Eterna Tower Mixed-Use Development

File No. H20-026

Addendum to the Downtown Strategy 2040 Final Environmental Impact Report

RESPONSE TO APPEAL

November 2022

CEQA Lead Agency:

City of San José
Department of Planning Building and Code Enforcement
200 East Santa Clara Street
San José, CA 95113

In Consultation with:

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PLANNING AND ENVIRONMENTAL CONSULTING

Memorandum

To: Maira Blanco, Planner
City of San José

From: Leianne Humble, Senior Project Manager
Denise Duffy & Associates, Inc.

Date: November 30, 2022

Subject: **Eterna Tower – Responses to Appeal of Environmental Determination**

The City of San José approved a Site Development Permit, File No. H20-026, for the Eterna Tower Mixed Use Development Project at the August 24, 2022 Director's Hearing and considered and adopted the Addendum to the Downtown Strategy 2040 Final Environmental Impact Report (EIR Addendum) prepared for the project, in accordance with CEQA.

After the Director's Hearing, the City received one timely environmental appeal on the Director's decision from the following appellants:

- Silicon Valley Residents for Responsible Development c/o Kelilah Federman, Adams Broadwell Joseph & Cardozo

As described in further detail below, the environmental appeals do not raise any new issues about the project's environmental impacts, provide no substantial evidence in support of a fair argument that the project, after mitigation, would result in a significant, unavoidable impact, or provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the EIR Addendum.

The following pages contain list the organization that submitted an appeal on the City's decision to approve the EIR Addendum and the City's formal response to the appeal. The specific comments have been excerpted from the appeal and are presented as "Comment" with a response directly following ("Response"). A copy of the appeal submitted to the City of San José is attached to this document in Attachment A.

SECTION 1.0 APPELLANT

Appeal Received From	Date of Appeal	Attachment	Total Number of Pages
A. Adams Broadwell Joseph & Cardozo	8/26/2022	Yes	70

A. Adams Broadwell Joseph & Cardozo (dated August 26, 2022)

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

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

The Project, proposed by ROYGBIV Real Estate Development LLC ("Applicant") includes construction of a 26-story, 184,667-gross square foot mixed-use building on the approximately 0.18-acre site at 17 and 29 East Santa Clara Street in downtown San José.[4] The Project would include 192 residential units and approximately 5,217 square feet of office space on the second floor. The Project site is currently occupied by a pair of two-story buildings, one of which (17 East Santa Clara Street) is an identified Structure of Merit on the City's Historic Resources Inventory[5]; both are proposed for demolition.

The Project is within the DC Downtown Primary Commercial Zoning District, and the Downtown General Plan Designation.[6] The Project is also located within the Downtown Employment Priority Area, which requires a minimum 4.0 FAR of commercial use within residential / commercial mixed-use projects.[7] Construction of the Project would occur over a period of 29 months.[8] The Project would include a diesel-powered backup generator.[9]

> **Response A.1**: The above description is a general description of the proposed project and does not raise any issue related to adequacy of the environmental documents. Therefore, no further response is required.

Comment A.2: This Appeal letter, and Silicon Valley Residents' attached August 23, 2022 comments to the Planning Director,[10] demonstrate that the Planning Director's decision to approve the Project violated CEQA, land use laws and the City's municipal codes, and was not supported by substantial evidence in the record. Specifically, our prior comments, and the comments of our expert consultant James Clark of Clark & Associates identified several flaws in the City's environmental

[1] City of San Jose, Planning, Building and Code Enforcement, Planning Director Hearing (August 24, 2022) Action Minutes. Available at: https://www.sanjoseca.gov/home/showpublisheddocument/88897
[2] Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§15000 et seq.
[3] City of San Jose, Planning Application Filing Fee Schedule, Effective August 15, 2022. Available at: https://www.sanjoseca.gov/home/showdocument?id=24803.
[4] City of San Jose, Addendum to the Downtown Strategy 2040 Final Environmental Impact Report for Eterna Tower Mixed-Use Development, File No. H20-026 (August 5, 2022) (hereinafter "Addendum")
[5] Addendum, Appendix B, Historical Evaluation, p. 1; City of San Jose, Planning, Building & Code Enforcement, Historic Resources Inventory.
[6] San Jose Zoning Code § 20.70.100.
[7] City of San Jose, Site Development Permit (H20-026) p. 10 of 28.
[8] Addendum p. 6.
[9] *Id.* at 1.
[10] Silicon Valley Residents for Responsible Development's August 23, 22 written comments to the Planning Director are attached hereto as Exhibit A and incorporated by reference.

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

> **Response A.2**: The above contains general allegations related to adequacy of the environmental documents. Therefore, no further response is required. Specific responses to the other parts of the letter are addressed below.

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

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

> **Response A.3**: The comment does not raise any issue related to adequacy of the environmental documents. Therefore, no further response is required.

I. STATEMENT OF INTEREST

Comment A.4: Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, along with their members, their families, and other individuals who live and work in the City of San José.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

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

[12] Exhibit A

[13] Gov. Code § 65009(b); PRC § 21177(a); Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield") (2004) 124 Cal. App. 4th 1184, 1199-1203; see Galante Vineyards v. Monterey Water Dist. (1997) 60 Cal. App. 4th 1109, 1121.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

> **Response A.4**: The above contains general allegations related to adequacy of the environmental documents. Therefore, no further response is required. Specific responses to the other parts of the letter are addressed below.

II. LEGAL BACKGROUND

Comment A.5: CEQA has two basic purposes, neither of which is satisfied by the Addendum. CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.[14] The EIR is the "heart" of this requirement.[15] The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."[16]

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

Further, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.[20] If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[21] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[22] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.[23] A CEQA lead agency is precluded from making the required

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[14] 14 Cal. Code Regs. ("CCR") § 15002(a)(1); Berkeley Keep Jets Over the Bay v. Bd. Of Port Comm'rs. (2001) 91 Cal.App.4th 1344, 1354 ("Berkeley Jets"); County of Inyo v. Yorty (1973) 32 Cal.App.3d 795, 810.
[15] No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 84.
[16] County of Inyo v. Yorty (1973) 32 Cal.App.3d 795, 810.
[17] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[18] See Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 568.
[19] PRC § 21100(b)(1); 14 CCR § 15126.2(a).
[20] 14 CCR § 15002(a)(2) and (3); Berkeley Jets, 91 Cal.App.4th at 1354; Laurel Heights Improvement Ass'n v. Regents of the University of Cal. (1998) 47 Cal.3d 376, 400.
[21] PRC §§ 21002.1(a), 21100(b)(3).
[22] Id., §§ 21002-21002.1
[23] 14 CCR § 15126.4(a)(2).

CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[24] This approach helps "ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[25]

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

> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
>
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
>
> **(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.[26]**

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

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

[24] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).
[25] Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn. (1986) 42 Cal.3d 929, 935.
[26] PRC, § 21166 (emphasis added).

> **(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[27]**

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

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

Accordingly, Dr. Clark's substantial evidence, and the City's own recognition of potentially significant impacts not previously addressed, require that the City prepare and circulate for public comment a Subsequent EIR or MND that adequately addresses all of the Project's potentially significant impacts and proposes appropriate mitigation measures.[31]

> **Response A.5**: This comment indicates that the EIR Addendum is inadequate and suggests that a Subsequent EIR is required. As presented in the responses to this letter below, the assumptions and conclusions made in the EIR Addendum are accurate, adequate, and supported by substantial evidence. Accordingly, pursuant to Section 15164 of the CEQA Guidelines, the City of San José prepared an Addendum to the San José Downtown Strategy 2040 Final Environmental Impact Report and addenda thereto because minor changes made to the project, as analyzed in the Addendum, did not raise any of the conditions or circumstances described in CEQA Guidelines Section 15162 calling for the preparation of a subsequent EIR.

III. THE CITY IMPROPERLY RELIED ON AN ADDENDUM

[27] 14 CCR, § 15162(a)(1)-(3) (emphasis added).
[28] 14 CCR, § 15162(b).
[29] 14 CCR, § 15164
[30] Id. §§ 15162 (a), 15164(e), and 15168(c)(4).
[31] 14 CCR, § 15162 ("no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]"); § 15164 ("The [agency's] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.").

Comment A.6: An addendum to an EIR is only appropriate if some changes or additions to the prior EIR are necessary, but none of the conditions described in Guidelines section 15162 have occurred. Where, as here, the project will have one or more significant impacts not discussed in the previous EIR, an addendum is inappropriate. The Addendum specifically identifies several potentially significant impacts not discussed in the Downtown Strategy 2040 FEIR, including Impact AQ-1 (infant cancer risk from exposure to diesel particulate matter during project construction), Impact HAZ-1 (exposure of construction workers and the public to soil and groundwater contaminants), Impact NSE-1 (construction noise in excess of the City's General Plan thresholds) and Impact NSE-2 (vibrations from construction exceeding the City's General Plan thresholds).

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

In addition, the City seeks to rely on CEQA Guidelines Section 15152 to tier from the Downtown Strategy 2040 EIR. Tiering refers to "using the analysis of general matters contained in a broader EIR…with later EIRs or negative declarations" and is appropriate when the sequence of analysis is from a program EIR to a site-specific EIR or negative declaration.[32] The CEQA Guidelines only recognize the use of an EIR or a negative declaration, not an addendum, to tier from a program EIR. The Addendum is not an appropriate environmental review document to tier from the Downtown Strategy 2040 EIR.

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

CEQA requires that the lead agency determine the appropriate form of CEQA review at the time the project application is submitted, not based on speculative future approvals.[33] CEQA requires lead agency to analyze the 'whole' of the project – this includes all foreseeable discretionary approvals.[34] For example, in *Laurel Heights Improvement Association v. Regents of University of California* [35]the California Supreme Court rejected an EIR where the agency failed to consider the whole of the project. The agency defined the project as involving "only the acquisition and operation of an

[32] 14 CCR, § 15152(a) and (b).
[33] CEQA Guidelines, § 15063 (timing and process of initial study); Pub. Resources Code, §§ 21003.1 (early identification of environmental effects), 21006 (CEQA is integral to agency decision making).
[34] Pub. Resources Code, § 21082.2(a) ("The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record"); CEQA Guidelines, § 15003(h) ("The lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect" and citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 401 ("*Laurel Heights I")*
[35] *Laurel Heights I, supra,* 47 Cal.3d 376.

existing facility and negligible or no expansion of use of existing use at that facility."[36] However, the Court found that future expansion of the project was a reasonably foreseeable consequence of the project and would likely change the scope or nature of the initial project or its environmental effects.[37] Here, approval of the Project's requested density bonus is a reasonably foreseeable consequence of the Project. The City therefore has a duty to analyze the impacts of the increase in density (and other associated impacts) that would result from approval of the density bonus.

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

By ignoring the Project's facial inconsistency with City land use requirements, the potentially significant impacts associated with those inconsistencies escape environmental review. As a result, the City has failed to comply with its CEQA obligations to disclose the nature and severity of the Project's impacts, and the City lacks substantial evidence to support its density bonus findings that the Project's proposed floor area ratio ("FAR") waiver and additional density bonus units would not have a specific adverse impact upon public health or safety, the environment, or harm historical property.[38] The Project's FAR waiver and density bonus may exacerbate the Project's impacts from air quality, public health, greenhouse gas emissions, and harm to historical property.

> **Response A.6**: This comment indicates that the EIR Addendum is inadequate because it identifies potentially significant impacts not discussed or disclosed in the Downtown Strategy 2040 FEIR. The analysis in the EIR Addendum is consistent with the Downtown Strategy 2040 FEIR as presented in the conclusions at the end of each chapter of the EIR Addendum. As presented in the responses to this letter below, the assumptions and conclusions made in the EIR Addendum are accurate, adequate, and supported by substantial evidence. The City has determined that preparation of a Subsequent EIR is not warranted.
>
> The subject site is designated Downtown on the Land Use/Transportation Diagram of the Envision San José 2040 General Plan, which allows residential density up to 800 dwelling units per acre (du/ac), intended for buildings between three and thirty stories in height. The Downtown designation is the primary designation for new high-intensity office, retail, service, residential, and entertainment uses in the Downtown area. All development within this designation should enhance the "complete community" in downtown, support pedestrian and bicycle circulation, and increase transit ridership.
>
> The project site is also located within the Downtown Employment Priority Area, which requires a minimum 4.0 FAR of commercial use within residential / commercial mixed-use projects. This designation is applied to Downtown sites planned for intensive job growth because of the area's proximity and good access to the future Downtown BART station.
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> The subject site is located in the DC Downtown Primary Commercial Zoning District, which allows for range of uses including residential, commercial, entertainment,

[36] *Laurel Heights I, supra,* 47 Cal.3d at p. 388.
[37] *Laurel Heights I, supra,* 47 Cal.3d at p. 396.
[38] Gov. Code, § 65589.5(d)(2).

education, and retail with a Site Development Permit.

The project proposes 20 percent of the total number of units as restricted affordable to low-income residents (28 units). Per the State Density Bonus Law (Government Code Section 65915), the project is allowed a 35 percent Density Bonus. With the density bonus applied, the maximum density is 1,080 dwelling units per acre. The project includes 192 units on 0.18-gross acres, or 1,066 dwelling units per acre. The project density is therefore consistent with the General Plan Land Use Designation with the allowed density bonus.

Additionally, the project applicant has requested a waiver to reduce the required 4.0 FAR of commercial square footage to 1.56 FAR. Because the project has been deemed eligible for the Density Bonus under State Law, the request for reduced commercial square footage is allowed as a waiver.

In addition, per the State's Density Bonus Law, if any development standard would physically prevent the project from being built at the permitted density, the developer may propose to have those standards waived or reduced. The city or county is not permitted to apply any development standard which physically precludes the construction of the project at its permitted density unless strict findings are made for denial. The City, however, is not required to waive or reduce development standards that would cause a public health or safety problem, cause an environmental problem, harm historical property, or would be contrary to law. There is no limit on the number of development standard waivers that may be requested or granted. In other words, the project qualifies for unlimited waivers to development standards, unless a waiver would cause a public health or safety problem, would cause harm to the environment or historical property, or would be contrary to law. The following five waivers were granted consistent with the State's Density Bonus Law:

- *Reduce parking requirement to zero*
- *Reduce off-street loading requirement to zero*
- *Reduce commercial requirement from 4.0 FAR to 1.56 FAR*
- *Eliminate Downtown Design Guidelines Section 4.2.2, Standard 'a' Height Transition*
- *Eliminate Downtown Design Guidelines Section 4.2.2, Standard 'c' Rear Transition*

The Eterna Tower Mixed-Use Development Project Addendum accounts for the density enumerated bonus and waivers in the analysis. The allowed density bonus is still within the residential pool assumptions in the Downtown Strategy 2040 FEIR. Therefore, the potential impacts of the increased density and waivers were analyzed in the EIR Addendum, and no further response is required.

As stated in the record at the August 24, 2022 Director's Hearing and as discussed in the EIR Addendum (Project Description and Section E. Cultural Resources), the existing buildings at 17 and 29 East Santa Clara Street are not historical resources as they are not designated City Landmarks or eligible for the local or state registers. The structure at 17 East Santa Clara

Street is a Structure of Merit which - although valuable to the City's downtown fabric - does not rise to the level of a historical resource in accordance with CEQA. Therefore, the project does not require a Historic Preservation Permit and is not subject to Title 13 (Chapter 13.48 – Historic Preservation) as suggested by the appellant.

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

Comment A.7: **A. The Air Quality Impacts of the Project Would Result in Unacceptable Negative Effects on Adjacent Properties**

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

> The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.

The dust and diesel particulate matter emissions from the Project are significant under CEQA and result in an unacceptable negative effect on adjacent properties.[40] Additionally, absent the use of Tier 4 Final engines, the project will result in unacceptable negative effects associated with diesel particulate matter. These impacts will adversely impact sensitive receptors at adjacent properties. The maximum excess residential cancer risks at these locations would be 17.19 per million for infant risk, which is greater than the Bay Area Air Quality Management District (BAAQMD) significance threshold of 10 in one million for cancer risk.[41] The dust from construction may negatively affect the sensitive receptors within adjacent properties, but the Addendum fails to adequately analyze and mitigate such impacts. As such, the City did not have substantial evidence to make the necessary findings to approve the Site Development Permit. The City must adequately analyze and mitigate the Project's significant air, dust, and health risk impacts in a Subsequent EIR to comply with CEQA.

> **Response A.7**: The project's air quality analysis (Section C of the EIR Addendum) was based on an Air Quality Assessment prepared by Illingworth and Rodkin, Inc. The project's air quality assessment did analyze the unmitigated and mitigated health risk impacts of the project on adjacent sensitive receptors. The unmitigated maximum cancer risk impact (from both construction and operation of the project) would result in a risk of 17.19 per million, assuming infant exposure during construction when emissions are greatest. The mitigated maximum cancer risk impact, with mitigation including the Downtown Strategy 2040 FEIR best management practices to control dust and exhaust during construction and the use of

[39] Clark Comments, p. 2; Addendum p. 54.
[40] Clark Comments, p. 5.
[41] *Id.*

construction equipment with Tier 4 Interim emissions standard engines, would result in a risk of 4.24 per million for infant risk. The mitigated cancer risk impact is below the BAAQMD significance threshold of 10 in one million for cancer risk, and therefore, results in a less-than-significant impact with mitigation. The 19 North Second Street Project (File Nos. HP21-007, SP21-044) is included in the background analysis. As detailed in the Air Quality section of the EIR Addendum, the PM 2.5 concentration Maximally Exposed Individual would be located at the future 19 North Second Street development (second floor, southwest corner); however, as stated above, with the implementation of best management practices to control dust and exhaust during construction and Mitigation Measure AQ-1, the project's cancer risk would be reduced to below the single-source BAAQMD thresholds. The cancer risk, annual PM 2.5 concentration, and Hazard Index, unmitigated and mitigated, do not exceed the cumulative BAAQMD thresholds of 100, 0.8 micrograms per cubic meter (μg/m3), and 10, respectively. Tier 4 Interim equipment is still considered "Best Available Control Technology" and the construction equipment with Tier 4 Interim engines are more readily available in fleet mixes. The main difference from Tier 4 Final equipment is that Tier 4 Final has a greater Nitrogen Oxides (NOx) emissions reduction, which the air quality assessment concluded had less-than-significant construction period NOx emissions. The comment does not present new information that has not been previously analyzed or provided substantial evidence supporting a fair argument that the project would result in significant unavoidable impacts requiring preparation of a subsequent EIR. Therefore, no further analysis is required.

Comment A.8: **B. The Project Fails to Implement Feasible Mitigation to Reduce Construction Air Emissions**

The Downtown Strategy 2040 EIR includes measures that may reduce air quality impacts, but the Addendum fails to implement them. The Downtown Strategy 2040 EIR provides that additional measures that would reduce emissions include to "equip all construction equipment, diesel trucks, and generators with Best Available Control Technology for emission reductions of NO_x and PM."[42]

New information which was not known and could not have been known at the time of preparation of the Downtown Strategy 2040 EIR shows that the Best Available Control Technology for emission reductions of NO_x and PM is through the use of Tier 4 Final Emission standard engines.[43] The Downtown Strategy 2040 EIR does not require the use of Tier 4 final engines. The Addendum likewise does not require Tier 4 Final engines. Mitigation Measure ("MM") AQ-1 provides:

1. All construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total shall meet U.S. EPA Tier 4 emission standards for particulate matter (PM_{10} and $PM_{2.5}$), if feasible, otherwise,
    a. If use of Tier 4 equipment is not available, alternatively use equipment that meets U.S. EPA emission standards for Tier 3 engines and include particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a minimum of 50 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment.
    b. Use of alternatively fueled or electric equipment.[44]

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

Dr. Clark concluded that not only is MM AQ-1 not the Best Available Control Technology, but that Tier 4 Interim emissions and Tier 3 emissions standards would not adequately reduce the Project's construction emissions to safe levels.[45] Dr. Clark explains that Tier 3 equipment would put out substantially more particulate matter (PM_{10} and $PM_{2.5}$) than Tier 4 Interim and Tier 4 Final equipment.[46] Tier 3 equipment puts out 80% to 89% more PM10 than Tier 4 Interim equipment and 85% to 91% more PM_{10} than Tier 4 Final equipment. Tier 3 equipment puts out 81% to 89% more PM2.5 than Tier 4 Interim equipment and 85% to 92% more $PM_{2.5}$ than Tier 4 Final equipment.[47] Substantial evidence presented herein, and in Dr. Clark's comments, that the Project's air quality impacts may be reduced through the use of Tier 4 Final Mitigation, but such measures were not implemented in the Addendum nor the Downtown Strategy 2040 EIR.

A subsequent EIR must be prepared, as here, when mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[48] Here, the Addendum fails to incorporate the Best Available Control Technology in the form of Tier 4 Final engines. A subsequent EIR must be prepared because Tier 4 Final mitigation measures are considerably different from those analyzed in the previous EIR and would substantially reduce one or more significant effects on the environment, but the project proponents declined to adopt the mitigation measure. The City should grant this Appeal and require the preparation of a subsequent EIR to be circulated for public review in compliance with CEQA.

> **Response A.8**: As noted in the above response, the air quality assessment analyzed the project's construction risk assessment with the Downtown Strategy 2040 FEIR best management practices to control dust and exhaust during construction and the use of construction equipment with Tier 4 Interim emissions standard engines, which reduced the cancer risk impact to below the BAAQMD significance threshold. Tier 4 Interim equipment is still considered "Best Available Control Technology" and the construction equipment with Tier 4 Interim engines are more readily available in fleet mixes. The main difference between Tier 4 Final equipment and Tier 4 Interim equipment is that Tier 4 Final has a greater NOx emissions reduction as stated by the appellant; however, the Tier 4 Interim equipment assumed in the air quality assessment still concluded less-than-significant construction period NOx emissions. In the event that special equipment is needed and cannot be procured with engines that meet Tier 4 standards, Mitigation Measure AQ-1 states that engines meeting Tier 3 standards could be used; however, this equipment would have to be equipped with particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a minimum of 50 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment. Therefore, the use of Tier 4 Interim equipment, or some equipment that meets Tier 3 standards with CARB Level 3 verifiable diesel emission control devices (in the event that Tier 4 equipment is not available), sufficiently mitigates the project's health risk impacts to below BAAQMD significance

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

thresholds as a Best Available Control Technology while meeting the measures included in the Downtown Strategy 2040 FEIR.

Comment A.9: C. The Addendum Relies on Inaccurate Air Quality Modeling

The Addendum is inadequate under CEQA for failing to accurately analyze the Project's Air Quality impacts. Dr. Clark concluded that the Addendum relies on modeling which assumes the use of Tier 4 Final emission standards, but Tier 4 Final engines are not required by the Addendum or the EIR.[49] This results in the artificial reduction of the Project's construction air emissions. Inaccurate modeling may not be relied on for determining the significance of air quality impacts. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.[50] An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.[51]

The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.[52] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[53] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[54] Here, the City's failure to provide accurate air modeling associated with the Tier 4 Final mitigation is a failure to disclose information about the Project's environmental effects and results in a failure to proceed in the manner required by CEQA. A subsequent EIR must be prepared which accurately analyzes and mitigates the Project's air emissions and includes a requirement to utilize Tier 4 Final Emission standards for Project Construction before the Project can be approved.

Response A.9: The commenter is incorrect in their assertion that the air quality modeling relied upon modeling that assumed the use of Tier 4 Final equipment. As noted in the above response, the use of Tier 4 Interim equipment was assumed in the modeling for mitigated impacts and would sufficiently mitigate the project's health risk impacts to below BAAQMD significance thresholds as a Best Available Control Technology while meeting the measures included in the Downtown Strategy 2040 FEIR. The comment does not present new information that has not been previously analyzed or provided substantial evidence for the preparation of a subsequent EIR pursuant to CEQA Guidelines Section 15162; therefore, no further analysis is required.

Comment A.10: **D. The Project Fails to Mitigate Air Quality Impacts Associated with Project Operation and the Backup Generator**

The Project will utilize a stand-by diesel engine backup generator, which will be located on the basement level.[55] The Addendum states that the Generator would be operated for testing and

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

maintenance purposes, with a maximum of 50 hours per year of nonemergency operation under normal conditions.[56] The Addendum and the Downtown Strategy 2040 FEIR failed to analyze the Project's potential use of the backup generator for 200 hours per year or more, as described in Dr. Clark's comments.

As such, the Addendum fails to analyze the full extent of the Project's operational air emissions by failing to accurately model the backup generators' air emissions. According to SCAQMD Rules 1110.2, 1470, back-up generators are allowed to operate for up to 200 hours per year and maintenance cannot exceed more than 50 hours per year.[57] The Addendum must be revised to quantify and analyze the full extent of the necessary maintenance and testing period for the generators onsite.

Second, the Addendum fails to analyze the Project's use of backup generator during a power outage. According to Dr. Clark, it is more likely that the Backup Generators would need to be used more than 150 hours per year, due to increasing Public Safety Power Shutoff ("PSPS") events and extreme heat events.[58]

During a PSPS event, the use of stationary generators is permitted as an emergency use.[59] For every PSPS or extreme heat event, significant GHG emissions i.e., carbon dioxide equivalents and diesel particulate matter ("DPM") will be released.[60] DPM has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including forty known cancer-causing organic substances.[61] Dr. Clark notes that the California Air Resources Board found that the 1,810 additional stationary generators during a PSPS in October 2019 generated 126 tons of NO_x, 8.3 tons of particulate matter, and 8.3 tons of DPM.[62] Therefore, the GHG, air quality, and DPM emission impacts associated with the use of the Backup Generator are significant, but the Addendum fails to adequately analyze or mitigate such impacts.[63] The failure to analyze is a failure to proceed in a manner required by law.[64] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[65] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[66] Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"[67]

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[56] *Id.* at 55.
[57] Clark Comments, p. 9.
[58] Clark Comments, p. 9.
[59] 17 CCR 93115.4(a)(30)(A)(2).
[60] Clark Comments, p. 9.
[61] *Id.*
[62] California Air Resources Board, Potential Emissions Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020). Available at: https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf.
[63] Clark Comments, p. 9.
[64] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
[65] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[66] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[67] *Berkeley Jets*, 91 Cal.App.4th at 1355.

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

Response A.10: Per direction by the BAAQMD, only emissions from routine testing and maintenance were considered in the analysis. The procedure is in accordance with BAAQMD Regulation 2, Rule 5 and the number of non-emergency operation hours per year is limited to 50 hours per the Airborne Toxic Control Measure for Stationary Toxic Compression Ignition Engines (Section 93115, Title 17 CCR). The District's procedure for permitting emergency generators is to consider operation of the generators for up to 50 hours per year. There is no way to reliably predict the number of hours that a power outage would occur and therefore, 50 hours is the standard. Furthermore, the reference the commenter uses for the power shutoff operational hours for a generator is from South Coast Air Quality Management District (SCAQMD), not BAAQMD where the Project is located. For cancer risk calculations to support issuance of permits under Regulation 2, Rule 5, BAAQMD uses 50 hours operation per year averaged over 30 years. The air quality assessment used the same assumptions, except the generator would operate 28 years and there would be construction for two years (30-year total averaging period).

The project site is in San José, a highly urbanized area that has not been subject to Public Power Safety Shutoff (PSPS) events, so applying outage estimates from 2019 during these events is inappropriate. There are extreme heat events that in some cases cause rolling power outages. For any particular site, these are rare events that would not result in power loss for long periods of time (requiring the use of the back-up generator).

The EIR Addendum provides a reasonable worst-case assessment of emissions because actual generator use would likely be less than 50 hours per year. Testing schedules are typically 30 minutes or less biweekly (or 12 hours per year) per generator under no load when emissions are much lower. The generators were modeled to operate 50 hours per year at 73 percent of full load. The commenter does not provide any credible evidence that generators would operate on average more than 50 hours per year over the life of the project.

Lastly, the commenter provides no evidence that the use of the back-up emergency generator would cause significant impacts even if it were to run for 150 to 200 hours per year. The operational emissions of air pollutants affected by diesel engine operation (i.e., NOx and particulate matter) are well below the significant thresholds and cancer risk associated with mitigated construction emissions and generator operation are also well below thresholds. No further analysis is required.

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

Comment A. 11: **A. The Addendum Fails to Adequately Analyze the Impacts of Hazardous Contamination**

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

The Project risks exacerbating hazardous contamination in soil and groundwater by bringing development and people to the area affected. According to the Office of Environmental Health Hazard Assessment (OEHHA), on behalf of the California Environmental Protection Agency (CalEPA), the Project site is within the 91st percentile in terms of groundwater threats.[70] The Project is also within the 41st percentile for toxic releases from facilities.[71] The Project site is adjoined on its northeastern corner by a site listed as an open Spills, Leaks, Investigations, and Cleanup (SLIC) release case in the regulatory database.[72] The site is contaminated with halogenated volatile organic compounds (HVOCs), including PCE, in soil, soilgas, indoor air, and shallow groundwater at concentrations above their respective regulatory screening criteria at this site.[73] In addition, elevated HVOC levels have been detected in soil, soil-gas, groundwater, and indoor air samples collected from the properties located north/northeast of the Project site.[74]

The Addendum fails to analyze the Project's risk of exacerbating existing environmental conditions and bringing people to the area affected, in violation of CEQA. The Addendum must be withdrawn, and a Subsequent EIR pursuant to CEQA Guidelines Section 15162 must be prepared and circulated for public review.

> **Response A.11**: Hazards and Hazardous Materials are discussed under Section I of the Eterna Tower Mixed-Use Development Project Addendum. As described in the EIR Addendum, a Phase I Environmental Site Assessment prepared by AEI Consultants, Inc., was performed for the project that identified hazardous materials contamination at the adjoining site located at 35 and 43 East Santa Clara Street from high volatility organic compounds. Based on the analytical results obtained from this project site and other nearby properties, the adjoining open release case was identified as a potential impact.
>
> Mitigation Measure HAZ-1 requires that the project applicant retain a qualified consultant to conduct a Phase II analysis consisting of focused sampling and analysis for contamination of soil, soil vapor, and/or groundwater on-site prior to issuance of any grading, building, or demolition permits. Sampling on the site would be under the regulatory oversight from the Santa Clara County Department of Environmental Health's (SCCDEHs) Voluntary Cleanup Program, or an equivalent program by another oversight agency, to address soil and groundwater contamination discovered on the property. Based on the results, the project applicant must prepare, under the guidance of the oversight agency, a Site and Groundwater Management Plan (SGMP) or equivalent report. The SGMP or equivalent report must establish and implement remedial measures and/or soil management practices to ensure

[68] 14 CCR 15126.2(a); *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 388.
[69] 14 CCR 15126.2(a).
[70] CalEnviroScreen 3.0 Results (June 2018 Update) Available at: https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30.
[71] *Id.*
[72] Addendum p. 124.
[73] *Id.*
[74] Addendum p. 124.

construction worker safety and the health of future workers and visitors. The comment does not present new information that has not been previously analyzed or provided substantial evidence supporting a fair argument that the project would result in significant unavoidable impacts requiring preparation of a subsequent EIR; therefore, no further analysis is required.

Comment A.12: **B. The Addendum Fails to Mitigate the Impacts of Hazardous Contamination**

"An EIR is inadequate if '[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.' "[75] Here, MM HAZ-1 would require additional analysis and provide mitigation measures that should have been included in an EIR. The Addendum fails as an informational document for impermissibly deferred analysis and mitigation.

Mitigation Measure HAZ-1 is inadequate because it constitutes impermissibly deferred analysis. The formulation of mitigation measures in the proposed Site and Groundwater Management Plan is deferred until some future time in violation of CEQA.[76] "Impermissible deferral of mitigation measures occur when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR."[77] Here, the Addendum states that a Phase II Environmental Site Assessment will be conducted after Project approval, at which time additional groundwater sampling and mitigation may be proposed.[78]

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

The CEQA Guidelines provide that "[t]he specific details of a mitigation measure…may be developed after project approval when it is impractical or infeasible to include those details during

[75] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.
[76] 14 CCR 15126.4(a)(1)(B).
[77] *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 915-916.
[78] Addendum p. 126-127.

the project's environmental review…"[79] The Addendum does not state why conducting a Phase II site assessment or preparing a SGMP or identifying necessary mitigation measures were impractical or infeasible at the time the Addendum was drafted.

In *Preserve Wild Santee v. City of Santee,* the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures "was impractical or infeasible at the time the EIR was certified."[80] The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.[81] Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.[82] Here, the fact that the Site and Groundwater Management Plan will be approved later by the Director of Planning, Building and Code Enforcement or the Director's designee does not cure the informational defects in this Addendum.[83] The City should grant this Appeal and remand the Project to City Planning Staff to prepare a legally adequate subsequent EIR which fully analyzes and mitigates the Project's hazards and hazardous contamination impacts to satisfy CEQA.

> **Response A.12**: Conducting a Phase II assessment and testing was not feasible on the project site due to the presence of existing mid-rise development on the site. Mitigation Measure HAZ-1 identifies a course of action with performance standards based on the results on the Phase II work subject to regulatory overview. Therefore, this mitigation does not represent deferred mitigation and is sufficient to avoid impacts related to the potential presence of hazardous materials. This mitigation is enforceable, since it requires implementation of the SGMP or equivalent report and must meet applicable environmental screening levels. Compliance with regulations is appropriate mitigation when those regulations identify specific standards and criteria for minimizing environmental risk. In addition, MM HAZ-1 will be incorporated in the Mitigation Monitoring and Reporting Program for the Initial Study/Mitigated Negative Declaration EIR Addendum and project conditions of approval. Therefore, preparation of a subsequent EIR is not required.

Comment A.13: **VI. THE HOUSING ACCOUNTABILITY ACT WOULD NOT PRECLUDE ADDITIONAL CEQA REVIEW**

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

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

[79] 14 CCR § 15126.4(a)(1)(B).
[80] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.
[81] *Id.*
[82] *Endangered Habitats League, Inc. v. County of Orange,* (2005) 131 Cal.App.4th 777, 794.
[83] *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.
[84] Gov. Code, § 65589.5, subd. (h)(6) ("Disapprove the housing development project" includes any instance in which a local agency does either of the following: (A) Votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit. (B) Fails to comply with the time periods specified in subdivision (a) of Section 65950. An extension of time pursuant to Article 5 (commencing with Section 65950) shall be deemed to be an extension of time pursuant to this paragraph.

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

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

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

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

Response A.13:

The subject project was not streamlined under the Housing Accountability Act and therefore, a full CEQA analysis was prepared.

While it is true that upholding Silicon Valley Residents' appeal would not prevent the preparation of a subsequent environmental document, as discussed above, the project would not require a subsequent environmental document because the EIR Addendum is the appropriate CEQA clearance.

Comment A.14: **VII. CONCLUSION**

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

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

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

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

> **Response A.14**: This comment indicates that the EIR Addendum is inadequate and suggests that a Subsequent EIR is required. As presented in the responses to this letter, the assumptions and conclusions made in the EIR Addendum are accurate, adequate, and supported by substantial evidence. None of the claims presented in this comment letter provide additional substantial evidence that the project would result a new significant environmental impact or a substantial increase in the severity of an environmental impact than determined in the Addendum Therefore, the City has determined that preparation of a Subsequent EIR is not warranted. This appeal letter and responses will be included in the City's record of proceedings.

RESPONSES TO LETTER A ATTACHMENT BY CLARK & ASSOCIATED ENVIRONMENTAL CONSULTING, INC.

Comment A.1-1: The City's Air Quality Analysis Fails To Consider The Impact Of Adding Additional Diesel Particulate Matter (DPM) On The Already Impacted Census Tract.

> **Response A.1-1**: The air quality assessment evaluated air quality impacts associated with the Project, including an extensive analysis of diesel particulate emissions and addressed the influence of cumulative sources of toxic air contaminants that include roadways, stationary sources, and other construction projects within 1,000 feet of the Project site. No further analysis is warranted.
>
> Note that BAAQMD uses CalEnviroScreen 4.0 to identify overburdened communities, which are those that have an overall pollution burden that exceeds the 70th percentile. This Project site has an overall pollution burden that is at the 64th percentile and is not considered by BAAQMD as an overburdened community. The description of "this already burdened community" is incorrect.

Comment A.1-2: Air Quality Mitigation Measure (MM) 1 Fails to Require the Use of Tier 4 Final Technology for Off-Road Sources of Diesel Exhaust On-Site.

> **Response A.1-2**: See Responses to A.11, A.12, and A.13 above. The use of Tier 4 equipment, either Tier 4 Final or Tier 4 Interim, is likely the easiest method to meet mitigation measure requirements. The air quality analysis reflects reality, in crafting the mitigation language, that there may be a rare circumstance that Tier 4 equipment is not available. In that case, Tier 3 equipment that are equipped with CARB Level 3 verifiable diesel emission control devices could be used. When the commenter describes the effectiveness of Tier 3 equipment, they neglect to recognize that the engines would have to be equipped with CARB Level 3 verifiable diesel emission control devices. According to the CalEEMod model, these devices reduce diesel particulate matter emissions by 85 percent. Diesel particulate matter emissions from Tier 3 engines equipped with CARB Level 3

verifiable diesel emission control devices would be similar to those associated with Tier 4 engines. Note the main difference between Tier 4 interim and Tier 4 final standards is that Tier 4 final includes the requirements for particulate matter (including diesel particulate matter) and includes controls to further reduce NOx. Mitigated emissions, based on Tier 4 interim emissions, result in cancer risk well below the threshold. Modeling based on use of Tier 4 Final or Tier 3 engines with CARB Level 3 verifiable diesel emission control devices would not substantially change this conclusion nor the significance finding. The commenter does not provide any evidence to the contrary. Therefore, no further analysis is necessary.

Comment A.1-3: The City's CalEEMod Analysis of Emissions from The Back Up Generator (BUG) On-Site Must Include the Testing and Non-Testing (Operational) Impacts of the BUG.

Response A.1-3: See Response A.14 above. Note that the commenter claims that there will be substantially more hours of generator operation than 50 hours per year, averaged over 28 years, based on the selection of certain events that occurred outside of this air basin back in 2019 when rural and suburban portions of the State were subject to PSPS events and then a separate extreme heat event that occurred in a different year of 2021. In the extreme heat event of 2021, operators were only allowed to operate their equipment, but most did not as long as there was electricity available. The backup generator's purpose is to provide electrical power in the event of a power outage and not serve as an alternative power source. Left out of the commenters discussion is the high cost of diesel fuel to operate this equipment, resulting in a much greater expense for electrical power to the site. There is no specific evidence provided that the assumptions of 50 hours per year of operation is an underestimate. Furthermore, there is no evidence provided that if the hours were greater than 50 hours that emissions would exceed thresholds as the results of emissions modeling show that total project criteria pollutant emissions are well below thresholds and the mitigated cancer risk that includes generator operation over 28 years is well below thresholds. No further analysis is necessary.

Attachment A

Copy of Appeal

CITY OF SAN JOSE
Planning, Building and Code Enforcement
200 East Santa Clara Street
San José, CA 95113-1905
tel (408) 535-3555 fax (408) 292-6055
Website: www.sanjoseca.gov/planning

INSTRUCTIONS FOR FILING AN APPLICATION FOR
APPEAL OF AN ENVIRONMENTAL DETERMINATION

WHO MAY APPEAL
Any person may file.

TIME LIMIT
A complete Notice of Environmental Appeal (see back page) must be filed in person at Development Services Center, City Hall, no later than 5 p.m. on the **third business day** following the day of the public hearing that relied upon the Environmental Determination.

APPEAL REQUIREMENTS
1. A complete Notice of Environmental Appeal including the following within the appropriate time limit:

    a. Application filing fee, (see Filing Fee Schedule).
    b. The appeal shall state with specificity the reasons that the Environmental Determination should be found not to be complete or not to have been prepared in compliance with the requirements of CEQA.
    c. No appeal shall be considered unless it is based on issues which were raised at the public hearing either orally or in writing prior to the public hearing. (21.07.040C)

PROCESSING SCHEDULE

Planning Staff:

- Checks the application for completeness.
- Logs and collects fees.
- Sets a public hearing date before City Council and places the item in the agenda.
- Prepares a recommendation to the City Council.

City Council:

- considers and acts upon the appeal in a public hearing.

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

CITY OF SAN JOSE
Planning, Building and Code Enforcement
200 East Santa Clara Street
San José, CA 95113-1905
tel (408) 535-3555 fax (408) 292-6055
Website: www.sanjoseca.gov/planning

NOTICE OF ENVIRONMENTAL APPEAL

TO BE COMPLETED BY PLANNING STAFF

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

TO BE COMPLETED BY PERSON FILING APPEAL

PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.

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

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

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

PERSON FILING APPEAL

NAME			DAYTIME TELEPHONE
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August 26, 2022

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

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

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

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

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

The Project, proposed by ROYGBIV Real Estate Development LLC ("Applicant") includes construction of a 26-story, 184,667-gross square foot mixed-use building on the approximately 0.18-acre site at 17 and 29 East Santa Clara Street in downtown San José.[4] The Project would include 192 residential units and approximately 5,217 square feet of office space on the second floor. The Project site is currently occupied by a pair of two-story buildings, one of which (17 East Santa Clara Street) is an identified Structure of Merit on the City's Historic Resources Inventory[5]; both are proposed for demolition.

The Project is within the DC Downtown Primary Commercial Zoning District, and the Downtown General Plan Designation.[6] The Project is also located within the Downtown Employment Priority Area, which requires a minimum 4.0 FAR of commercial use within residential / commercial mixed-use projects.[7] Construction of the Project would occur over a period of 29 months.[8] The Project would include a diesel-powered backup generator.[9]

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

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[3] City of San Jose, Planning Application Filing Fee Schedule, Effective August 15, 2022. Available at: https://www.sanjoseca.gov/home/showdocument?id=24803.
[4] City of San Jose, Addendum to the Downtown Strategy 2040 Final Environmental Impact Report for Eterna Tower Mixed-Use Development, File No. H20-026 (August 5, 2022) (hereinafter "Addendum").
[5] Addendum, Appendix B, Historical Evaluation, p. 1; City of San Jose, Planning, Building & Code Enforcement, Historic Resources Inventory.
[6] San Jose Zoning Code § 20.70.100.
[7] City of San Jose, Site Development Permit (H20-026) p. 10 of 28.
[8] Addendum p. 6.
[9] *Id.* at 1.
[10] Silicon Valley Residents for Responsible Development's August 23, 22 written comments to the Planning Director are attached hereto as **Exhibit A** and incorporated by reference.

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

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

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

I. STATEMENT OF INTEREST

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

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they

[11] San Jose Muni. Code § 21.04.140 subd. (E)(3) (providing that "[n]o appeal shall be considered unless it is based upon issues that were raised previously either orally or in writing to a recommending body or a decision-making body at or prior to a public hearing whenever the underlying project is considered at a public hearing.")
[12] Exhibit A.
[13] Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1199-1203; *see Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which is satisfied by the Addendum. CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.[14] The EIR is the "heart" of this requirement.[15] The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."[16]

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

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

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[14] 14 Cal. Code Regs. ("CCR") § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[15] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.
[16] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[17] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[18] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[19] PRC § 21100(b)(1); 14 CCR § 15126.2(a).

requiring the consideration of environmentally superior alternatives.[20] If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[21] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[22] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.[23] A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[24] This approach helps "ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[25]

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

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

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[20] 14 CCR § 15002(a)(2) and (3); *Berkeley Jets,* 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.
[21] PRC §§ 21002.1(a), 21100(b)(3).
[22] *Id*., §§ 21002-21002.1.
[23] 14 CCR § 15126.4(a)(2).
[24] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).
[25] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

was certified as complete, becomes available.[26]

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

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

[26] PRC, § 21166 (emphasis added).

previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[27]

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

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

Accordingly, Dr. Clark's substantial evidence, and the City's own recognition of potentially significant impacts not previously addressed, require that the City prepare and circulate for public comment a Subsequent EIR or MND that adequately addresses all of the Project's potentially significant impacts and proposes appropriate mitigation measures.[31]

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[27] 14 CCR, § 15162(a)(1)-(3) (emphasis added).
[28] 14 CCR, § 15162(b).
[29] 14 CCR, § 15164.
[30] *Id*. §§ 15162 (a), 15164(e), and 15168(c)(4).
[31] 14 CCR, § 15162 ("no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]"); § 15164 ("The [agency's] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.").

III. THE CITY IMPROPERLY RELIED ON AN ADDENDUM

An addendum to an EIR is only appropriate if some changes or additions to the prior EIR are necessary, but none of the conditions described in Guidelines section 15162 have occurred. Where, as here, the project will have one or more significant impacts not discussed in the previous EIR, an addendum is inappropriate. The Addendum specifically identifies several potentially significant impacts not discussed in the Downtown Strategy 2040 EIR, including Impact AQ-1 (infant cancer risk from exposure to diesel particulate matter during project construction), Impact HAZ-1 (exposure of construction workers and the public to soil and groundwater contaminants), Impact NSE-1 (construction noise in excess of the City's General Plan thresholds) and Impact NSE-2 (vibrations from construction exceeding the City's General Plan thresholds).

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

In addition, the City seeks to rely on CEQA Guidelines Section 15152 to tier from the Downtown Strategy 2040 EIR. Tiering refers to "using the analysis of general matters contained in a broader EIR…with later EIRs or negative declarations" and is appropriate when the sequence of analysis is from a program EIR to a site-specific EIR or negative declaration.[32] The CEQA Guidelines only recognize the use of an EIR or a negative declaration, not an addendum, to tier from a program EIR. The Addendum is not an appropriate environmental review document to tier from the Downtown Strategy 2040 EIR.

Moreover, the Downtown Strategy 2040 EIR does not contemplate the use of density bonuses to inflate the size and impacts of Projects tiering from it. The City's reliance on anticipated density bonus approvals to claim that the Project is currently "consistent" with existing zoning and land use plans so as to rely on an

[32] 14 CCR, § 15152(a) and (b).

addendum to the Downtown Strategy 2040 EIR is entirely unsupported and contrary to CEQA.

CEQA requires that the lead agency determine the appropriate form of CEQA review at the time the project application is submitted, not based on speculative future approvals.[33] CEQA requires lead agency to analyze the 'whole' of the project – this includes all foreseeable discretionary approvals.[34] For example, in *Laurel Heights Improvement Association v. Regents of University of California*[35] the California Supreme Court rejected an EIR where the agency failed to consider the whole of the project. The agency defined the project as involving "only the acquisition and operation of an existing facility and negligible or no expansion of use of existing use at that facility."[36] However, the Court found that future expansion of the project was a reasonably foreseeable consequence of the project and would likely change the scope or nature of the initial project or its environmental effects.[37] Here, approval of the Project's requested density bonus is a reasonably foreseeable consequence of the Project. The City therefore has a duty to analyze the impacts of the increase in density (and other associated impacts) that would result from approval of the density bonus.

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

By ignoring the Project's facial inconsistency with City land use requirements, the potentially significant impacts associated with those inconsistencies escape environmental review. As a result, the City has failed to

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[33] CEQA Guidelines, § 15063 (timing and process of initial study); Pub. Resources Code, §§ 21003.1 (early identification of environmental effects), 21006 (CEQA is integral to agency decision making).
[34] Pub. Resources Code, § 21082.2(a) ("The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record"); CEQA Guidelines, § 15003(h) ("The lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect" and citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 401 ("*Laurel Heights I")*
[35] *Laurel Heights I, supra,* 47 Cal.3d 376.
[36] *Laurel Heights I, supra,* 47 Cal.3d at p. 388.
[37] *Laurel Heights I, supra,* 47 Cal.3d at p. 396.

comply with its CEQA obligations to disclose the nature and severity of the Project's impacts, and the City lacks substantial evidence to support its density bonus findings that the Project's proposed floor area ratio ("FAR") waiver and additional density bonus units would not have a specific adverse impact upon public health or safety, the environment, or harm historical property.[38] The Project's FAR waiver and density bonus may exacerbate the Project's impacts from air quality, public health, greenhouse gas emissions, and harm to historical property.

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

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

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

> The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.

The dust and diesel particulate matter emissions from the Project are significant under CEQA and result in an unacceptable negative effect on adjacent properties.[40] Additionally, absent the use of Tier 4 Final engines, the project will result in unacceptable negative effects associated with diesel particulate matter. These impacts will adversely impact sensitive receptors at adjacent properties. The maximum excess residential cancer risks at these locations would be 17.19 per million for infant risk, which is greater than the BAAQMD significance threshold of

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

10 in one million for cancer risk.[41] The dust from construction may negatively affect the sensitive receptors within adjacent properties, but the Addendum fails to adequately analyze and mitigate such impacts. As such, the City did not have substantial evidence to make the necessary findings to approve the Site Development Permit. The City must adequately analyze and mitigate the Project's significant air, dust, and health risk impacts in a Subsequent EIR to comply with CEQA.

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

The Downtown Strategy 2040 EIR includes measures that may reduce air quality impacts, but the Addendum fails to implement them. The Downtown Strategy 2040 EIR provides that additional measures that would reduce emissions include to "equip all construction equipment, diesel trucks, and generators with Best Available Control Technology for emission reductions of NOx and PM."[42]

New information which was not known and could not have been known at the time of preparation of the Downtown Strategy 2040 EIR shows that the Best Available Control Technology for emission reductions of NOx and PM is through the use of Tier 4 Final Emission standard engines.[43] The Downtown Strategy 2040 EIR does not require the use of Tier 4 final engines. The Addendum likewise does not require Tier 4 Final engines. Mitigation Measure ("MM") AQ-1 provides:

1. All construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total shall meet U.S. EPA Tier 4 emission standards for particulate matter (PM10 and PM2.5), if feasible, otherwise,

a. If use of Tier 4 equipment is not available, alternatively use equipment that meets U.S. EPA emission standards for Tier 3 engines and include particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a minimum of 50 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment.
b. Use of alternatively fueled or electric equipment.[44]

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

Dr. Clark concluded that not only is MM AQ-1 not the Best Available Control Technology, but that Tier 4 Interim emissions and Tier 3 emissions standards would not adequately reduce the Project's construction emissions to safe levels.[45] Dr. Clark explains that Tier 3 equipment would put out substantially more particulate matter (PM_{10} and $PM_{2.5}$) than Tier 4 Interim and Tier 4 Final equipment.[46] Tier 3 equipment puts out 80% to 89% more PM_{10} than Tier 4 Interim equipment and 85% to 91% more PM_{10} than Tier 4 Final equipment. Tier 3 equipment puts out 81% to 89% more $PM_{2.5}$ than Tier 4 Interim equipment and 85% to 92% more $PM_{2.5}$ than Tier 4 Final equipment.[47] Substantial evidence presented herein, and in Dr. Clark's comments, that the Project's air quality impacts may be reduced through the use of Tier 4 Final Mitigation, but such measures were not implemented in the Addendum nor the Downtown Strategy 2040 EIR.

A subsequent EIR must be prepared, as here, when mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[48] Here, the Addendum fails to incorporate the Best Available Control Technology in the form of Tier 4 Final engines. A subsequent EIR must be prepared because Tier 4 Final mitigation measures are considerably different from those analyzed in the previous EIR and would substantially reduce one or more significant effects on the environment, but the project proponents declined to adopt the mitigation measure. The City should grant this Appeal and require the preparation of a subsequent EIR to be circulated for public review in compliance with CEQA.

C. The Addendum Relies on Inaccurate Air Quality Modeling

The Addendum is inadequate under CEQA for failing to accurately analyze the Project's Air Quality impacts. Dr. Clark concluded that the Addendum relies on modeling which assumes the use of Tier 4 Final emission standards, but Tier 4 Final engines are not required by the Addendum or the Downtown Strategy 2040

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

EIR.[49] This results in the artificial reduction of the Project's construction air emissions. Inaccurate modeling may not be relied on for determining the significance of air quality impacts. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.[50] An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.[51]

The failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.[52] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[53] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[54] Here, the City's failure to provide accurate air modeling associated with the Tier 4 Final mitigation is a failure to disclose information about the Project's environmental effects and results in a failure to proceed in the manner required by CEQA. A subsequent EIR must be prepared which accurately analyzes and mitigates the Project's air emissions and includes a requirement to utilize Tier 4 Final Emission standards for Project Construction before the Project can be approved.

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

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

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

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

As such, the Addendum fails to analyze the full extent of the Project's operational air emissions by failing to accurately model the backup generators' air emissions. According to SCAQMD Rules 1110.2, 1470, back-up generators are allowed to operate for up to 200 hours per year and maintenance cannot exceed more than 50 hours per year.[57] The Addendum must be revised to quantify and analyze the full extent of the necessary maintenance and testing period for the generators onsite.

Second, the Addendum fails to analyze the Project's use of backup generator during a power outage. According to Dr. Clark, it is more likely that the Backup Generators would need to be used more than 150 hours per year, due to increasing Public Safety Power Shutoff ("PSPS") events and extreme heat events.[58]

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

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[57] Clark Comments, p. 9.
[58] Clark Comments, p. 9.
[59] 17 CCR 93115.4(a)(30)(A)(2).
[60] Clark Comments, p. 9.
[61] *Id.*
[62] California Air Resources Board, Potential Emissions Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020). Available at: https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf.
[63] Clark Comments, p. 9.
[64] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

proceed in the manner required by CEQA, such as the failure to address a subject required to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[65] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[66] Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"[67]

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

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

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

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

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[65] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[66] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[67] *Berkeley Jets*, 91 Cal.App.4th at 1355.
[68] 14 CCR 15126.2(a); *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 388.
[69] 14 CCR 15126.2(a).

The Project risks exacerbating hazardous contamination in soil and groundwater by bringing development and people to the area affected. According to the Office of Environmental Health Hazard Assessment (OEHHA), on behalf of the California Environmental Protection Agency (CalEPA), the Project site is within the 91st percentile in terms of groundwater threats.[70] The Project is also within the 41st percentile for toxic releases from facilities.[71] The Project site is adjoined on its northeastern corner by a site listed as an open Spills, Leaks, Investigations, and Cleanup (SLIC) release case in the regulatory database.[72] The site is contaminated with halogenated volatile organic compounds (HVOCs), including PCE, in soil, soil-gas, indoor air, and shallow groundwater at concentrations above their respective regulatory screening criteria at this site.[73] In addition, elevated HVOC levels have been detected in soil, soil-gas, groundwater, and indoor air samples collected from the properties located north/northeast of the Project site.[74]

The Addendum fails to analyze the Project's risk of exacerbating existing environmental conditions and bringing people to the area affected, in violation of CEQA. The Addendum must be withdrawn, and a Subsequent EIR pursuant to CEQA Guidelines Section 15162 must be prepared and circulated for public review.

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

"An EIR is inadequate if '[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.' "[75] Here, MM HAZ-1 would require additional analysis and provide mitigation measures that should have been included in an EIR. The Addendum fails as an informational document for impermissibly deferred analysis and mitigation.

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

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[70] CalEnviroScreen 3.0 Results (June 2018 Update) Available at: https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30.
[71] *Id.*
[72] Addendum p. 124.
[73] *Id.*
[74] Addendum p. 124.
[75] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

proposed Site and Groundwater Management Plan is deferred until some future time in violation of CEQA.[76] "Impermissible deferral of mitigation measures occur when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR."[77] Here, the Addendum states that a Phase II Environmental Site Assessment will be conducted after Project approval, at which time additional groundwater sampling and mitigation may be proposed.[78]

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

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

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

preparing a SGMP or identifying necessary mitigation measures were impractical or infeasible at the time the Addendum was drafted.

In *Preserve Wild Santee v. City of Santee,* the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures "was impractical or infeasible at the time the EIR was certified."[80] The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.[81] Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.[82] Here, the fact that the Site and Groundwater Management Plan will be approved later by the Director of Planning, Building and Code Enforcement or the Director's designee does not cure the informational defects in this Addendum.[83] The City should grant this Appeal and remand the Project to City Planning Staff to prepare a legally adequate subsequent EIR which fully analyzes and mitigates the Project's hazards and hazardous contamination impacts to satisfy CEQA.

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

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

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

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

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

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

As the court of appeal explained:

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

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

VII. CONCLUSION

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

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

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

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

Sincerely,

Kelilah D. Federman

Attachments
KDF:acp

5622-007acp

EXHIBIT A

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August 23, 2022

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

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

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

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

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

residential units and approximately 5,217 square feet of office space on the second floor. The Project would provide 22 percent of the residential units at Below Market Rate. The Project site is currently occupied by a pair of two-story buildings, one of which (17 East Santa Clara Street) is an identified Structure of Merit on the City's Historic Resources Inventory[2]; both are proposed for demolition. The Project would retain the street facing façade and parapet of the existing building at 17 East Santa Clara Street, which would be integrated into the new project.

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

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

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

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

[3] San Jose Zoning Code § 20.70.100.

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

[5] Addendum p. 6.

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

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

I. STATEMENT OF INTEREST

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

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which is satisfied by the Addendum. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the

environment.[7] The EIR is the "heart" of this requirement.[8] The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."[9]

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

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

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

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[7] 14 CCR § 15002(a)(1) ("CEQA Guidelines"); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[8] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.
[9] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[10] 14 CCR, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[11] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[12] PRC, § 21100(b)(1); 14 CCR, § 15126.2(a).
[13] 14 CCR, § 15002(a)(2) and (3); *Berkeley Jets,* 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.
[14] PRC, §§ 21002.1(a), 21100(b)(3).
[15] *Id.*, §§ 21002-21002.1.
[16] 14 CCR, § 15126.4(a)(2).

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

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

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

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

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

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[17] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).
[18] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.
[19] 14 CCR, §§ 15060, 15063(c).
[20] *See, e.g.,* PRC, § 21100.
[21] *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).
[22] PRC, § 21166.

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[23]

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

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

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

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

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

III. THE CITY IMPROPERLY RELIED ON AN ADDENDUM

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

[24] 14 CCR, § 15162(b).
[25] 14 CCR, § 15164.
[26] *Id*. §§ 15162 (a), 15164(e), and 15168(c)(4).
[27] 14 CCR, § 15162 ("no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]"); § 15164 ("The [agency's] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.").

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

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

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

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

[28] CEQA Guidelines, § 15063 (timing and process of initial study); Pub. Resources Code, §§ 21003.1 (early identification of environmental effects), 21006 (CEQA is integral to agency decision making).
[29] Pub. Resources Code, § 21082.2(a) ("The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record"); CEQA Guidelines, § 15003(h) ("The lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect" and citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 401 ("*Laurel Heights I")*
[30] *Laurel Heights I, supra,* 47 Cal.3d 376.

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

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

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

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

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

[31] *Laurel Heights I, supra,* 47 Cal.3d at p. 388.
[32] *Laurel Heights I, supra,* 47 Cal.3d at p. 396.
[33] Gov. Code, § 65589.5(d)(2).
[34] Addendum, Appendix B, Historical Evaluation, p. 1; City of San Jose, Planning, Building & Code Enforcement, Historic Resources Inventory, available at: https://www.sanjoseca.gov/your-government/departments/planning-building-code-enforcement/planning-division/historic-preservation/historic-resources-inventory.

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

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

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

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

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

[35] City of San Jose Historic Resources Inventory, Classification of Resources, available at: https://www.sanjoseca.gov/home/showdocument?id=75623.
[36] City of San Jose, Downtown Strategy 2040 Integrated Final EIR, p. 97.
[37] City of San Jose, Site Development Permit (H20-026) p. 2 of 28.
[38] City of San Jose, Downtown Strategy 2040 Integrated Final EIR, p. 64.
[39] Clark Comments, p. 5.

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

1. All construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total shall meet U.S. EPA Tier 4 emission standards for particulate matter (PM10 and PM2.5), if feasible, otherwise,

a. If use of Tier 4 equipment is not available, alternatively use equipment that meets U.S. EPA emission standards for Tier 3 engines and include particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a minimum of 50 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment.
b. Use of alternatively fueled or electric equipment.[40]

Dr. Clark concluded that, not only is MM AQ-1 not the Best Available Control Technology, but that Tier 4 Interim emissions and Tier 3 emissions standards would not adequately reduce the Project's construction emissions to less than significant levels.[41] Dr. Clark concludes that Tier 3 equipment would put out substantially more particulate matter (PM_{10} and $PM_{2.5}$) than Tier 4 Interim and Tier 4 Final equipment.[42] Tier 3 equipment puts out 80% to 89% more PM_{10} than Tier 4 Interim equipment and 85% to 91% more PM_{10} than Tier 4 Final equipment. Tier 3 equipment puts out 81% to 89% more $PM_{2.5}$ than Tier 4 Interim equipment and 85% to 92% more $PM_{2.5}$ than Tier 4 Final equipment.[43] Substantial evidence presented herein, and in Dr. Clark's comments, that the Project's air quality impacts may be reduced through the use of Tier 4 Final Mitigation, but such measures were not implemented in the Addendum nor the Downtown Strategy 2040 EIR.

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

[40] Addendum p. 59.
[41] Clark Comments, p. 5.
[42] Clark Comments, p. 6.
[43] *Id.*

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

B. The Addendum Relies on Inaccurate Air Quality Modeling

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

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.[48] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[49] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[50]

Even when the substantial evidence standard is applicable to agency

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[44] 14 CCR, § 15162(a)(1)-(3) (emphasis added).
[45] *Id.* at 5.
[46] 14 CCR § 15064(b).
[47] *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.
[48] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
[49] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[50] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"[51] Here, the City's failure to provide accurate air modeling associated with the Tier 4 Final mitigation results in a failure to proceed in the manner required by CEQA. A subsequent EIR must be prepared which accurately analyzes and mitigates the Project's air emissions associated.

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

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

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

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

[51] *Berkeley Jets*, 91 Cal.App.4th at 1355.
[52] Clark Comments, p. 9.
[53] *Id.*
[54] 17 CCR 93115.4(a)(30)(A)(2).
[55] Clark Comments, p. 9.
[56] *Id.*

found that the 1,810 additional stationary generators during a PSPS in October 2019 generated 126 tons of NOx, 8.3 tons of particulate matter, and 8.3 tons of DPM.[57] Therefore, the GHG, air quality, and DPM emission impacts associated with the use of the Backup Generator are significant, but the Addendum fails to adequately analyze or mitigate such impacts.[58] The failure to analyze is a failure to proceed in a manner required by law.[59] Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.[60] In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."[61] Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"[62]

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

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[57] California Air Resources Board, Potential Emissions Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020). Available at: https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf.
[58] Clark Comments, p. 9.
[59] *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.
[60] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.
[61] *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.
[62] *Berkeley Jets*, 91 Cal.App.4th at 1355.

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

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

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

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

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

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[63] CalEnviroScreen 3.0 Results (June 2018 Update) Available at: https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30.
[64] *Id.*
[65] Addendum p. 124.
[66] *Id.*
[67] *Id.*
[68] 14 CCR 15126.2(a); *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 388.
[69] 14 CCR 15126.2(a).

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

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

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

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

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

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[70] 14 CCR 15126.4(a)(1)(B).
[71] *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 915-916.
[72] Addendum p. 126-127.
[73] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.
[74] 14 CCR § 15126.4(a)(1)(B).

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

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

In order to approve a Site Development Permit, the City must make all the following findings[79]:

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

[75] *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.
[76] *Id.*
[77] *Endangered Habitats League, Inc. v. County of Orange,* (2005) 131 Cal.App.4th 777, 794.
[78] *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.
[79] San Jose Zoning Code § 20.100.630.

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

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

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

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

VIII. CONCLUSION

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

[80] Addendum p. 54.
[81] *Id.*

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

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

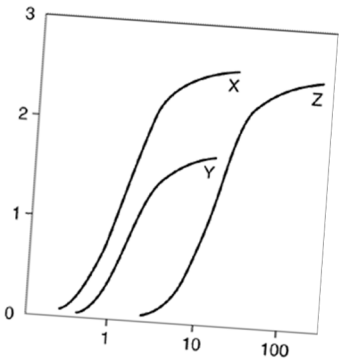
Sincerely,

Kelilah D. Federman

Attachments
KDF:acp

5622-006acp

ATTACHMENT A



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August 23,2022

Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080

Attn: Ms. Kelilah D. Federman

Subject: Comments On Addendum to the San Jose Downtown Strategy 2040 Final Environmental Impact Report (SCH # 2003042127), H20-026 – 17 and 29 East Santa Clara Street, Eterna Tower Mixed-Use Development Project.

Dear Ms. Federman:

At the request of Adams Broadwell Joseph & Cardozo (ABJC), Clark and Associates (Clark) has reviewed materials related to the August 5, 2022 City of San Jose's (the City's) Addendum for the above referenced project.

Clark's review of the materials in no way constitutes a validation of the conclusions or materials contained within the plan. If we do not comment on a specific item this does not constitute acceptance of the item.

Project Description:

According to the City, the Site Development Permit would allow for the demolition of the existing two-story buildings on the site to construct a 26-story, approximately 184,667-gross square foot mixed-use building on an approximately 0.18-acre site at 17 and 29 East Santa Clara Street in downtown San José. The building would accommodate 192 residential units and approximately 5,217 square feet of office space on the second floor. The project would provide 22 percent of the units at Below Market Rate (BMR). The project site is currently occupied by a pair of two-story buildings, one of which (17 East Santa Clara Street) is an identified Structure of Merit on the City's Historic Resources Inventory; both are proposed for demolition. The project would retain

the street facing façade and parapet of the existing building at 17 East Santa Clara Street, which would be integrated into the new project.

The construction schedule assumes a start-up date of early 2023 with construction occurring over a period of approximately 29 months. At this time, the storage of materials would be provided offsite at 82 North Second Street and the project would use an onsite tower crane to load material for the building. A detailed Construction Management Plan and construction haul route plan would be required as part of the Grading Permit process.

The tower footings would be engineered in coordination with the BART tunnel, the tunnel platform, and the vertical circulation (e.g., elevators, stairs, and ventilation). The structural system for both the tower and the BART/VTA station would most likely need to be constructed simultaneously. According to the applicant, this process would involve consultation on the following items, but not limited to, architects, structural engineers, waterproofing techniques, geotechnical requirements, mechanical ventilation, lighting, fire safety, fireproofing, and sound abatement.

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

Figure 1: Project Site Location

According to the Air Quality Analysis of the project prepared by Illingworth and Rodkin, LLC,[1] the air quality impacts from this project would be associated with construction of the new buildings and infrastructure and operation of the project. The closest sensitive receptors to the project site are the future adjacent senior residents (19 N. 2nd Street Senior Housing) to the northeast of the project site. There are additional sensitive receptors at farther distances surrounding the site. The project would introduce new sensitive receptors (i.e., new residents) to the area. [2]

The conclusion from the City that the Eterna Towers Project will have the same impacts as the approved Project is not supported by the facts of the Project. There are substantial impacts that are

[1] Illingworth and Rodkin, 2022. Eterna Tower Air Quality Assessment San José, California. Dated July 9, 2021 Revised January 13, 2022. Pgs 1-2.

[2] Illingworth and Rodkin, 2022. Eterna Tower Air Quality Assessment San José, California. Dated July 9, 2021 Revised January 13, 2022. Pgs 1-2.

not addressed in the City's analysis that must be addressed in a subsequent environmental impact report (SEIR).

Specific Comments:

1. The City's Air Quality Analysis Fails To Consider The Impact Of Adding Additional Diesel Particulate Matter (DPM) On The Already Impacted Census Tract.

The City's analysis of pollutants in this section of the response ignores the substantial evidence that the census tract in which the Project Site resides is in the top quartile for DPM exposure in California.

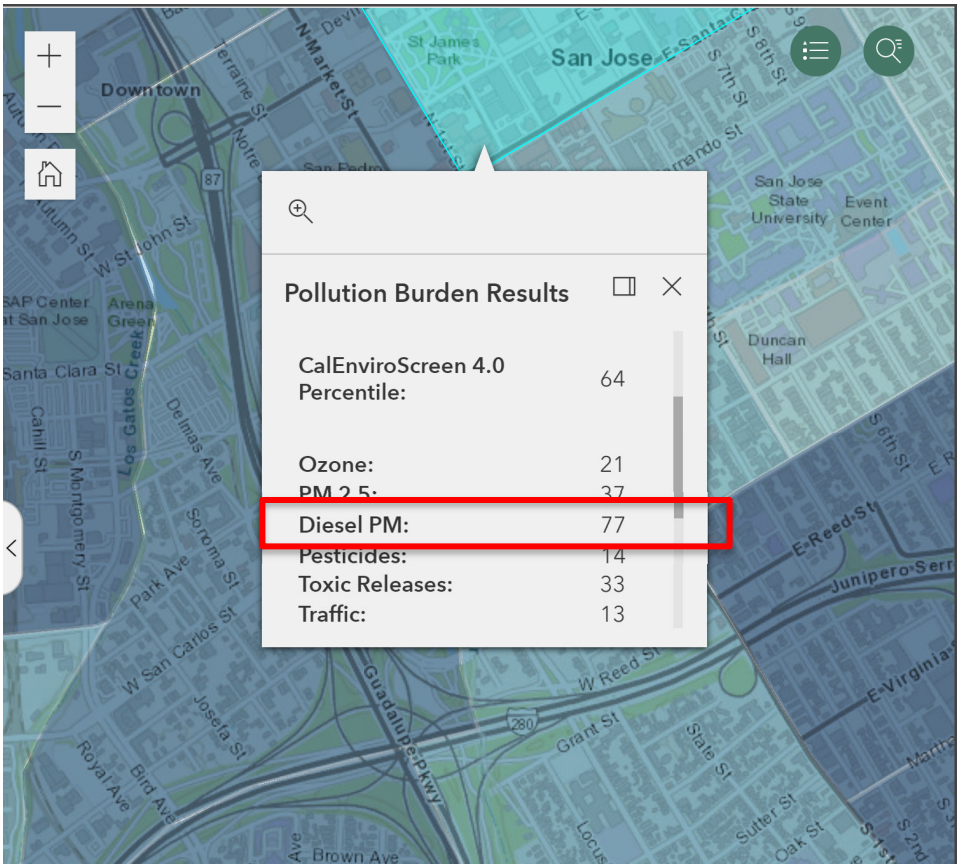


Figure 1: CalEnviroScreen 4.0 Analysis Of Census Tract 6085501000

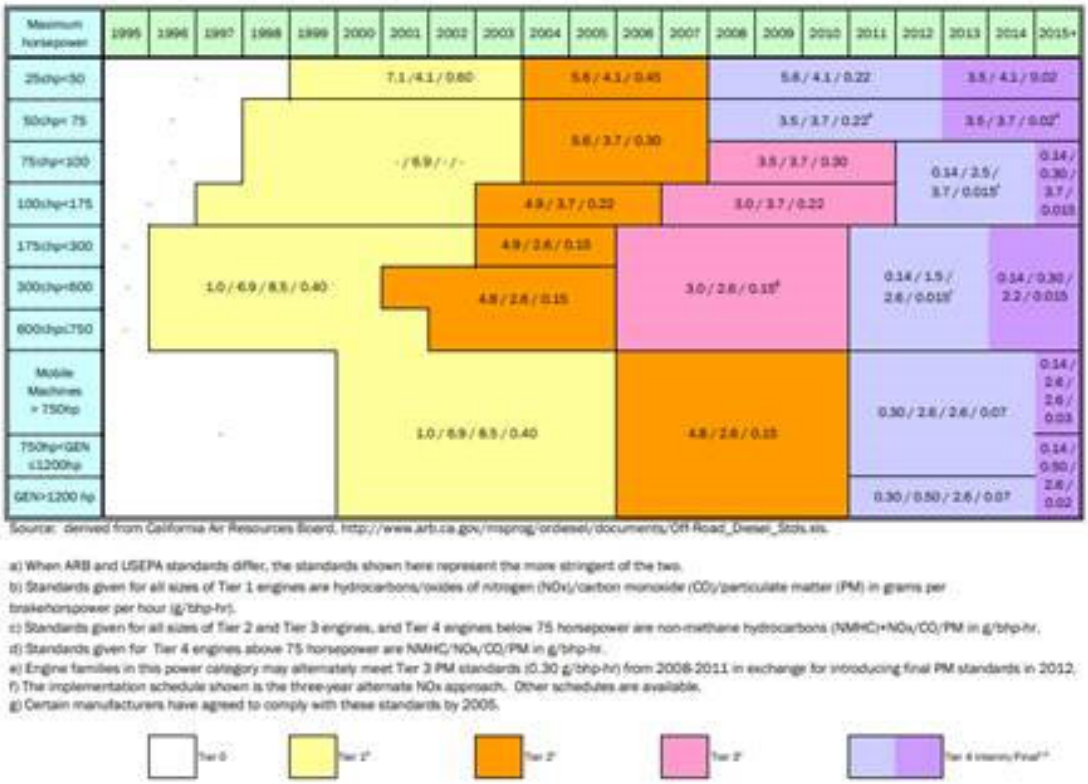
The City must reanalyze the air quality and traffic impacts of the Project and consider the public well-being of this already burdened community in a Subsequent EIR.

2. Air Quality Mitigation Measure (MM) 1 Fails To Require The Use Of Tier 4 Final Technology For Off-Road Sources Of Diesel Exhaust On-Site.

The list of mitigation measures to reduce construction related air quality emissions (particulate matter (PM_{10} and $PM_{2.5}$)) fails to require the best emission technology level, Tier 4 Final, on construction equipment with a horsepower (hp) rating greater than 25 hp while it utilizes the Tier 4 interim designation in the CalEEMOD analysis of the Project. MM AQ-1 first states that all construction equipment larger than 25 horsepower used at the site for more than two continuous days or 20 hours total shall meet U.S. EPA Tier 4 emission standards for particulate matter, if feasible any construction equipment rated 75 hp or greater must be Tier 4 Certified. The measure does not specify whether the equipment must be Tier 4 Final or Tier 4 Interim Certified. MM AQ-1 goes on to state that if Tier 4 equipment is not available, alternatively use equipment that meets U.S. EPA emission standards for Tier 3 engines and include particulate matter emissions control equivalent to CARB Level 3 verifiable diesel emission control devices that altogether achieve a minimum of 50 percent reduction in particulate matter exhaust in comparison to uncontrolled equipment. Allowing the construction phase to use a lower tiered engine will produce more PM_{10} and $PM_{2.5}$ emissions than were accounted for in the CalEEMOD analysis.

The United States Environmental Protection Agency (U.S. EPA) and by agreement, CARB, have slowly adopted more stringent standards to lower the emissions from off-road construction equipment since 1994. Since 1994, Tier 1, Tier 2, Tier 3, Tier 4 Interim, and Tier 4 Final construction

equipment have been phased in over time. Tier 4 Final represents the cleanest burning equipment and therefore has the lowest emissions compared to other tiers, including Tier 4 Interim equipment.[3]



Source: derived from California Air Resources Board, http://www.arb.ca.gov/msprog/ordiesel/documents/Off-Road_Diesel_Stds.xls.

a) When ARB and USEPA standards differ, the standards shown here represent the more stringent of the two.
b) Standards given for all sizes of Tier 1 engines are hydrocarbons/oxides of nitrogen (NO_x)/carbon monoxide (CO)/particulate matter (PM) in grams per brakehorsepower per hour (g/bhp-hr).
c) Standards given for all sizes of Tier 2 and Tier 3 engines, and Tier 4 engines below 75 horsepower are non-methane hydrocarbons (NMHC)+NO_x/CO/PM in g/bhp-hr.
d) Standards given for Tier 4 engines above 75 horsepower are NMHC/NO_x/CO/PM in g/bhp-hr.
e) Engine families in this power category may alternately meet Tier 3 PM standards (0.30 g/bhp-hr) from 2008-2011 in exchange for introducing final PM standards in 2012.
f) The implementation schedule shown is the three-year alternate NO_x approach. Other schedules are available.
g) Certain manufacturers have agreed to comply with these standards by 2005.

When Tier 3 equipment is compared to Tier 4 Interim and Tier 4 Final equipment it is clear that the use of Tier 3 equipment would put out substantially more particulate matter (PM_{10} and $PM_{2.5}$).[4] Tier 3 equipment puts out 80% to 89% more PM_{10} than Tier 4 Interim equipment and 85% to 91% more PM_{10} than Tier 4 Final equipment. Tier 3 equipment puts out 81% to 89% more $PM_{2.5}$ than Tier 4 Interim equipment and 85% to 92% more $PM_{2.5}$ than Tier 4 Final equipment. Allowing the use of

[3] "San Francisco Clean Construction Ordinance Implementation Guide for San Francisco Public Projects." August 2015, *available at:* https://www.sfdph.org/dph/files/EHSdocs/AirQuality/San_Francisco_Clean_Construction_Ordinance_2015.pdf, p. 6.

[4] "San Francisco Clean Construction Ordinance Implementation Guide for San Francisco Public Projects." August 2015, *available at:* https://www.sfdph.org/dph/files/EHSdocs/AirQuality/San_Francisco_Clean_Construction_Ordinance_2015.pdf, p. 6.

Tier 3 or equivalent control technology for construction equipment as a mitigation measure does not provide the community with the greatest level of protection possible.

It is clear from the City's air quality analysis of the Project (CalEEMOD outputs) in Appendix A to the Addendum, that the City is assuming only Tier 4 Final certified equipment will be utilized onsite.

Construction Off-road Equipment Mitigation - BMPs, Tier 4 interim mitigation

Table Name	Column Name	Default Value	New Value
tblConstDustMitigation	WaterUnpavedRoadVehicleSpeed	0	15
tblConstEquipMitigation	NumberOfEquipmentMitigated	0.00	1.00
tblConstEquipMitigation	NumberOfEquipmentMitigated	0.00	3.00
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tblConstEquipMitigation	NumberOfEquipmentMitigated	0.00	1.00
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tblConstEquipMitigation	NumberOfEquipmentMitigated	0.00	4.00
tblConstEquipMitigation	NumberOfEquipmentMitigated	0.00	1.00
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The City must address the use of Tier 3, Tier 4 interim, and Tier 4 final certified equipment and the impacts that will have on the adjacent communities in a subsequent EIR for the Project.

3. The City's CalEEMOD Analysis Of Emissions From The Back Up Generator (BUG) On-Site Must Include The Testing And Non-Testing (Operational) Impacts Of The BUG

The assumption by the City that maintenance and testing of the BUG would not exceed 50 hours per year is unsupported. Underestimation of the use of the BUG has a direct impact on the health risk analysis presented in the Addendum. The City must revise its air quality analysis to include a realistic operations schedule for the BUG onsite in a subsequent EIR.

In addition to the testing emissions, the air quality analysis must include the substantial increase in operational emissions from BUGs in the Air Basin due to unscheduled events, including but not limited to Public Safety Power Shutoff (PSPS) events and extreme heat events. Extreme heat events are defined as periods where in the temperatures throughout California exceed 100 degrees Fahrenheit.[5] From January, 2019 through December, 2019, Southern California Edison reported 158 of their circuits underwent a PSP event[6]. In Los Angeles County, two circuits had 4 PSPS events during that period lasting an average of 35 to 38 hours. The total duration of the PSPS events lasted between 141 hours to 154 hours in 2019. In 2021, the Governor of California declared that, during extreme heat events, the use of stationary generators shall be deemed an emergency use under California Code of Regulations (CCR), title 17, section 93115.4 sub. (a) (30) (A)(2). The number of Extreme Heat Events is likely to increase in California with the continuing change in climate the State is currently undergoing.

Power produced during PSPS or extreme heat events is expected to come from engines regulated by CARB and California's 35 air pollution control and air quality management districts (air districts).[7] Of particular concern are health effects related to emissions from diesel back-up engines. DPM has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including over forty known cancer-causing organic substances. The majority of DPM is small enough to be inhaled deep into the lungs and make them more susceptible to injury.

According to the California Public Utilities Commission (CPUC) de-energization report[8] in October 2019, there were almost ***806 PSPS events*** (emphasis added) that impacted almost 973,000 customers (~7.5% of households in California) of which ~854,000 of them were residential customers, and the rest were commercial/industrial/medical baseline/other customers. CARB's data also

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[5] Governor of California. 2021. Proclamation of a state of emergency. June 17, 2021.

[6] SCAQMD. 2020. Proposed Amendment To Rules (PARS) 1110.2, 1470, and 1472. Dated December 10, 2020. http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/1110.2/1110-2_1470_1472/par1110-2_1470_wgm_121020.pdf?sfvrsn=6.

[7] CARB. 2019. Use of Back-up Engines For Electricity Generation During Public Safety Power Shutoff Events. October 25, 2019.

[8] https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf as cited in CARB, 2020. Potential Emission Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage associated With Power Outage.

indicated that, on average, each of these customers had about 43 hours of power outage in October 2019.[9] Using the actual emission factors for each diesel BUG engines in the air district's stationary BUGs database, CARB staff calculated that the 1,810 additional stationary generators (like those proposed for the Project) running during a PSPS in October 2019 generated 126 tons of NOx, 8.3 tons or particulate matter, and 8.3 tons of DPM.

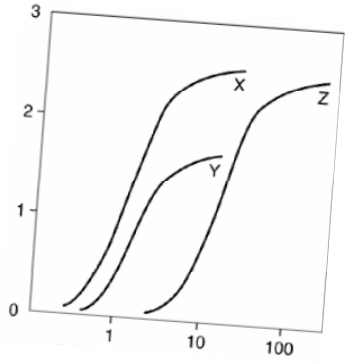
For every PSPS or Extreme Heat Event (EHE) triggered during the operational phase of the project, significant concentrations of DPM will be released that are not accounted for in the City's analysis. In 2021, two EHEs have been declared so far. For the June 17, 2021 Extreme Heat Event, the period for which stationary generator owners were allowed to use their BUGs lasted 48 hours. For the July 9, 2021 EHE, the period for which stationary generator owners were allowed to use their BUGs lasted 72 hours. These two events would have increased the calculated DPM emissions by a factor of 5 from the Project if only the 10 hours of testing that is allowed were quantified for the Project's operational emissions. A subsequent EIR must be written for the Project that includes an analysis of the additional operation of the BUG that will occur at the project site that is not accounted for in the current air quality analysis.

Conclusion

The facts identified and referenced in this comment letter lead me to reasonably conclude that the Project could result in significant unmitigated impacts if the Addendum is approved. The City must re-evaluate the significant impacts identified in this letter by requiring the preparation of a subsequent environmental impact report.

Sincerely,

[9] CARB, 2020. Potential Emission Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage associated With Power Outage.



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James J. J. Clark, Ph.D.

Principal Toxicologist

Toxicology/Exposure Assessment Modeling

Risk Assessment/Analysis/Dispersion Modeling

Education:

Ph.D., Environmental Health Science, University of California, 1995

M.S., Environmental Health Science, University of California, 1993

B.S., Biophysical and Biochemical Sciences, University of Houston, 1987

Professional Experience:

Dr. Clark is a well recognized toxicologist, air modeler, and health scientist. He has 20 years of experience in researching the effects of environmental contaminants on human health including environmental fate and transport modeling (SCREEN3, AEROMOD, ISCST3, Johnson-Ettinger Vapor Intrusion Modeling); exposure assessment modeling (partitioning of contaminants in the environment as well as PBPK modeling); conducting and managing human health risk assessments for regulatory compliance and risk-based clean-up levels; and toxicological and medical literature research.

Significant projects performed by Dr. Clark include the following:

LITIGATION SUPPORT

Case: James Harold Caygle, et al, v. Drummond Company, Inc. Circuit Court for the Tenth Judicial Circuit, Jefferson County, Alabama. Civil Action. CV-2009

Client: Environmental Litgation Group, Birmingham, Alabama

Dr. Clark performed an air quality assessment of emissions from a coke factory located in Tarrant, Alabama. The assessment reviewed include a comprehensive review of air quality standards, measured concentrations of pollutants from factory, an inspection of the facility and detailed assessment of the impacts on the community. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Rose Roper V. Nissan North America, et al. Superior Court of the State Of California for the County Of Los Angeles – Central Civil West. Civil Action. NC041739

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to multiple chemicals, including benzene, who later developed a respiratory distress. A review of the individual's medical and occupational history was performed to prepare an exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to respiratory irritants. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: O'Neil V. Sherwin Williams, et al. United States District Court Central District of California

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to petroleum distillates who later developed a bladder cancer. A review of the individual's medical and occupational history was performed to prepare a quantitative exposure assessment. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Summary judgment for defendants.

Case: Moore V., Shell Oil Company, et al. Superior Court of the State Of California for the County Of Los Angeles

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to chemicals while benzene who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a quantitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Raymond Saltonstall V. Fuller O'Brien, KILZ, and Zinsser, et al. United States District Court Central District of California

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to benzene who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a quantitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Richard Boyer and Elizabeth Boyer, husband and wife, V. DESCO Corporation, et al. Circuit Court of Brooke County, West Virginia. Civil Action Number 04-C-7G.

Client: Frankovitch, Anetakis, Colantonio & Simon, Morgantown, West Virginia.

Dr. Clark performed a toxicological assessment of a family exposed to chlorinated solvents released from the defendant's facility into local drinking water supplies. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to chlorinated solvents. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: JoAnne R. Cook, V. DESCO Corporation, et al. Circuit Court of Brooke County, West Virginia. Civil Action Number 04-C-9R

Client: Frankovitch, Anetakis, Colantonio & Simon, Morgantown, West Virginia.

Dr. Clark performed a toxicological assessment of an individual exposed to chlorinated solvents released from the defendant's facility into local drinking water supplies. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to chlorinated solvents. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Patrick Allen And Susan Allen, husband and wife, and Andrew Allen, a minor, V. DESCO Corporation, et al. Circuit Court of Brooke County, West Virginia. Civil Action Number 04-C-W

Client: Frankovitch, Anetakis, Colantonio & Simon, Morgantown, West Virginia.

Dr. Clark performed a toxicological assessment of a family exposed to chlorinated solvents released from the defendant's facility into local drinking water supplies. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to chlorinated solvents. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Michael Fahey, Susan Fahey V. Atlantic Richfield Company, et al. United States District Court Central District of California Civil Action Number CV-06 7109 JCL.

Client: Rose, Klein, Marias, LLP, Long Beach, California

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to refined petroleum hydrocarbons who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Settlement in favor of plaintiff.

Case: Constance Acevedo, et al., V. California Spray-Chemical Company, et al., Superior Court of the State Of California, County Of Santa Cruz. Case No. CV 146344

Dr. Clark performed a comprehensive exposure assessment of community members exposed to toxic metals from a former lead arsenate manufacturing facility. The former manufacturing site had undergone a DTSC mandated removal action/remediation for the presence of the toxic metals at the site. Opinions were presented regarding the elevated levels of arsenic and lead (in attic dust and soils) found throughout the community and the potential for harm to the plaintiffs in question.

Case Result: Settlement in favor of defendant.

Case: Michael Nawrocki V. The Coastal Corporation, Kurk Fuel Company, Pautler Oil Service, State of New York Supreme Court, County of Erie, Index Number I2001-11247

Client: Richard G. Berger Attorney At Law, Buffalo, New York

Dr. Clark performed a toxicological assessment of an individual occupationally exposed to refined petroleum hydrocarbons who later developed a leukogenic disease. A review of the individual's medical and occupational history was performed to prepare a qualitative exposure assessment. The exposure assessment was evaluated against the

known outcomes in published literature to exposure to refined petroleum hydrocarbons. The results of the assessment and literature have been provided in a declaration to the court.

Case Result: Judgement in favor of defendant.

SELECTED AIR MODELING RESEARCH/PROJECTS

Client – Confidential

Dr. Clark performed a comprehensive evaluation of criteria pollutants, air toxins, and particulate matter emissions from a carbon black production facility to determine the impacts on the surrounding communities. The results of the dispersion model will be used to estimate acute and chronic exposure concentrations to multiple contaminants and will be incorporated into a comprehensive risk evaluation.

Client – Confidential

Dr. Clark performed a comprehensive evaluation of air toxins and particulate matter emissions from a railroad tie manufacturing facility to determine the impacts on the surrounding communities. The results of the dispersion model have been used to estimate acute and chronic exposure concentrations to multiple contaminants and have been incorporated into a comprehensive risk evaluation.

Client – Los Angeles Alliance for a New Economy (LAANE), Los Angeles, California

Dr. Clark is advising the LAANE on air quality issues related to current flight operations at the Los Angeles International Airport (LAX) operated by the Los Angeles World Airport (LAWA) Authority. He is working with the LAANE and LAX staff to develop a comprehensive strategy for meeting local community concerns over emissions from flight operations and to engage federal agencies on the issue of local impacts of community airports.

Client – City of Santa Monica, Santa Monica, California

Dr. Clark is advising the City of Santa Monica on air quality issues related to current flight operations at the facility. He is working with the City staff to develop a comprehensive strategy for meeting local community concerns over emissions from flight operations and to engage federal agencies on the issue of local impacts of community airports.

Client: Omnitrans, San Bernardino, California

Dr. Clark managed a public health survey of three communities near transit fueling facilities in San Bernardino and Montclair California in compliance with California Senate Bill 1927. The survey included an epidemiological survey of the effected communities, emission surveys of local businesses, dispersion modeling to determine potential emission concentrations within the communities, and a comprehensive risk assessment of each community. The results of the study were presented to the Governor as mandated by Senate Bill 1927.

Client: Confidential, San Francisco, California

Summarized cancer types associated with exposure to metals and smoking. Researched the specific types of cancers associated with exposure to metals and smoking. Provided causation analysis of the association between cancer types and exposure for use by non-public health professionals.

Client: Confidential, Minneapolis, Minnesota

Prepared human health risk assessment of workers exposed to VOCs from neighboring petroleum storage/transport facility. Reviewed the systems in place for distribution of petroleum hydrocarbons to identify chemicals of concern (COCs), prepared comprehensive toxicological summaries of COCs, and quantified potential risks from carcinogens and non-carcinogens to receptors at or adjacent to site. This evaluation was used in the support of litigation.

Client – United Kingdom Environmental Agency

Dr. Clark is part of team that performed comprehensive evaluation of soil vapor intrusion of VOCs from former landfill adjacent residences for the United Kingdom's Environment

Agency. The evaluation included collection of liquid and soil vapor samples at site, modeling of vapor migration using the Johnson Ettinger Vapor Intrusion model, and calculation of site-specific health based vapor thresholds for chlorinated solvents, aromatic hydrocarbons, and semi-volatile organic compounds. The evaluation also included a detailed evaluation of the use, chemical characteristics, fate and transport, and toxicology of chemicals of concern (COC). The results of the evaluation have been used as a briefing tool for public health professionals.

EMERGING/PERSISTENT CONTAMINANT RESEARCH/PROJECTS

Client: Ameren Services, St. Louis, Missouri

Managed the preparation of a comprehensive human health risk assessment of workers and residents at or near an NPL site in Missouri. The former operations at the Property included the servicing and repair of electrical transformers, which resulted in soils and groundwater beneath the Property and adjacent land becoming impacted with PCB and chlorinated solvent compounds. The results were submitted to U.S. EPA for evaluation and will be used in the final ROD.

Client: City of Santa Clarita, Santa Clarita, California

Dr. Clark is managing the oversight of the characterization, remediation and development activities of a former 1,000 acre munitions manufacturing facility for the City of Santa Clarita. The site is impacted with a number of contaminants including perchlorate, unexploded ordinance, and volatile organic compounds (VOCs). The site is currently under a number of regulatory consent orders, including an Immanent and Substantial Endangerment Order. Dr. Clark is assisting the impacted municipality with the development of remediation strategies, interaction with the responsible parties and stakeholders, as well as interfacing with the regulatory agency responsible for oversight of the site cleanup.

Client: Confidential, Los Angeles, California

Prepared comprehensive evaluation of perchlorate in environment. Dr. Clark evaluated the production, use, chemical characteristics, fate and transport, toxicology, and remediation of perchlorate. Perchlorates form the basis of solid rocket fuels and have recently been detected in water supplies in the United States. The results of this research

were presented to the USEPA, National GroundWater, and ultimately published in a recent book entitled *Perchlorate in the Environment.*

Client – Confidential, Los Angeles, California

Dr. Clark is performing a comprehensive review of the potential for pharmaceuticals and their by-products to impact groundwater and surface water supplies. This evaluation will include a review if available data on the history of pharmaceutical production in the United States; the chemical characteristics of various pharmaceuticals; environmental fate and transport; uptake by xenobiotics; the potential effects of pharmaceuticals on water treatment systems; and the potential threat to public health. The results of the evaluation may be used as a briefing tool for non-public health professionals.

PUBLIC HEALTH/TOXICOLOGY

Client: Brayton Purcell, Novato, California

Dr. Clark performed a toxicological assessment of residents exposed to methyl-tertiary butyl ether (MTBE) from leaking underground storage tanks (LUSTs) adjacent to the subject property. The symptomology of residents and guests of the subject property were evaluated against the known outcomes in published literature to exposure to MTBE. The study found that residents had been exposed to MTBE in their drinking water; that concentrations of MTBE detected at the site were above regulatory guidelines; and, that the symptoms and outcomes expressed by residents and guests were consistent with symptoms and outcomes documented in published literature.

Client: Confidential, San Francisco, California

Identified and analyzed fifty years of epidemiological literature on workplace exposures to heavy metals. This research resulted in a summary of the types of cancer and non-cancer diseases associated with occupational exposure to chromium as well as the mortality and morbidity rates.

Client: Confidential, San Francisco, California

Summarized major public health research in United States. Identified major public health research efforts within United States over last twenty years. Results were used as a briefing tool for non-public health professionals.

Client: Confidential, San Francisco, California

Quantified the potential multi-pathway dose received by humans from a pesticide applied indoors. Part of team that developed exposure model and evaluated exposure concentrations in a comprehensive report on the plausible range of doses received by a specific person. This evaluation was used in the support of litigation.

Client: Covanta Energy, Westwood, California

Evaluated health risk from metals in biosolids applied as soil amendment on agricultural lands. The biosolids were created at a forest waste cogeneration facility using 96% whole tree wood chips and 4 percent green waste. Mass loading calculations were used to estimate Cr(VI) concentrations in agricultural soils based on a maximum loading rate of 40 tons of biomass per acre of agricultural soil. The results of the study were used by the Regulatory agency to determine that the application of biosolids did not constitute a health risk to workers applying the biosolids or to residences near the agricultural lands.

Client – United Kingdom Environmental Agency

Oversaw a comprehensive toxicological evaluation of methyl-*tertiary* butyl ether (M*t*BE) for the United Kingdom's Environment Agency. The evaluation included available data on the production, use, chemical characteristics, fate and transport, toxicology, and remediation of M*t*BE. The results of the evaluation have been used as a briefing tool for public health professionals.

Client – Confidential, Los Angeles, California

Prepared comprehensive evaluation of *tertiary* butyl alcohol (TBA) in municipal drinking water system. TBA is the primary breakdown product of M*t*BE, and is suspected to be the primary cause of M*t*BE toxicity. This evaluation will include available information on the production, use, chemical characteristics, fate and transport in the environment, absorption, distribution, routes of detoxification, metabolites, carcinogenic potential, and remediation of TBA. The results of the evaluation were used as a briefing tool for non-public health professionals.

Client – Confidential, Los Angeles, California

Prepared comprehensive evaluation of methyl *tertiary* butyl ether (MTBE) in municipal drinking water system. MTBE is a chemical added to gasoline to increase the octane

rating and to meet Federally mandated emission criteria. The evaluation included available data on the production, use, chemical characteristics, fate and transport, toxicology, and remediation of MTBE. The results of the evaluation have been were used as a briefing tool for non-public health professionals.

Client – Ministry of Environment, Lands & Parks, British Columbia

Dr. Clark assisted in the development of water quality guidelines for methyl tertiary-butyl ether (MTBE) to protect water uses in British Columbia (BC). The water uses to be considered includes freshwater and marine life, wildlife, industrial, and agricultural (e.g., irrigation and livestock watering) water uses. Guidelines from other jurisdictions for the protection of drinking water, recreation and aesthetics were to be identified.

Client: Confidential, Los Angeles, California

Prepared physiologically based pharmacokinetic (PBPK) assessment of lead risk of receptors at middle school built over former industrial facility. This evaluation is being used to determine cleanup goals and will be basis for regulatory closure of site.

Client: Kaiser Venture Incorporated, Fontana, California

Prepared PBPK assessment of lead risk of receptors at a 1,100-acre former steel mill. This evaluation was used as the basis for granting closure of the site by lead regulatory agency.

RISK ASSESSMENTS/REMEDIAL INVESTIGATIONS

Client: Confidential, Atlanta, Georgia

Researched potential exposure and health risks to community members potentially exposed to creosote, polycyclic aromatic hydrocarbons, pentachlorophenol, and dioxin compounds used at a former wood treatment facility. Prepared a comprehensive toxicological summary of the chemicals of concern, including the chemical characteristics, absorption, distribution, and carcinogenic potential. Prepared risk characterization of the carcinogenic and non-carcinogenic chemicals based on the exposure assessment to quantify the potential risk to members of the surrounding community. This evaluation was used to help settle class-action tort.

Client: Confidential, Escondido, California

Prepared comprehensive Preliminary Endangerment Assessment (PEA) of dense non-aqueous liquid phase hydrocarbon (chlorinated solvents) contamination at a former printed circuit board manufacturing facility. This evaluation was used for litigation support and may be used as the basis for reaching closure of the site with the lead regulatory agency.

Client: Confidential, San Francisco, California

Summarized epidemiological evidence for connective tissue and autoimmune diseases for product liability litigation. Identified epidemiological research efforts on the health effects of medical prostheses. This research was used in a meta-analysis of the health effects and as a briefing tool for non-public health professionals.

Client: Confidential, Bogotá, Columbia

Prepared comprehensive evaluation of the potential health risks associated with the redevelopment of a 13.7 hectares plastic manufacturing facility in Bogotá, Colombia The risk assessment was used as the basis for the remedial goals and closure of the site.

Client: Confidential, Los Angeles, California

Prepared comprehensive human health risk assessment of students, staff, and residents potentially exposed to heavy metals (principally cadmium) and VOCs from soil and soil vapor at 12-acre former crude oilfield and municipal landfill. The site is currently used as a middle school housing approximately 3,000 children. The evaluation determined that the site was safe for the current and future uses and was used as the basis for regulatory closure of site.

Client: Confidential, Los Angeles, California

Managed remedial investigation (RI) of heavy metals and volatile organic chemicals (VOCs) for a 15-acre former manufacturing facility. The RI investigation of the site included over 800 different sampling locations and the collection of soil, soil gas, and groundwater samples. The site is currently used as a year round school housing approximately 3,000 children. The Remedial Investigation was performed in a manner

that did not interrupt school activities and met the time restrictions placed on the project by the overseeing regulatory agency. The RI Report identified the off-site source of metals that impacted groundwater beneath the site and the sources of VOCs in soil gas and groundwater. The RI included a numerical model of vapor intrusion into the buildings at the site from the vadose zone to determine exposure concentrations and an air dispersion model of VOCs from the proposed soil vapor treatment system. The Feasibility Study for the Site is currently being drafted and may be used as the basis for granting closure of the site by DTSC.

Client: Confidential, Los Angeles, California

Prepared comprehensive human health risk assessment of students, staff, and residents potentially exposed to heavy metals (principally lead), VOCs, SVOCs, and PCBs from soil, soil vapor, and groundwater at 15-acre former manufacturing facility. The site is currently used as a year round school housing approximately 3,000 children. The evaluation determined that the site was safe for the current and future uses and will be basis for regulatory closure of site.

Client: Confidential, Los Angeles, California

Prepared comprehensive evaluation of VOC vapor intrusion into classrooms of middle school that was former 15-acre industrial facility. Using the Johnson-Ettinger Vapor Intrusion model, the evaluation determined acceptable soil gas concentrations at the site that did not pose health threat to students, staff, and residents. This evaluation is being used to determine cleanup goals and will be basis for regulatory closure of site.

Client –Dominguez Energy, Carson, California

Prepared comprehensive evaluation of the potential health risks associated with the redevelopment of 6-acre portion of a 500-acre oil and natural gas production facility in Carson, California. The risk assessment was used as the basis for closure of the site.

Kaiser Ventures Incorporated, Fontana, California

Prepared health risk assessment of semi-volatile organic chemicals and metals for a fifty-year old wastewater treatment facility used at a 1,100-acre former steel mill. This evaluation was used as the basis for granting closure of the site by lead regulatory agency.

ANR Freight - Los Angeles, California

Prepared a comprehensive Preliminary Endangerment Assessment (PEA) of petroleum hydrocarbon and metal contamination of a former freight depot. This evaluation was as the basis for reaching closure of the site with lead regulatory agency.

Kaiser Ventures Incorporated, Fontana, California

Prepared comprehensive health risk assessment of semi-volatile organic chemicals and metals for 23-acre parcel of a 1,100-acre former steel mill. The health risk assessment was used to determine clean up goals and as the basis for granting closure of the site by lead regulatory agency. Air dispersion modeling using ISCST3 was performed to determine downwind exposure point concentrations at sensitive receptors within a 1 kilometer radius of the site. The results of the health risk assessment were presented at a public meeting sponsored by the Department of Toxic Substances Control (DTSC) in the community potentially affected by the site.

Unocal Corporation - Los Angeles, California

Prepared comprehensive assessment of petroleum hydrocarbons and metals for a former petroleum service station located next to sensitive population center (elementary school). The assessment used a probabilistic approach to estimate risks to the community and was used as the basis for granting closure of the site by lead regulatory agency.

Client: Confidential, Los Angeles, California

Managed oversight of remedial investigation most contaminated heavy metal site in California. Lead concentrations in soil excess of 68,000,000 parts per billion (ppb) have been measured at the site. This State Superfund Site was a former hard chrome plating operation that operated for approximately 40-years.

Client: Confidential, San Francisco, California

Coordinator of regional monitoring program to determine background concentrations of metals in air. Acted as liaison with SCAQMD and CARB to perform co-location sampling and comparison of accepted regulatory method with ASTM methodology.

Client: Confidential, San Francisco, California

Analyzed historical air monitoring data for South Coast Air Basin in Southern California and potential health risks related to ambient concentrations of carcinogenic metals and volatile organic compounds. Identified and reviewed the available literature and calculated risks from toxins in South Coast Air Basin.

IT Corporation, North Carolina

Prepared comprehensive evaluation of potential exposure of workers to air-borne VOCs at hazardous waste storage facility under SUPERFUND cleanup decree. Assessment used in developing health based clean-up levels.

Professional Associations

American Public Health Association (APHA)
Association for Environmental Health and Sciences (AEHS)
American Chemical Society (ACS)
California Redevelopment Association (CRA)
International Society of Environmental Forensics (ISEF)
Society of Environmental Toxicology and Chemistry (SETAC)

Publications and Presentations:

Books and Book Chapters

Sullivan, P., **J.J. J. Clark,** F.J. Agardy, and P.E. Rosenfeld. (2007). *Synthetic Toxins In The Food, Water and Air of American Cities*. Elsevier, Inc. Burlington, MA.

Sullivan, P. and **J.J. J. Clark**. 2006. *Choosing Safer Foods, A Guide To Minimizing Synthetic Chemicals In Your Diet*. Elsevier, Inc. Burlington, MA.

Sullivan, P., Agardy, F.J., and **J.J.J. Clark**. 2005. *The Environmental Science of Drinking Water*. Elsevier, Inc. Burlington, MA.

Sullivan, P.J., Agardy, F.J., **Clark, J.J.J.** 2002. *America's Threatened Drinking Water: Hazards and Solutions*. Trafford Publishing, Victoria B.C.

Clark, J.J.J. 2001. "TBA: Chemical Properties, Production & Use, Fate and Transport, Toxicology, Detection in Groundwater, and Regulatory Standards" in *Oxygenates in the Environment.* Art Diaz, Ed.. Oxford University Press: New York.

Clark, J.J.J. 2000. "Toxicology of Perchlorate" in *Perchlorate in the Environment.* Edward Urbansky, Ed. Kluwer/Plenum: New York.

Clark, J.J.J. 1995. Probabilistic Forecasting of Volatile Organic Compound Concentrations At The Soil Surface From Contaminated Groundwater. UMI.

Baker, J.; **Clark, J.J.J.**; Stanford, J.T. 1994. Ex Situ Remediation of Diesel Contaminated Railroad Sand by Soil Washing. Principles and Practices for Diesel Contaminated Soils, Volume III. P.T. Kostecki, E.J. Calabrese, and C.P.L. Barkan, eds. Amherst Scientific Publishers, Amherst, MA. pp 89-96.

Journal and Proceeding Articles

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