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Via Email and US MailYes Duffy, Chairperson
Kimberly Gaffney, Vice Chairperson
Igor Tregub, Member
Michael Thompson, Member
Holly Scheider, Member
Shoshana O'Keefe, Member
Charles Kahn, Member
Brandon Yung, Member
Debra Sanderson, Member
Zoning Adjustments Board
Planning and Development
1947 Center Street, 2nd Floor
Berkeley, CA 94704
Email: zab@cityofberkeley.info**Via Email Only**Allison Riemer, Associate Planner
Email: ariemer@cityofberkeley.infoRe: Comments on Agenda Item 5: 3000 Shattuck Avenue Project Addendum to the Initial Study Negative Declaration (SCH #2017062025)

Dear Chairperson Duffy, Vice Chairperson Gaffney, Members: Tregub, Thompson, Schneider, O'Keefe, Kahn, Yung, Sanderson, and Ms. Riemer:

On behalf of **East Bay Residents for Responsible Development** ("East Bay Residents"), we submit these comments on the Addendum to the 3000 Shattuck Avenue Project Initial Study Negative Declaration (SCH #2017062025) prepared by the City of Berkeley (the "City") for the 3000 Shattuck Avenue Project ("Project") proposed by Mark Rhoades of the Rhoades Planning Group and Khan Shazada & Farhat (collectively, "Applicant").¹ The City adopted the IS/ND ("2018 IS/ND") for the original 3000 Shattuck Avenue Project ("original project") and approved the

¹ City of Berkeley, Addendum to the 3000 Shattuck Avenue Project Initial Study – Negative Declaration (Permit No. ZP2015-0229, SCH # 2017062025) (January 2023), https://www.dropbox.com/s/kr0fme3neozjy7/2023-01-27_CEQA_Addendum%20to%20IS-ND_3000%20Shattuck.pdf?dl=0 (hereinafter "Addendum").
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original project on November 27, 2018.² These comments precede the hearing of the City of Berkeley Zoning Adjustment Board ("ZAB") on May 11, 2023 at 7:00 pm.³

The Project consists of changes to the original project considered in the 2018 IS/ND. The Project proposes to demolish the existing 1,163-square-foot ("SF") gas station and construct 80,235 sf of residential space including 166 residential units, 1,095 SF of retail space, and zero parking spaces on the 0.31-acre site. Construction of the Project is anticipated to last eighteen (18) months. The Project site is located at 3000 Shattuck Avenue, Berkeley, CA 94705 (APNs 53-1592-1 & 53-1592-2). The Project site is designated as Avenue Commercial in the City's General Plan and is located in the South Area Commercial (C-SA) zoning district. The original project proposed 32,603 SF of residential uses, with 44 units including 4 affordable units. This Project proposes 80,235 SF of residential uses, with 166 units including 17 affordable units. The original project proposed the inclusion of 17 parking spaces for automobiles, this Project proposes zero parking spaces.⁴

We prepared these comments with the assistance of air quality and hazards expert Matt Hagemann and Paul Rosenfeld of Soil Water Air Protection Enterprise (SWAPE), whose technical comments and curriculum vitae are attached hereto as Exhibit A.⁵ Our review of the Addendum and 2018 IS/ND demonstrates that the Project fails to comply with CEQA. As explained more fully below, the Addendum fails to accurately disclose the extent of the Project's potentially significant air quality, public health, hazardous contamination, land use, and cumulative impacts which are new or more severe than the impacts analyzed in the 2018 IS/ND. There is substantial evidence to support a fair argument that the Project will result in significant, unmitigated impacts in each of these areas. Further, the Project fails to comply with the City's General Plan and Housing Element. The City may not approve the Project until the City prepares an EIR that adequately analyzes the Project's potentially significant impacts and incorporates all feasible mitigation measures to avoid or minimize these impacts.

² City of Berkeley, 3000 Shattuck Avenue Mixed Use Project Initial Study–Negative Declaration, [https://www.dropbox.com/s/ui1snla3csdgpik/IS-](https://www.dropbox.com/s/ui1snla3csdgpik/IS-ND%20with%20appendices_3000%20Shattuck.pdf?dl=0)

[ND%20with%20appendices_3000%20Shattuck.pdf?dl=0](https://www.dropbox.com/s/ui1snla3csdgpik/IS-ND%20with%20appendices_3000%20Shattuck.pdf?dl=0) (hereinafter "2018 IS/ND").

³ City of Berkeley Zoning Adjustments Meeting Agenda, May 11, 2023, https://berkeleyca.gov/sites/default/files/legislative-body-meeting-agendas/2023-05-11_ZAB_Agenda_Linked.pdf.

⁴ Addendum p. 3.

⁵ See **Exhibit A**, Matt Hagemann, P.G., C.Hg., Paul E. Rosenfeld, Ph.D., Comments on the 3000 Shattuck Mixed-Use Project (SCH No. 2017062025) (April 10, 2023) ("SWAPE Comments"). 6154-007j

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Moreover, the City prepared the Addendum in violation of CEQA and the court's holding in *Friends of College of San Mateo Gardens v. San Mateo County Community College District*. There, the court held that the Community College District improperly prepared an addendum to an MND, because there was substantial evidence to support a fair argument that the project changes may result in a significant effect on the environment.⁶ Agencies are permitted to prepare an addendum to an adopted MND, rather than a subsequent EIR or negative declaration, if only "minor technical changes or additions are necessary or none of the conditions described in [CEQA Guidelines] Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred."⁷ Here, the changes proposed in the Addendum are not "minor technical changes or additions" but constitute major revisions to the MND based on new significant environmental effects thus requiring preparation of an Environmental Impact Report ("EIR") if the impacts cannot be mitigated. Substantial evidence supports a fair argument that the Project's potentially significant impacts cannot be adequately mitigated by the measures proposed in the Addendum and 2018 IS/ND.

For the reasons discussed herein, and in the attached expert comments, East Bay Residents urges the City to remedy the deficiencies in the Addendum by preparing a legally adequate EIR and circulating it for public review and comment.⁸ East Bay Residents and their expert consultants have identified numerous potentially significant impacts that the Addendum either mischaracterizes, underestimates, or fails to identify.

I. STATEMENT OF INTEREST

East Bay Residents for Responsible Development ("ERRBD" or "Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes the **UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483**, and their members and their families who live and/or work in the City of Berkeley and Alameda County.

⁶ *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2022) 11 Cal.App.5th 596, 600.

⁷ CEQA Guidelines, § 15164, subd. (b).

⁸ We reserve the right to supplement these comments at later hearings on this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199–1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

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The individual members of EBRRD live, work, and raise their families in the City and in Alameda County. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of EBRRD also have an interest in enforcing the City's planning and zoning laws and the State's 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 it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Residents' members are concerned about projects that are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled workforces, and without providing lifesaving healthcare expenditures for the construction workforce.

II. LEGAL BACKGROUND

CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project.⁹ "CEQA's fundamental goal [is] fostering informed decision-making."¹⁰ "The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind."¹¹

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR, except in certain limited circumstances.¹² The EIR is the very heart of CEQA.¹³ The EIR acts like an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return."¹⁴ The EIR aids an agency in identifying, analyzing, disclosing, and, to the extent possible, avoiding a project's significant environmental effects through implementing feasible

⁹ 14 Cal. Code Regs. ("CEQA Guidelines") § 15002, subd. (a)(1).

¹⁰ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 402.

¹¹ *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.

¹² See, e.g., Pub. Resources Code, § 21100.

¹³ *Dunn-Edwards v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 652.

¹⁴ *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220. 6154-007j

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mitigation measures.¹⁵ The EIR also serves “to demonstrate to an apprehensive citizenry that the [agency] has analyzed and considered the ecological implications of its action.”¹⁶ Thus, an EIR “protects not only the environment but also informed self-government.”¹⁷

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.”¹⁸ The EIR aids an agency in identifying, analyzing, disclosing, and, to the extent possible, avoiding a project’s significant environmental effects through implementing feasible mitigation measures.¹⁹ In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact. Because “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process” by allowing the agency to dispense with the duty to prepare an EIR, negative declarations are allowed only in cases where there is not even a “fair argument” that the project will have a significant environmental effect.²⁰

Under the fair argument 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.²¹ The phrase “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”²² In certain circumstances, a project with potentially significant impacts can be modified by the adoption of mitigation measures to reduce the impacts to a level of insignificance. In such cases, an agency may satisfy its CEQA obligation by preparing a mitigated

¹⁵ Pub. Resources Code § 21002.1(a); CEQA Guidelines § 15002(a), (f).

¹⁶ *No Oil, Inc. v. City of Richmond* (1974) 13 Cal.3d 68, 86.

¹⁷ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

¹⁸ Pub. Resources Code, § 21080, subd. (d) (emphasis added); CEQA Guidelines, § 15064; see also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927; *Mejia v. City of Richmond* (2005) 13 Cal.App.4th 322.

¹⁹ Pub. Resources Code, § 21002.1, subd. (a); CEQA Guidelines, § 15002, subd. (a) & (f).

²⁰ *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Resources Code, §§ 21100, 21064.

²¹ Pub. Res. Code §§21080(d), 21082.2(d); 14 Cal. Code Reg. §§ 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 Richmond* (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.

²² Pub. Resources Code, § 21068.

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negative declaration.²³ A mitigated negative declaration, however, is also subject to the fair argument standard. Thus, an MND is also inadequate, and an EIR is required, whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur, even with the imposition of mitigation measures.

The “fair argument” standard is an exceptionally “low threshold” favoring environmental review in an EIR rather than a negative declaration.²⁴ The “fair argument” standard requires the preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.²⁵ As a matter of law, substantial evidence includes both expert and lay opinion.²⁶ Even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR.²⁷ Under the “fair argument” test, CEQA always resolves the benefit of the doubt in favor of the public and the environment.

Agencies are permitted to prepare an addendum to an adopted MND, rather than a subsequent EIR or negative declaration, if only “minor technical changes or additions are necessary or none of the conditions described in [CEQA Guidelines] Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred.”²⁸ “If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration,” and if no subsequent EIR is required, the agency “shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation.” (CEQA Guidelines, § 15162, subd. (b).) Additionally, CEQA requires preparation of an EIR where “[s]ubstantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.”

Here, the changes proposed in the Addendum are not “minor technical changes or additions” but constitute major revisions to the 2018 IS/ND based on new significant environmental effects thus requiring the preparation of a negative

²³ Pub. Resources Code, § 21064.5; CEQA Guidelines, § 15064, subd. (f)(2).

²⁴ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.

²⁵ CEQA Guidelines, § 15064, subd. (f)(1); *Pocket Protectors v. City of Sacramento*, *supra*, 124 Cal.App.4th at 931.

²⁶ Pub. Resources Code, § 21080, subd. (e)(1); CEQA Guidelines, § 15064, subd. (f)(5).

²⁷ *Arviv Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.

²⁸ CEQA Guidelines, § 15164, subd. (b).

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declaration at a minimum, and an EIR if the impacts cannot be mitigated. As shown below, SWAPE provided substantial evidence that ROG emissions, and construction and demolition emissions may be significant and were not analyzed or mitigated in the 2018 IS/ND.

The California Supreme Court held that if “the project modification introduces previously unstudied and potentially significant environmental effects that cannot be avoided or mitigated through further revisions to the project plans, then the appropriate environmental document would no longer be a negative declaration at all, but an EIR.”²⁹ Thus, “an agency [must] prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved, and courts must enforce that standard.”³⁰

In *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.*, the court held that the Community College District improperly prepared an addendum to an MND, because there was substantial evidence to support a fair argument that the project changes may result in a significant effect on the environment.³¹ In that case, the court found that the change in the Project as detailed in the Addendum was significant enough to require additional environmental review, and that an Addendum was not the appropriate CEQA document. Similarly, here, the Project’s changes, including the doubling of its height, increased air quality, public health, and hazards impacts results in new significant impact such that an Addendum is inappropriate and an EIR must be prepared. The ZAB must remand the Project to Staff to prepare a legally adequate EIR for the Project, because substantial evidence supports a fair argument that the Project’s changes may result in significant impacts, which have not been avoided through the revisions in the Addendum. Project impacts remain significant and unmitigated, as detailed herein.

Moreover, the ZAB lacks the evidence necessary to approve the requested Use Permit for the Project because substantial evidence demonstrates that the Project will be detrimental to the general welfare. The Project Applicant has not made a commitment to ensure the Project is built with local skilled and trained workforce, or that the Project will provide apprenticeship training opportunities or

²⁹ *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 958.

³⁰ *Id.* at p. 959.

³¹ (2022) 11 Cal.App.5th 596.
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healthcare benefits or other workforce benefits for City of Berkeley or East Bay residents. The Project may be built with low-wage, out-of-area workers who lack the livable wages, health benefits, stability, and basic standard of living that Berkeley has committed to ensuring for all of its workers on all housing developments constructed in the City. The Project would therefore be detrimental to the health, safety, peace, morals, comfort, and general welfare of the City and its residents, especially its local construction workforce who may not have the opportunity to build much-needed housing in their own community. The Project is also inconsistent with the workforce and economic requirements of the City of Berkeley General Plan ("General Plan").

The ZAB should remand the Project to Staff to prepare a legally adequate EIR and include conditions of approval requesting community benefits, including local hire provisions, workforce standards, and healthcare benefits for workers, to ensure the Project does not cause a detriment to the general welfare of the City.

III. THE PROJECT'S POTENTIALLY SIGNIFICANT HAZARDS IMPACTS REQUIRE PREPARATION OF AN EIR

The Project site is contaminated with hazardous contaminants from its historical use as a service station operated by Atlantic Richfield Company (ARCO).³² ARCO later became an affiliate of BP and the site was operated as BP Station No. 00414 until it was sold to Mr. Shahzada Khan on February 25, 2004.³³ The Project site is listed on the State Water Resources Control Board's Geotracker database as Site T0600100094. The site is therefore on a Cortese List per Section 65962.5 of the Government Code. The Project site is currently an operational gas station and smog check location operated by Berkeley Gas & Smog. The Project site contained three underground storage tanks (USTs) that contained gasoline, and one waste oil UST.³⁴

The Addendum tiers from the IS which states:

The site is included on the list of hazardous materials sites compiled pursuant to Government Code 65962.5 (Cortese List) as "closed" cases. As

³² Atlantic Richfield Company, Case Closure Summary Report Former British Petroleum Station #00414 City of Berkeley case #27540. 3000 Shattuck Avenue Berkeley, California (June 9, 2010), https://documents.geotracker.waterboards.ca.gov/esi/uploads/geo_report/8836282312/T0600100094.PDF p. 2/16 (hereinafter "Case Closure Summary Report").

³³ *Id.*

³⁴ *Id.*

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described in the Environmental Setting, the RWQCB issued a case closure letter for the clean-up case in September 2014, concluding that the current plume is restricted to the site and does not present a current or potential risk to human health or the environment. Therefore, the project would not create a significant hazard to the public or the environment and the impact would be less than significant.³⁵

The IS relies on the misleading statement that the cleanup case is “closed.”³⁶ The Addendum then relies on the same misleading proposition. The Addendum states that “[t]here are two closed State Water Quality Control Board GeoTracker investigations on the project site (T0600100094 [closed 2013] and T10000004483 [closed 2014]).”³⁷

These statements are misleading because the site was closed to commercial/industrial screening levels, “based on the assumption that land use at the site will remain unchanged.”³⁸ The Project site fails to meet the residential ESL levels necessary to place housing on the site. The site must undergo additional soil remediation to remove excess contaminants and reach acceptable residential ESLs because the site is being converted from commercial/industrial to residential use. People will live on the site, their children may play on the grounds, but the site was cleaned only to commercial/industrial screening levels. The contamination that currently remains onsite may result in health risk impacts to the residents and the community.

Moreover, the Addendum includes the Case Closure Summary Report that states that “[s]oil vapor samples have not been collected at the site.”³⁹ The Case Closure Summary was required to include “Cumulative data tables for all soil, groundwater samples, including grab samples, and soil vapor *must* be included.”⁴⁰ Data on soil vapor samples and cumulative data on the potential for soil vapor intrusion was not included in the Case Closure Summary, the Initial Study, or the Addendum and is not available for public review and scrutiny.

³⁵ IS, [https://www.dropbox.com/s/19ieh5spqget2qb/IS-ND%20with%20appendices 3000%20Shattuck.pdf?dl=0](https://www.dropbox.com/s/19ieh5spqget2qb/IS-ND%20with%20appendices%203000%20Shattuck.pdf?dl=0), p. 23.

³⁶ *Id.*

³⁷ Addendum p. 22.

³⁸

³⁹ Case Closure Summary Report, p. 10/16.

⁴⁰ *Id.* at pdf 83 of 86.
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At the time of the site's closure in 2010, "[a] station building [was] present at the site and the entire site [was] paved, with no exposed soil present at the ground surface."⁴¹ Project construction here, will disrupt and expose soil, potentially exposing dangerous and previously untested levels of soil vapor. At the time of the closure, the "potential for soil vapor intrusion was evaluated by comparing current groundwater concentrations to groundwater ESLs...for the protection of the vapor intrusion pathway in a ***commercial setting***."⁴² The soil vapor and potential health risk impacts have not been analyzed for a residential setting and may pose a significant risk to residents of the Project site.

The City must draft an EIR because substantial evidence supports a fair argument that hazardous contamination and soil vapor may result in a significant environmental impact. The courts have repeatedly held that an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that a project may have a significant environmental impact.⁴³ Here, the City cannot approve the Project based on an Addendum to the Initial Study because project modification results in potentially significant impacts from hazardous contamination and soil vapor which were unstudied at the time of preparation of the 2018 IS/ND.

The California Supreme Court held that if "the project modification introduces previously unstudied and potentially significant environmental effects that cannot be avoided or mitigated through further revisions to the project plans, then the appropriate environmental document would no longer be a negative declaration at all, but an EIR."⁴⁴ Thus, "an agency [must] prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved, and courts must enforce that standard."⁴⁵ The City must prepare an EIR to adequately analyze and mitigate the Project's potentially significant and as yet unstudied impacts from soil vapor and hazardous contamination, before the Project can lawfully be approved.

⁴¹ Case Closure Summary Report, p. 10/16.

⁴² *Id.*

⁴³ Pub. Resources Code § 21151; CEQA Guidelines § 15064(f); *Citizens for Responsible Equitable Env't'l Dev. v. City of Chula Vista* ("CREED") (2011) 197 Cal.App.4th 327, 330-31; *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 ("CBE v. SCAQMD").

⁴⁴ *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 958.

⁴⁵ *Id.* at p. 959.

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IV. THE PROJECT RESULTS IN SIGNIFICANT AIR QUALITY IMPACTS REQUIRING PREPARATION OF AN EIR

An EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that a project may have a significant environmental impact.⁴⁶ “[S]ignificant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”⁴⁷ An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.”⁴⁸ Substantial evidence, for purposes of the fair argument standard, includes “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”⁴⁹ The Project may result in potentially significant impacts to air quality. Air quality impacts constitute new or increased significant environmental effects “not previously considered in connection with the project as originally approved.”⁵⁰

A. The Project Results in Significant ROG Emissions

East Bay Resident’s air quality expert consultants at SWAPE found that the Project results in significant emissions from Reactive Organic Gas (“ROG”) which exceed the Bay Area Air Quality Management District (“BAAQMD”) threshold. BAAQMD provides that ROG emissions shall not exceed 54 pounds per day (“lbs/day”), but the Project would result in ROG emissions of 71.55 lbs/day.⁵¹ The 2018 IS/ND makes no mention of ROG emissions, but the Addendum states that the ROG emissions would be 3 lbs/day.⁵² This conclusion is not supported by substantial evidence. SWAPE found that the changes to the Project result in a 2,285% increase in ROG emissions, far and away exceeding the BAAQMD significance threshold. Therefore, ROG emissions remain significant and the Addendum nor the 2018 IS/ND adequately mitigate such impacts. The City must prepare an EIR to satisfy CEQA.

⁴⁶ Pub. Resources Code § 21151; CEQA Guidelines § 15064(f); *Citizens for Responsible Equitable Env’tl Dev. v. City of Chula Vista* (“CREED”) (2011) 197 Cal.App.4th 327, 330-31; *Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 (“CBE v. SCAQMD”).

⁴⁷ Pub. Resources Code § 21068; CEQA Guidelines § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

⁴⁸ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83.

⁴⁹ Pub. Resources Code § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.

⁵⁰ *Friends of College of San Mateo Gardens v. San Mateo Community College District*, *supra*, 1 Cal.5th at 959.

⁵¹ SWAPE Comments, p. 5.

⁵² Addendum, p. 14.

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The California Supreme Court held that if “the project modification introduces previously unstudied and potentially significant environmental effects that cannot be avoided or mitigated through further revisions to the project plans, then the appropriate environmental document would no longer be a negative declaration at all, but an EIR.”⁵³ Further, “an agency [must] prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved, and courts must enforce that standard.”⁵⁴

East Bay Residents present substantial evidence, in these comments and in our expert comments attached, showing that the Project may result in potentially significant ROG emissions, which must be mitigated before the Project can be approved. These impacts were not considered in the prior 2018 IS/ND, and must be analyzed in an EIR. SWAPE’s comments present dozens of effective mitigation measures to help reduce Project ROG, construction, and operational air emissions. Such measures should be implemented in an EIR’s Mitigation Monitoring and Reporting Program. The City must prepare an EIR to study the previously unstudied and potentially significant air quality impacts from the Project, particularly with respect to ROG emissions, to satisfy CEQA.

B. The Addendum Underestimates the Project’s Construction and Demolition Emissions

The Addendum states that Project construction will last 18 months.⁵⁵ The Addendum states that the original project included a construction period of 18 months as well.⁵⁶ But, the 2018 IS/ND provided that the construction period will last 20 months.⁵⁷ Thus, it is particularly troubling, that the Addendum’s air quality analysis relies on a 21-month construction period, resulting in an underestimation of the Project’s construction emissions. SWAPE concludes that the elongated construction duration results in an underestimation of the daily emissions resultant from construction equipment onsite. SWAPE concludes that the analysis improperly relies on the assumption that “there will be less construction activities

⁵³ *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 958.

⁵⁴ *Id.* at p. 959.

⁵⁵ Addendum, p. 3.

⁵⁶ *Id.*

⁵⁷ 2018 IS/ND.

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required per day and, consequently, less pollutants emitted per day.”⁵⁸ The Addendum’s air quality construction emissions calculations underestimate the Project’s daily emissions and are therefore not supported by substantial evidence. The City must prepare a legally adequate EIR which accurately analyzes the Project’s daily construction emissions with an accurate construction schedule guiding the analysis.

Further, the Addendum fails as an informational document under CEQA for failing to model the emissions associated with demolition of the existing building on the Project site. SWAPE concludes that the Addendum fails altogether to analyze the demolition phase of construction and inputted zeros into the calculations for square feet being demolished.⁵⁹ This is not an accurate assessment of the required demolition of the existing gas station, two gas pump islands, and related infrastructure.⁶⁰ Demolition of existing infrastructure will obviously exceed zero square feet of demolition activity, counter to the Addendum’s unsupported calculations. SWAPE concludes that the failure to include the demolition emissions presents a significant issue, because by failing to include any amount of required demolition, the model underestimates the emissions associated with fugitive dust, debris removal, as well as exhaust from hauling trucks traveling to and from the site, which may be significant and remain unmitigated.⁶¹ These impacts were not considered in the prior 2018 IS/ND, and must be analyzed in an EIR.

C. The Addendum Underestimates the Project’s Construction Emissions from Trucking the Modular Units

The Addendum fails as an informational document under CEQA for failing to quantify and analyze the Project’s potentially significant air pollution impacts from trucking the modular units potentially hundreds of miles to the Project site. The Addendum and 2018 IS/ND failed to quantify the potentially significant air quality, health risk, and cumulative impact associated with trucking the modular units. These modular units may be transported from out of state or hundreds of miles from the Project site. Absent an analysis of the emissions associated with trucking these modular units, the Addendum fails as an informational document under CEQA, and the conclusion that air impacts from Project construction are less than significant is not supported by substantial evidence.

⁵⁸ SWAPE Comments, p. 4.

⁵⁹ *Id.*

⁶⁰ 2018 IS/ND, p. 6.

⁶¹ SWAPE Comments, p. 5. s

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V. THE PROJECT RESULTS IN SIGNIFICANT CUMULATIVE IMPACTS REQUIRING PREPARATION OF AN EIR

CEQA requires agencies to analyze whether a project has impacts that are individually limited, but cumulatively considerable.⁶² Cumulatively considerable means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects). Cumulative impacts are defined as “two or more individual effects, which, when considered together, are considerable or which compound or increase other environmental impacts.”⁶³

The Addendum fails to include any analysis supported by substantial evidence to conclude that the Project does not result in cumulatively considerable impacts. In fact, the Addendum only mentions cumulative impacts for traffic and air quality impacts, but dismisses all other potentially significant cumulative impacts out of hand, without providing substantial evidence to support the conclusions. The 2018 IS/ND concluded that because the Project is “an infill location” cumulative impacts are less than significant for all resource areas.⁶⁴ But, it is particularly because this Project is an infill project, that a cumulative analysis of concurrent construction impacts is so critical. Here, the Project is proposed to be constructed concurrently with the 2920 Shattuck Project, just down the street, among other new Berkeley high rise developments. Both this Project and the 2920 Shattuck project will result in potentially cumulatively significant air quality, hazards, and land use impacts that were not analyzed in conjunction with either Project’s analysis.

The City must prepare an EIR which accurately analyzes the Project’s potentially significant cumulative impacts before the Project can lawfully be approved.

⁶² 14 CCR § 15355(b); *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 905.

⁶³ 14 CCR § 15355.

⁶⁴ 2018 IS/ND, p. 38.
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VI. THE PROJECT MAY BE DETRIMENTAL TO THE GENERAL WELFARE OF THE CITY, RESIDENTS, AND WORKERS

In order to approve a Use Permit, under Berkeley Municipal Code Section 23.406.040, the Zoning Adjustments Board must find that the proposed project:

- 1) Will not be detrimental to the health, safety, peace, morals, comfort, or **general welfare** of persons residing or visiting in the area or neighborhood of the proposed use; and
- 2) Will not be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City.

Municipal Code Section 22.20.020 defines detrimental impacts to include, *inter alia*, increased demand for workforce housing, training, and benefits: “The increased demand for affordable housing, child care and public services, **adequate employment training and placement facilities and amenities**, and the other impacts generated by development projects, unless mitigated, are detrimental to the City’s public health, safety and general welfare.”⁶⁵ Under Section 22.20.020, a detriment to the general welfare occurs when the City fails to mitigate the impacts of a development project, including the increased demand for housing, workforce training, and public services that may result from the Project.⁶⁶ Pursuant to Municipal Code Section 22.20.020, the Project’s impacts to the general welfare for failure to provide employment training, placement facilities, and amenities, require mitigation.⁶⁷

Further, the ZAB may approve a Use Permit for demolition of a non-residential building or structure only if the ZAB finds that “demolition will not be materially detrimental to the commercial needs and public interest of any affected neighborhood or the City of Berkeley”⁶⁸ Here, the ZAB cannot make the necessary findings that demolition of the existing structure and construction of the Project is in the public interest, absent community and workforce benefits to promote the general welfare.

⁶⁵ BMC § 22.20.020(G) (emphasis added).

⁶⁶ *Id.*

⁶⁷ BMC § 22.20.020(G).

⁶⁸ *Id.* at § 23.326.070(D)(1).

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Housing projects, like this one, that are constructed with low-wage or uninsured construction workers are detrimental to the health, safety, peace, morals, comfort, and general welfare of persons residing or visiting the City and the Project's Downtown neighborhood, as well as to the general welfare of the City. The City should request the Applicant include community benefits in the Project conditions of approval, including local hire provisions and healthcare standards and benefits in order to promote the general welfare.

A. The Project is Detrimental to the General Welfare for Failing to Hire Locally

Absent a provision requiring the Applicant to hire locally, the Project may be detrimental to the general welfare of Berkeley residents. Local hire commitments are a critical way not only to hire local residents, but to use project hiring needs to target opportunities to low-income residents and people of color who might otherwise not benefit from new development.⁶⁹ Local hire programs help address the fragmentation inherent in the development process, establishing better communication among developers, employers, community organizations, local job training resources, and the workforce development system that can provide job readiness and job retention support services.⁷⁰ Here, the Project Applicant has not made a commitment to ensure the Project is built with local skilled and trained workforce. The Project is therefore likely to be detrimental to City goals and the Berkeley community – particularly to its highly qualified construction workforce, who may not have the opportunity to build much-needed housing in their own community. The City should request the Applicant provide a local hire percentage of 30 percent as a community benefit for the Project.

B. The Project is Detrimental to the General Welfare for Failing to Provide Healthcare to Construction Workers

Further, the Project has not committed to healthcare standards or benefits for the construction workers building the Project. This results in a detriment to the general welfare of the City and its residents, including in particular, to its construction worker residents. By failing to provide healthcare for its construction

⁶⁹ Kathleen Mulligan-Hansel, *Making Development Work for Local Residents: Local Hire Programs and Implementation Strategies that Serve Low-Income Communities*, (July 2008). Available at: https://s3.amazonaws.com/proggov21-uploads/uploads/asset/asset_file/Making_Development_Work_Local_Residents_Mulligan-HanselPWF2008.pdf.

⁷⁰ *Id.*
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workers, the Project leaves the responsibility of providing for the health, safety, and welfare of the workers and the community on the workers themselves, or on taxpayer-funded public assistance, thus externalizing the cost of construction. By failing to provide healthcare standards, the Project would perpetuate existing income and healthcare inequities for construction workers, causing a detriment to the general welfare by failing to provide for the health and safety of its workers. The City should request the Applicant provide healthcare benefits as a community benefit of the Project.

Project construction will increase the local demand for a construction workforce. The Project's lack of workforce standards and worker healthcare may exacerbate the existing demand for local affordable housing and public services by construction workers that currently receive low pay without benefits. Without mitigation, these impacts remain significant, and the ZAB cannot make the necessary findings that the Project complies with the General Plan and zoning code. To comply with the General Plan Economic Development and Employment Element, the City must ensure that new housing developments provide jobs that go to Berkeley residents and provide job training programs and job readiness.

Moreover, the Municipal Code provides that the "Zoning Ordinance establishes *minimum* requirements to promote the public health, safety, and general welfare."⁷¹ The Municipal Code also provides that, "[t]o the extent possible, it is the government's responsibility to balance the responsibility to ensure the health, safety, and general welfare of the public at large in a fiscally and environmentally sustainable manner."⁷² It is therefore the responsibility of the Zoning Adjustment Board to promote the general welfare beyond the minimum required by law. Here, the ZAB must require the Project to include community benefits like those detailed herein, otherwise, the Project contravenes the Municipal Code and General Plan.

VII. THE PROJECT IS INCONSISTENT WITH THE GENERAL PLAN

CEQA requires an agency to analyze whether a project conforms with the applicable land use plan, policy or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an

⁷¹ BMC § 22.104.030.

⁷² *Id.* at § 2.09.020.

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environmental effect.⁷³ The Addendum fails as an informational document under CEQA for failing to analyze the Project's inconsistency with the General Plan.

A. The Project is Inconsistent with the General Plan Economic Development & Employment Element

The Project is inconsistent with the General Plan Economic Development & Employment Element, and thus cannot be approved until consistency is demonstrated.⁷⁴ The General Plan Economic Development and Employment Element Policy (ED-1) provides that the City must "[i]ncrease the number of jobs that go to Berkeley citizens by coordinating economic development efforts with employment placement."⁷⁵ Further, the General Plan provides that the City intends to "[w]ork with job training programs and encourage training for life skills, job readiness, and specific target industries."⁷⁶ The Project does not include any commitment to provide construction jobs to Berkeley or East Bay residents, and does not contribute to any apprenticeship or other construction job training programs. Housing development projects in the City must also implement the goals and policies of the General Plan, including the following:

- 1) Ensure that Berkeley has an adequate supply of decent housing, living wage jobs, and businesses providing basic goods and services.
- 2) New housing will be developed to expand housing opportunities in Berkeley to meet the needs of all income groups.⁷⁷

The City has determined that "it is in the City of Berkeley's economic interest to support a pipeline of skilled workers to accomplish the construction objectives and policies of the Berkeley General Plan."⁷⁸ The Project must support this goal by

⁷³ CEQA Guidelines Appendix G, XI Land Use and Planning.

⁷⁴ SB 330 requires conformance with applicable, objective general plan and zoning standards. Gov. Code § 65905.5. (a).

⁷⁵ Berkeley General Plan Economic Development and Employment Element, p. ED-5. Available at: https://berkeleyca.gov/sites/default/files/documents/12_Economic%20Development%20and%20Employment%20Element-FINAL.pdf.

⁷⁶ *Id.*

⁷⁷ Berkeley General Plan Economic Development and Employment Element, p. ED-5.

⁷⁸ City of Berkeley, Agenda and Staff Report, Berkeley City Council, Council Consent Item 14 Helping Achieve Responsible Development with Healthcare and Apprenticeship Training Standards (HARD HATS), <https://berkeleyca.gov/sites/default/files/city-council-meetings/2022-09-20%20Agenda%20Packet%20-%20Council%20-%20WEB.pdf> ("HARD HATS Staff Report") (Sept. 20, 2022) p. 7.
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including community benefits such as local hire and healthcare and workforce benefits, otherwise the Project is detrimental to the general welfare, violates the General Plan, and may not be approved.

Moreover, the Project's failure to provide sufficient affordable housing onsite contravenes the General Plan's objective that development in the City should ensure an "adequate supply of decent housing."⁷⁹ The City may allow the Applicant to pay a fee, in-lieu of providing an adequate supply of affordable housing on the Project site.⁸⁰ If the City continues this practice of allowing developers to get away with paying in lieu fees, instead of providing onsite affordable housing, the City will have an insufficient supply of decent affordable housing as required by the General Plan. The Project's failure to provide *onsite* affordable housing for local residents therefore contravenes the General Plan's Economic Development and Employment Element and cannot be approved by ZAB.

VIII. THE PROJECT IS INCONSISTENT WITH THE CITY'S HOUSING ELEMENT

CEQA requires an agency to analyze whether a project conforms with the applicable land use plan, policy or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect.⁸¹ The Addendum fails as an informational document under CEQA for failing to analyze the Project's inconsistency with the Housing Element.

The Project proposes to construct a ten-story residential building containing 166 dwelling units (17 Very Low-Income unit).⁸² The project is seeking a 50% Density Bonus by providing 15% of the base project units as affordable to very low-income households. The Developer stated in their application for the Project that in order to "comply with City of Berkeley Affordable Housing rental requirements, the project will also be providing additional Affordable Units and/or/or-in-combination-

⁷⁹ Berkeley General Plan Economic Development and Employment Element, p. ED-5.

⁸⁰ City of Berkeley Planning and Development, Zoning Project Application, 3000 Shattuck Ave. Berkeley CA 94705 (March 14, 2022), https://www.dropbox.com/s/n987ldxqb6pesmp/2022-03-29_APP_PCKT_3000%20Shattuck%20%281%29.pdf?dl=0.

⁸¹ CEQA Guidelines Appendix G, XI Land Use and Planning.

⁸² Addendum p. 2.

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with providing an in-lieu Mitigation Fee per the City of Berkeley requirements.”⁸³ More affordable units must be provided for the Project to be consistent with the City’s Housing Element and state law.

The Regional Housing Needs Assessment is the California State-required process that seeks to ensure cities and counties plan for enough housing in their Housing Element cycle to accommodate all economic segments of the community.⁸⁴ Accordingly, the Housing Element of the City’s General Plan identifies the City’s housing conditions and needs, evaluates the City’s ability to meet its Regional Housing Needs Allocation (“RHNA”), establishes the goals, objectives, and policies of the City’s housing strategy, and provides an array of programs to create mixed-income neighborhoods across the City.⁸⁵ The Housing Element, which was amended on February 17, 2023, states that “the City has a remaining RHNA of 5,033 units (1,923 very low income; 852 low income; 1,227 moderate income; and 1,031 above moderate income units)... The City must identify adequate sites capacity for this remaining RHNA.”⁸⁶ Accordingly, Policy H-1 – Extremely Low, Very Low, Low and Moderate-Income Housing – provides: “Increase the number of housing units affordable to Berkeley residents with lower income levels.”⁸⁷ Because the City has not produced and is not expected to produce enough affordable housing to meet its RHNA, projects that do not contribute to the City’s RHNA are inconsistent with the City’s Housing Element, a primary goal of which is to meet the RHNA.

Berkeley Municipal Code Section 23.328.010 provides that residential housing projects constructing five or more dwelling units must include at least 20 percent of the total number of dwelling units within the project as inclusionary units. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees in-lieu of providing below-market rate units.⁸⁸

⁸³ City of Berkeley Planning and Development, Zoning Project Application, 3000 Shattuck Ave. Berkeley CA 94705 (March 14, 2022), https://www.dropbox.com/s/n987ldxqb6pesmp/2022-03-29_APP_PCKT_3000%20Shattuck%20%281%29.pdf?dl=0.

⁸⁴ Cal. Gov. Code Section 65580 – 65589.9; *see* City of Berkeley, Adopted 2023-2031 Housing Element, available at https://berkeleyca.gov/sites/default/files/documents/Berkeley_2023-2031%20Housing%20Element_02-17-2023v2_0.pdf.

⁸⁵ *Id.*

⁸⁶ City of Berkeley, Adopted 2023-2031 Housing Element, p 107.

⁸⁷ *Id.* at 15.

⁸⁸ Effective July 1, 2022, the fee is set at follows: Paid at Certificate of Occupancy: \$46,185 per rental unit; or Paid at building permit: \$43,185 per rental unit.

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However, the City has failed to meet its RHNA in previous cycles. Under the 5th RHNA Cycle from 2015-2023, Berkeley was required to plan for 2,959 units.⁸⁹ This includes 532 at very low income, 442 at low income, 584 at moderate income, and 1,401 at above moderate income. The Housing Element states that 3,742 units have been built, or 126% of the target. However, the targets for affordable housing were missed, with 309 very low income (58%), 130 low income (29%), and 106 moderate income (18%) units completed. 3,197 units of above moderate, or market rate housing was built, which was 228% of the goal. Thus, the City already has adequate above moderate and market rate housing units to meet its RHNA requirements, but is short on production of affordable units.

Here, the Project fails to provide the City's required 20% affordable units on-site, contributing to the City's current shortage of affordable units, while at the same time taking a viable project site out of production for those additional affordable units. Although the Project will pay an in-lieu fee, the Project would not be consistent with the Housing Element because it places the burden on the City to identify alternate sites to construct affordable housing units in time to meet its RHNA requirements.⁹⁰

The Applicant's proposal to pay in lieu fees instead of providing 20% on-site affordable units for the 3000 Shattuck Project is not unique. The Project is one of at least three concurrent projects proposed by the Applicant, which similarly fail to contribute an adequate percentage of affordable units. The Applicant also proposes to construct the 2900-2920 Shattuck Avenue Project,⁹¹ a ten-story residential building containing 221 dwelling units (22 Very Low-Income unit).⁹² The 2920 Shattuck Avenue project is seeking a 46.25% Density Bonus by providing only 14% of the base project units as affordable to very low-income households.⁹³ The Applicant's 1598 University Project similarly proposes to pay an in lieu fee for the affordable units required by the City in excess of the on-site affordable necessary to qualify for a density bonus. The Applicant's decision not to provide the recommended 20% of on-site affordable units for its pending projects contributes to a cumulative shortage of affordable units that the City should address before considering approval of this Project.

⁸⁹ City of Berkeley, Adopted 2023-2031 Housing Element, pg. D-8.

⁹⁰ City of Berkeley, Adopted 2023-2031 Housing Element, p. 107.

⁹¹ Use Permit #ZP2022-0116 (APN: 053 159000501).

⁹² City of Berkeley, Zoning Project Application, 2920 Shattuck Ave. Berkeley CA 94705, APN 053 159000501, (Sept. 4, 2022), https://www.dropbox.com/s/528twax3fw4fw9p/2022-09-04_APP_PCKT_2920%20Shattuck.pdf?dl=0 ("Application Packet"), pdf pg. 2108 of 2143.

⁹³ City of Berkeley, Zoning Project Application, 2920 Shattuck Ave. 6154-007j

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IX. CONCLUSION

CEQA requires that an agency prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved may have a significant environmental impact not previously considered in connection with the project as originally approved.⁹⁴ As discussed herein, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not considered in the prior 2018 IS/ND, and that are not adequately analyzed or mitigated. The Project is detrimental to the general welfare for failing to provide workforce and community benefits.

The Addendum also fails to contain the basic information and analysis required by CEQA, deficiencies which “cannot be dismissed as harmless or insignificant defects.”⁹⁵ The City’s findings regarding Project impacts do not comply with the law and are not supported by substantial evidence. The City cannot approve the Project until it prepares an EIR that resolves these issues and complies with CEQA’s requirements.

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

Sincerely,



Kelilah D. Federman

KDF:lj1

⁹⁴ *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 958.

⁹⁵ *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1220.

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