly affected by the Project’s environmental

¹ Pub. Resources Code, §§ 21000 et seq.; 14 Cal. Code Regs. (“C.C.R.”) §§ 15000 et seq. (“CEQA Guidelines”).

² **Exhibit A:** April 30, 204 James Clark Comment Letter on Initial Study/Mitigated Negative Declaration For 865 Embedded Way Industrial Project, City of San Jose, California File Nos. H22-022 & ER22-113 (hereinafter, “Clark Comments”).

³ **Exhibit B:** April 30, 2024 Norm Marshall Comment Letter re 865 Embedded Way Industrial Project (hereinafter, “Marshall Comments”).

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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 onsite.

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 business and industry 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. AN EIR IS REQUIRED

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁴ “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.”⁵ 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.”⁶

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.⁷ CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard. Under that standard, a lead agency “shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.⁸

⁴ See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

⁵ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

⁶ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁷ See Pub. Resources Code § 21100.

⁸ Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

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In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

(1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur*, and (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.⁹

Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”¹⁰ The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.¹¹ An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹²

“Substantial evidence” required to support a fair argument is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”¹³ According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the

⁹ Pub. Resources Code § 21064.5 (emphasis added).

¹⁰ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

¹¹ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹² *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

¹³ CEQA Guidelines § 15384(a).

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environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.”¹⁴

With respect to this Project, the MND fails to satisfy the basic purposes of CEQA. The City failed to adequately investigate, analyze, and disclose the Project’s potentially significant air quality and transportation impacts. Therefore, the City’s conclusions that the Project will have less than significant impacts are unsupported. Whereas the City lacks substantial evidence to support its conclusions, Dr. Clark and Mr. Marshall provide substantial evidence demonstrating that the Project may result in potentially significant impacts on air quality and transportation. Therefore, there is a fair argument that the Project may cause significant impacts requiring the preparation of an EIR.

III. THE MND FAILS TO INCLUDE A COMPLETE, STABLE AND ACCURATE PROJECT DESCRIPTION

The MND does not meet CEQA’s requirements because it fails to include a complete, stable project description, rendering the entire analysis inadequate. Without a complete and accurate project description, the environmental analysis under CEQA can be impermissibly narrow, thus minimizing the Project’s impacts and undercutting public review.¹⁵

CEQA places the burden of environmental investigation on the lead agency rather than the public. Accordingly, a lead agency may not hide behind its failure to provide a complete and accurate project description.¹⁶ Under CEQA, the “project” is defined as “the whole of an action” and the lead agency therefore must describe the entirety of the project’s activities to ensure that all potential impacts of the project will be examined prior to approval.¹⁷ An initial study that fails to describe the

¹⁴ CEQA Guidelines § 15126.4(a)(2).

¹⁵ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

¹⁶ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

¹⁷ CEQA Guidelines § 15378.

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entire project is fatally deficient: “[A] correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA.”¹⁸ Where an agency fails to provide an accurate project description, or fails to gather information and undertake an adequate environmental analysis in its initial study, a negative declaration is inappropriate.¹⁹ An accurate and complete project description is necessary to fully and intelligently evaluate the project’s potential environmental effects.²⁰ Without a complete project description, the environmental analysis under CEQA will be impermissibly narrow, thus minimizing the project’s impacts and undercutting public review.²¹

The MND’s Project Description describes the Project as an industrial/manufacturing warehouse but then states the project is “designed for a research and development (R&D) use” because “a designated end user has not yet been determined.”²² As a warehouse with unidentified future tenants and use, it cannot be known how the Project building will be used once operational. Despite this, the MND states that “the project will be analyzed as an R&D facility.”²³ As both Dr. Clark and Mr. Marshall’s comments highlight, there are vast differences in impacts between a warehouse facility and a R&D facility. As Dr. Clark states, “[t]hese two different uses have different associated traffic and criteria pollutant analyses.”²⁴ Notably, if the Project ultimately moves forward as a warehouse, the number of associated truck trips and diesel particulate matter (“DPM”) emissions would be significantly higher than what is presented in the MND and air quality assessment.²⁵ For example, the Air Quality Study fails to include the emissions from onsite service vehicles that may be used to move to and products from the warehouse.²⁶ The MND therefore fails to analyze or disclose a potentially significant source of criteria and toxic pollutants.²⁷

Similarly, Mr. Marshall states, “there are large differences between categories and great variation in the [trip generation] rates” for warehouse uses as

¹⁸ *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267; see also, *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214.

¹⁹ *El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1597.

²⁰ *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 406.

²¹ *Laurel Heights Improvement Association, supra*, 47 Cal.3d 376.

²² MND, pg. 6.

²³ *Id.*

²⁴ Clark Comments, pg. 7.

²⁵ *Id.*

²⁶ *Id.* at pg. 8.

²⁷ *Id.*

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compared to R&D uses.²⁸ “Actual project trip generation could be significantly higher or lower than the baseline estimate” used to assess the vehicle miles traveled (“VMT”) mitigation proposed in the MND.²⁹ Given the significant differences in associated impacts between the different uses, it is imperative that the MND provide an accurate project description.

The City must prepare and circulate an EIR with a complete, stable and accurate project description that analyzes all of the Project’s potential impacts using realistic and enforceable assumptions about the Project’s operations.

IV. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT WILL HAVE SIGNIFICANT UNMITIGATED AIR QUALITY AND PUBLIC HEALTH IMPACTS

A lead agency’s significance determination must be supported by accurate scientific and factual data.³⁰ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.³¹

These standards apply to an agency’s analysis of public health impacts of a project under CEQA. In *Sierra Club v. County of Fresno*, the California Supreme Court affirmed CEQA’s mandate to protect public health and safety by holding that an EIR fails as an informational document when it fails to disclose the public health impacts from air pollutants that would be generated by a development project.³² In *Sierra Club*, the Supreme Court held that the EIR for the Friant Ranch Project—a 942-acre master-planned, mixed-use development with 2,500 senior residential units, 250,000 square feet of commercial space, and open space on former agricultural land in north central Fresno County—was deficient as a matter of law in its informational discussion of air quality impacts as they relate to adverse human health effects.³³ As the Court explained, “a sufficient discussion of impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of the impact.”³⁴ The Court concluded

²⁸ Marshall Comments, pg. 6.

²⁹ *Id.* at pg. 7.

³⁰ 14 C.C.R. § 15064(b).

³¹ *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

³² *Sierra Club*, 6 Cal.5th at 518–522.

³³ *Id.* at 507–508, 518–522.

³⁴ *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

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that the County's EIR was inadequate for failing to disclose the nature and extent of public health impacts caused by the project's air pollution. As the Court explained, the EIR failed to comply with CEQA because after reading the EIR, "the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin."³⁵ CEQA mandates discussion, supported by substantial evidence, of the nature and magnitude of impacts of air pollution on public health.³⁶

Furthermore, in *Berkeley Jets*, the Court of Appeal held that a CEQA document must analyze the impacts from human exposure to toxic substances.³⁷ In that case, the Port of Oakland approved a development plan for the Oakland International Airport.³⁸ The EIR admitted that the Project would result in an increase in the release of toxic air contaminants ("TACs") and adopted mitigation measures to reduce TAC emissions, but failed to quantify the severity of the Project's impacts on human health.³⁹ The Court held that mitigation alone was insufficient, and that the Port had a duty to analyze the health risks associated with exposure to TACs.⁴⁰ 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."⁴¹

Here, as discussed below, the MND's conclusions regarding the Project's air quality and related public health impacts are unsupported by substantial evidence.

³⁵ *Id.* at 518. CEQA's statutory scheme and legislative intent also include an express mandate that agencies analyze human health impacts and determine whether the "***environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.***" (Public Resources Code § 21083(b)(3) (emphasis added).) Moreover, CEQA directs agencies to "take immediate steps to identify any critical thresholds for the ***health and safety of the people*** of the state and take all coordinated actions necessary to prevent such thresholds being reached." (Public Resources Code § 21000(d) (emphasis added).)

³⁶ *Sierra Club*, 6 Cal.5th at 518–522.

³⁷ *Berkeley Jets*, 91 Cal.App.4th at 1369–1371.

³⁸ *Id.* at 1349–1350.

³⁹ *Id.* at 1364–1371.

⁴⁰ *Id.*

⁴¹ 14 C.C.R. § 15003(b).

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A. The MND’s Air Quality Impact Analysis Improperly Relies on Mitigated Emissions to Conclude that Construction Emissions Are Less Than Significant

Determining whether a project may have a significant effect plays a critical role in the CEQA process.⁴² The determination as to whether a project may have one or more significant effects must be based on substantial evidence in the record.⁴³ Lead agencies can only rely on an MND for a project where they determine that revisions in project plans or proposals made by, or agreed to, by the applicant would avoid or mitigate effects to a point where clearly no significant effect on the environment would occur.⁴⁴

Under CEQA, a project has significant impacts if it “[v]iolate[s] any air quality standard or contribute[s] substantially to an existing or projected air quality violation.”⁴⁵ The Bay Area Air Quality Management District (“BAAQMD” or “Air District”) maintains thresholds of significance for criteria air pollutants that are to be used in determining the significance of a project’s air quality impacts under CEQA.⁴⁶ The MND failed to fully analyze the Project’s construction emissions by improperly applying mitigation measures to unmitigated emissions prior to making its significance determination. By assuming the application of emissions controls to the Project’s unmitigated emissions, the MND “compress[es] the analysis of impacts and mitigation measures into a single issue,”⁴⁷ in violation of CEQA. This approach is prohibited by CEQA because it fails to inform the public of the true severity of an impact. As a result, the MND fails to disclose that Project construction may result in significant emissions that exceed applicable Air District thresholds, resulting in significant, unmitigated air quality and public health impacts.

As Dr. Clark’s comments reveal, the air quality analysis completed for the MND⁴⁸ calculated construction emissions assuming that the construction would incorporate Tier 4 interim equipment.⁴⁹ However, as Dr. Clark highlights, the availability of such equipment is limited and there is nothing in the MND to ensure that such equipment will be used in Project construction. Dr. Clark states: “Without

⁴² CEQA Guidelines § 15064.

⁴³ CEQA Guidelines § 15064(f).

⁴⁴ CEQA Guidelines §§ 15064(f)(2), 15071(c).

⁴⁵ CEQA Appendix G.

⁴⁶ As stated in the MND, the MND relies on BAAQMD’s 2017 thresholds, reproduced in MND, pg.32.

⁴⁷ See *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

⁴⁸ MND, Appendix A: Air Quality and Greenhouse Gas Assessment (hereinafter “AQ Study”).

⁴⁹ Clark Comments, pp. 3-4.

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a binding commitment to only use Tier 4 interim and above construction equipment for all phases of the Project, the emissions from the construction phase will exceed BAAQMD's threshold and will create an adverse health outcome for the community."⁵⁰ Dr. Clark's analysis confirms that, without application of Tier 4 interim controls, the Project's construction emissions will exceed the BAAQMD significance threshold for nitrogen oxides ("NO_x").⁵¹ The MND fails to include specific and enforceable mitigation measures that would bind the Applicant to ensure Tier 4 interim construction equipment is used.

Critically, neither the MND nor the AQ Study calculate or disclose the Project's unmitigated construction emissions. Instead, the AQ Study simply assumes that Tier 4 interim equipment will be used and calculates emissions accordingly. This approach incorrectly dismisses the significance of the Project's actual, unmitigated emissions. Without disclosing the Project's unmitigated construction emissions, the MND only discloses estimated emissions with the application of an unenforceable mitigation measure, the inclusion of Tier 4 interim equipment. This "downward adjustment" of the Project's construction emissions artificially reduces their significance. The MND concludes that the Project's construction emissions are less than significant, based on these unsupported and unenforceable assumptions, and without application of any binding mitigation measures.⁵²

This approach violates CEQA. CEQA defines mitigation as including any measures designed to avoid, minimize, rectify, reduce, or compensate for a significant impact.⁵³ The inclusion of Tier 4 interim equipment in the emissions calculations is clearly designed as mitigation to reduce the Project's construction emissions that would result from using equipment with less efficient emissions controls. As the inclusion is meant to reduce impacts, this makes it a mitigation measure within the meaning of CEQA.

CEQA requires that mitigation measures be fully enforceable through permit conditions, agreements or other legally binding instruments.⁵⁴ When adopting a mitigated negative declaration, the lead agency is required to adopt "a program for reporting on or monitoring the changes which it has either required in the project or

⁵⁰ Clark Comments, pg. 6.

⁵¹ Clark Comments, pg. 4.

⁵² MND, pg. 37.

⁵³ 14 CCR § 15370.

⁵⁴ 14 CCR § 15126.4(a)(2).

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made a condition of approval to mitigate or avoid significant environmental effects.”⁵⁵ Because the City has not required the use of Tier 4 interim equipment as a mitigation measure, it is not included in the Project’s Mitigation Monitoring and Reporting Program (“MMRP”). Therefore, there is nothing to require the use of Tier 4 interim equipment during Project construction, and the MND’s conclusions that Project air quality and public health impacts will be less than significant are completely unsupported.

The Court of Appeal has made clear that mitigation must be incorporated directly into a project’s MMRP to be considered enforceable. In *Lotus v. Department of Transportation*,⁵⁶ an EIR approved by Caltrans contained several measures “[t]o help minimize potential stress on the redwood trees” during construction of a highway. Although those measures were clearly separate mitigation, the project proponents considered them “part of the project.” The EIR concluded that due to the planned implementation of those measures, the project would not result in significant impacts. The Court disagreed, finding that the EIR had “disregard[ed] the requirements of CEQA” by “compressing the analysis of impacts and mitigation measures into a single issue.”⁵⁷ The Court continued, stating “[a]bsent a determination regarding the significance of the impacts ... it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered.”⁵⁸

Similar to the inadequate analysis contained in the *Lotus* EIR, the MND’s Air Quality analysis only shows emissions with mitigation and the MND thus concludes the Project’s air quality emissions will result in less than significant levels prior to mitigation. This approach improperly “compress[es] the analysis of impacts and mitigation measures into a single issue.” Even if the MND’s conclusions were accurate, the use of Tier 4 interim equipment must be incorporated into the Project’s MMRP as formal mitigation measures in order to be factored into the City’s ultimate significance findings. “Simply stating that there will be no significant impacts because the project incorporates ‘special construction techniques’ is not adequate or permissible.”⁵⁹

⁵⁵ CEQA Guidelines § 15074(d).

⁵⁶ *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

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The City has a duty to disclose unmitigated emissions and compare them to the applicable significance thresholds before applying mitigation measures. As a result of its improper reliance on Tier 4 interim equipment to achieve emissions reductions, the MND underestimates the amount of emissions that will be generated by the Project and the effects on nearby sensitive receptors. The City must prepare and circulate an EIR that includes an accurate analysis of the Project's air quality impacts, and incorporates all mitigation measures intended to reduce emissions as binding mitigation in the Project's MMRP.

B. The MND Underestimates Project Operational Emissions and Resultant Health Risks by Omitting Emissions Sources

The MND purports to evaluate and disclose the Project's expected emissions of air pollutants, including diesel particulate matter ("DPM").⁶⁰ However, as explained by Dr. Clark, the emissions modeling excludes known sources of emissions. Specifically, the Air Quality Study's analysis of operational emissions fails to include emissions from the backup generator that will be installed onsite.⁶¹ These emissions, particularly DPM, are crucial components of the Project's overall air quality impact. Exposure to diesel exhaust emissions has been linked to a range of adverse health effects, including respiratory problems, cardiovascular diseases, and even premature death.⁶²

In failing to include these critical emissions, the MND underestimates the Project's operational air quality and public health impacts. The MND's conclusions regarding these impacts are therefore unsupported by substantial evidence, and Dr. Clark's comments provide a fair argument supported by substantial evidence that the Project may have significant air quality and health risk impacts. The City must therefore prepare an EIR that fully analyzes, discloses and mitigates all of the Project's emissions-related impacts.

⁶⁰ MND, pp. 38-39.

⁶¹ Clark Comments, pg. 7.

⁶² U.S. EPA, *Learn About Impacts of Diesel Exhaust and the Diesel Emissions Reduction Act (DERA)*, <https://www.epa.gov/dera/learn-about-impacts-diesel-exhaust-and-diesel-emissions-reduction-act-dera>.

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V. THE MND FAILS TO ADEQUATELY ANALYZE AND MITIGATE THE PROJECT'S POTENTIALLY SIGNIFICANT TRANSPORTATION IMPACTS

The MND's conclusion that transportation impacts from the Project will be less than significant with mitigation is not supported by substantial evidence. Evidence supplied in the accompanying report from transportation expert Norman Marshall provides a fair argument supported by substantial evidence that the Project will have significant unmitigated transportation impacts.

First, Mr. Marshall's analysis using the updated version of the San Jose VMT Evaluation Tool reveals significant deficiencies in the identification of significant impacts and requisite mitigation. Using the updated VMT Tool, Mr. Marshall demonstrates that the proposed project exceeds the VMT threshold for office employment use.⁶³ Despite the MND's assertion that the proposed mitigation is adequate to reduce VMT impacts, Mr. Marshall found that the VMT mitigation package "is only adequate if using the previous version of the City's VMT Evaluation Tool."⁶⁴ Mr. Marshall's comments explain how the mitigation measures proposed in the MND are insufficient to reduce VMT below the established threshold.⁶⁵

Moreover, Mr. Marshall identifies serious flaws in the assumptions underlying the proposed VMT mitigation measures.⁶⁶ One key assumption is the requirement that the vanpool program achieve a 25 percent employee participation rate.⁶⁷ However, Mr. Marshall contends that this assumption is wildly optimistic and likely unattainable, particularly given the unidentified tenant and use of the project.⁶⁸ The MND provides no evidence supporting this assumption and how it plans to achieve a 25 percent participation rate.

Additionally, Mr. Marshall highlights deficiencies in the proposed monitoring of the efficacy of the VMT mitigation measures. While the MND outlines a monitoring approach based on trip counts, Mr. Marshall explains why this method is insufficient for accurately measuring VMT reduction.⁶⁹ Instead, Marshall advocates for a monitoring process that encompasses each of the VMT-reducing

⁶³ Marshall Comments, pg. 4.

⁶⁴ *Id.* at pg. 1.

⁶⁵ *Id.* at pg. 4.

⁶⁶ *Id.* at pg. 5.

⁶⁷ MND, pg. 11.

⁶⁸ Marshall Comments, pg. 5.

⁶⁹ *Id.* at pp. 5-6.

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measures identified in the mitigation plan.⁷⁰ He emphasizes the importance of auditing each traffic demand management (“TDM”) measure to ensure compliance and effectiveness in reducing VMT.⁷¹

Based on Mr. Marshall’s analysis, the MND’s conclusions with respect to the Project’s transportation are not supported by substantial evidence. Mr. Marshall’s comments provide a fair argument supported by substantial evidence that the Project will have significant transportation impacts. These impacts must be analyzed, disclosed, and mitigated in an EIR before the City can approve the Project.

VI. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO APPROVE THE PROJECT’S SITE DEVELOPMENT PERMIT

Under San Jose Municipal Code (“SJMC”) section 20.100.630, the Site Development Permit requires that the City make certain findings, including that the permit as approved is consistent with and will further the policies of the General Plan.⁷² The City must also find that “[t]he 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 effect on adjacent property or properties.”⁷³

As an initial matter, the City may not make the required finding for the Site Development Permit that the Project will not result in unacceptable negative environmental impacts. As demonstrated above, the MND fails to disclose, analyze, or effectively mitigate the Project’s potentially significant impacts on air quality and transportation. Accordingly, the Project will have an unacceptable negative effect on adjacent property, as even “insignificant” impacts under CEQA can be deemed so. Therefore, the City cannot make the necessary findings under SJMC section 20.100.630(A)(6), as required to approve the Project’s Site Development permit.

These impacts also create inconsistencies with General Plan policies. Specifically, our analysis of the MND reflected in these comments show that the

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² SJMC § 20.100.630(A)(1).

⁷³ SJMC § 20.100.630 (A)(6) (emphasis added).

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Project fails to comply with several key goals and policies in the Envision San José 2040 General Plan,⁷⁴ including the following.

Air Quality

MS-10.1	Assess projected air emissions from new development in conformance with the Bay Area Air Quality Management District (BAAQMD) CEQA Guidelines and relative to state and federal standards. Identify and implement feasible air emission reduction measures.
MS-11.3	Review projects generating significant heavy duty truck traffic to designate truck routes that minimize exposure of sensitive receptors to TACs and particulate matter.
MS-13.1	Include dust, particulate matter, and construction equipment exhaust control measures as conditions of approval for subdivision maps, site development and planned development permits, grading permits, and demolition permits. At minimum, conditions shall conform to construction mitigation measures recommended in the current BAAQMD CEQA Guidelines for the relevant project size and type.

The MND's approach to assessing air quality impacts contradicts several key General Plan policies, including MS-10.1, and MS-13.1, both of which emphasize the importance of implementing enforceable mitigation measures to protect air quality. MS-10.1 mandates the implementation of feasible air emission reduction measures in accordance with BAAQMD guidelines and state and federal standards. However, the MND's reliance on Tier 4 interim equipment without including it as enforceable mitigation measures fails to fulfill this requirement. Similarly, MS-13.1 requires the inclusion of dust, particulate matter, and construction equipment exhaust control measures as conditions of approval for various permits, including site development permits. The MND's failure to incorporate enforceable mitigation measures to address the Project's construction emissions directly contradicts this policy.

Finally, the MND overlooks emissions from the backup generator onsite, thereby disregarding potential impacts on nearby sensitive receptors, which contravenes MS-11.3. Moreover, the MND fails to evaluate the emissions associated with the movement of materials by trucks during the operational phase, undermining the MND's compliance with MS-11.3. In summary, the MND's failure

⁷⁴ Available at:
<https://www.sanoseca.gov/home/showpublisheddocument/22359/637928744399330000>

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to properly analyze air quality impacts or to incorporate binding mitigation measures violates multiple General Plan policies.

Transportation

TR-1.1	Accommodate and encourage use of non-automobile transportation modes to achieve San José’s mobility goals and reduce vehicle trip generation and vehicle miles traveled (VMT)
TR-1.2	Consider impacts on overall mobility and all travel modes when evaluating transportation impacts of new developments or infrastructure projects
TR-1.4	Through the entitlement process for new development, projects shall be required to fund or construct needed transportation improvements for all transportation modes giving first consideration to improvement of bicycling, walking and transit facilities and services that encourage reduced vehicle travel demand. . . Development proposals shall be reviewed for their impacts on all transportation modes through the study of Vehicle Miles Traveled (VMT), Envision San José 2040 General Plan policies, and other measures enumerated in the City Council Transportation Analysis Policy and its Local Transportation Analysis. Projects shall fund or construct proportional fair share mitigations and improvements to address their impacts on the transportation systems
TR-5.3	Development projects’ effects on the transportation network will be evaluated during the entitlement process and will be required to fund or construct improvements in proportion to their impacts on the transportation system. Improvements will prioritize multimodal improvements that reduce VMT over automobile network improvements
TR-9.1	Enhance, expand and maintain facilities for walking and bicycling to provide neighborhoods with safe and direct access to transit and key destinations, a particularly to provide neighborhoods with safe and direct access to transit and key destinations, a complete alternative transportation network that facilitates non-automobile trips, and enjoyable outdoor open space.
TR-9.2	Serve as a model city for VMT reduction by implementing programs and policies that reduce VMT for City of San José employees
TR-9.3	Enhance the overall travel experience of transit riders, pedestrians, bicyclists, and shared micromobility users to encourage mode shift.

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The MND's inadequate disclosure and analysis of the Project's transportation impacts directly conflict with the above-cited General Plan policies. For example, policies such as TR-1.1, TR-1.4, TR-5.3, and TR-9.2 underscore the City's commitment to reducing VMT, a goal undermined by the MND's flawed VMT analysis and insufficient proposed mitigation measures highlighted by Mr. Marshall's analysis. By failing to accurately assess and address the significant VMT impact associated with the Project, the MND falls short of meeting these critical General Plan policies, undermining the city's efforts to reduce VMT and promote sustainable transportation and mobility.

As a result of the Project's inconsistencies with these General Plan policies, the City is precluded from making the necessary findings to approve the Project's Site Development Permit pursuant to SJMC section 20.100.630 (A)(1).

VII. CONCLUSION

CEQA requires that an EIR be prepared if there is substantial evidence that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment.⁷⁵ As discussed herein, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not identified in the MND, and that are not adequately analyzed or mitigated. The MND also fails to contain the basic information and analysis required by CEQA, deficiencies which "cannot be dismissed as harmless or insignificant defects."⁷⁶ Moreover, the serious flaws in the MND preclude the City from making the required findings to approve the Project's site development permit.

We urge the City to fulfill its responsibilities under CEQA by withdrawing the MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter. Only by complying with all applicable laws will the City and the public be able to ensure that the Project's environmental impacts are mitigated to less than significant levels.

⁷⁵ Pub. Res. Code § 21151; 14 CCR §15063(b)(1).

⁷⁶ *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1220.

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Thank you for your attention to these comments.

Sincerely,



Ariana Abedifard

Attachments
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