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### Re: Delta Fair Village Mixed-Use Project IS/MEND Comments

Dear Ms. Morris:

We are writing on behalf of **Antioch Residents for Responsible Development** to provide comments on the May 2020 Initial Study/Mitigated Negative Declaration ("IS/MND") prepared for the Delta Fair Village Mixed-Use Project proposed by Chiu Family LLC. The Project involves the demolition of 73,546 square feet of the 147,081 square feet Delta Fair Village Shopping Center to develop the site with approximately 210 multi-family residential units, which would be located in five four-story buildings above a single-story parking garage. Additionally, a new 4,174-square feet retail building would be constructed on the western portion of the site. The new development would total 411,511 square feet. The Project is located at 3000 Delta Fair Boulevard in the City of Antioch, northeast of the intersection of Buchanan Road and Delta Fair Boulevard.

According to the IS/MND, the Project will require the following approvals from the City of Antioch ("City"): (1) MND Certification pursuant to the California Environmental Quality Act ("CEQA"); (2) a General Plan Amendment to redesignate the site from Regional Commercial to Mixed Use (3) Rezone of the site from C-3 to Planned Development (P-D); and (4) Use Permit and Design Review for

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the development of a new retail building and a multifamily residential development at a density of 35 du/ac within a P-D zoning district.

As explained in these comments, the IS/MND does not comply with the requirements of CEQA in several respects:

First, the IS/MND fails to properly analyze and mitigate impacts from air quality and their associated health risks. Specifically, the City failed to properly analyze construction and operational air emissions by underestimating and failing to support their emission projections. As a result, the City failed to disclose, analyze and mitigate a potentially significant health risk that is evident when the IS/MND's errors are corrected.

Second, the MND fails to properly disclose, analyze, and mitigate Greenhouse Gas ("GHG") emissions. The MND's analysis uses an inapplicable threshold of significance in violation of CEQA and relies on several erroneous and unsupported assumptions which underestimate the Project's actual GHG impacts and ultimately result in a potentially significant impact.

Third, the MND fails to properly disclose, analyze, and mitigate potential hazardous impacts from the Project. The City failed to prepare a Phase I Environmental Site Assessment to provide a proper basis for determining impacts from Hazards and Hazardous Materials.

For each of these reasons, the City may not rely upon an IS/MND to satisfy its CEQA analysis, instead the City must prepare an Environmental Impact Report to disclose and analyze these potentially significant impact and circulate that environmental document for public review and comment.

These comments were prepared with the assistance of air quality, GHG, and hazardous materials experts from Soil Water Air Protection Enterprise ("SWAPE") Matt Hagemann, P.G, C.Hg. and Paul E. Rosenfeld, PhD.<sup>1</sup> SWAPE's comments and curriculum vitae are attached hereto as Exhibit A and are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments from SWAPE, in addition to our comments.

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<sup>1</sup> **Exhibit A:** A letter from Matt Hagemann, P.G, C.Hg. and Paul E. Rosenfeld, PhD to Aaron Messing Re: Comments on the Delta Fair Village Project (SCH 2020050040), June 1, 2020 ("**SWAPE comments**").

## I. Statement of Interest

Antioch Residents for Responsible Development is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental impacts of the Project. The association includes Antioch residents Nathan Deleon, Sunshine Kinder, and Anthony Lundberg-Palacios and the International Brotherhood of Electrical Workers Local 302, Plumbers & Steamfitters Local 159, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and those members' families and other individuals that live, recreate, work and raise their families in the City of Antioch (collectively "Antioch Residents").

Antioch Residents supports the development of mixed-use projects where properly analyzed and carefully planned to minimize impacts on public health and the environment. Mixed-use projects should avoid impacts to air quality, public health, water resources and traffic, and should take all feasible steps to ensure unavoidable impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can mixed-use development truly be sustainable.

Individual members of Antioch Residents and the members of the affiliated labor organizations live, work, recreate and raise their families in the City of Antioch. These members would be directly affected by the Project's environmental and health and safety impacts. Members of Antioch Residents may also work on the Project itself. Accordingly, these individuals will be first in line to be exposed to any health and safety hazards created by the Project. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

The organizational members of Antioch Residents and their members also have 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 to expand in the region, and by making it less desirable for businesses to locate and people to live there. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities.

Finally, the organizational members of Antioch Residents are concerned with projects that can result in serious environmental harm without providing

countervailing economic benefits. CEQA provides a balancing process whereby economic benefits are weighed against significant impacts to the environment.<sup>2</sup> It is in this spirit we offer these comments.

## **II. The IS/MND Lacks Substantial Evidence to Support Its Conclusions on Significant Impacts and Substantial Evidence Supports a Fair Argument that Project Operation and Construction May Result in Potentially Significant Air Quality, Greenhouse Gas, and Hazardous Material Impacts that the IS/MND Fails to Disclose and Mitigate**

CEQA is intended to provide the fullest possible protection to the environment. CEQA requires that a lead agency prepare and certify an EIR for any discretionary project that may have a significant adverse effect on the environment and requires analysis of the “whole of an action,” including the “direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”<sup>3</sup>

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.<sup>4</sup> “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR “protects not only the environment but also informed self-government.”<sup>5</sup> 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.”<sup>6</sup>

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures.<sup>7</sup> The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and

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<sup>2</sup> Pub. Resources Code § 21081(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

<sup>3</sup> Pub. Res. Code §§ 21002.1(a), 21100(a), 21065, 21151(a); 14 C.C.R. §§ 15064(a)(1), (f)(1), 15367, 15378(a).

<sup>4</sup> 14 CCR § 15002(a)(1).

<sup>5</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

<sup>6</sup> *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.

<sup>7</sup> 14 CCR§ 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

to “identify ways that environmental damage can be avoided or significantly reduced.”<sup>8</sup> If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”<sup>9</sup>

“At the heart of CEQA is the requirement that public agencies prepare an EIR for any project that may have a significant effect on the environment.”<sup>10</sup> A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.<sup>11</sup> “[S]ignificant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”<sup>12</sup> An effect on the environment need not be “momentous” to meet the CEQA test for significance—it is enough that the impacts are “not trivial.”<sup>13</sup> Substantial evidence, for purposes of the fair argument standard, includes “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”<sup>14</sup>

An agency’s decision to rely on an MND under CEQA is reviewed by a court for abuse of discretion under the fair argument standard.<sup>15</sup> To determine if there has been an abuse of discretion, a court reviews the agency’s factual conclusions de novo.<sup>16</sup>

Under the fair argument standard, a reviewing court may not uphold an agency’s decision to not prepare an EIR because of substantial evidence that the project would not have a significant environmental impact.<sup>17</sup> The reviewing court’s

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<sup>8</sup> 14 CCR §15002(a)(2).

<sup>9</sup> PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

<sup>10</sup> *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 (internal citations and quotations omitted).

<sup>11</sup> *Id.* at 957.

<sup>12</sup> Pub. Res. Code § 21068; 14 C.C.R. § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

<sup>13</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.

<sup>14</sup> Pub. Res. Code § 21080(e)(1) (emphasis added); *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331 (“CREED”).

<sup>15</sup> *Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) Nos. B292246, B295112, 2020 WL 1270355, \*4 (“STACK”).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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function is to determine whether substantial evidence supports the agency's conclusion as to whether the prescribed fair argument could be made.<sup>18</sup> If there is substantial evidence that the proposed project might have a significant impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration.<sup>19</sup> Neither the lead agency nor a court may "weigh" conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.<sup>20</sup> "The fair argument standard thus creates a low threshold for requiring an EIR, reflecting the legislative preference for resolving doubts in favor of environmental review."<sup>21</sup>

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.<sup>22</sup> In short, when "expert opinions clash, an EIR should be done."<sup>23</sup> "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project."<sup>24</sup> Where substantial evidence is presented, "evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact."<sup>25</sup>

The fair argument test requires the preparation of an EIR whenever "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial."<sup>26</sup> As described below substantial evidence is present here that the Project may cause a significant effect on the environment.

In particular, these comments show that the Project may result in significant impacts from emissions of air pollutants and their associated health risks, GHG

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*13.

<sup>21</sup> *Id.* at \*4.

<sup>22</sup> *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 935; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–1318; CEQA Guidelines § 15064(f)(5).

<sup>23</sup> *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.

<sup>24</sup> *Pocket Protectors*, 124 Cal.App.4th at 935.

<sup>25</sup> *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).

<sup>26</sup> 14 C.C.R. § 15063(b)(1) (emphasis added).

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emissions exacerbating climate change, and impacts from hazardous materials on the Project site. Thus, the City is required under CEQA to take a closer look at the potentially significant environmental impacts of the Project in a legally adequate EIR.

**A. The IS/MND fails to identify, analyze, and mitigate the Project’s potentially significant air quality impacts and associated health risks**

Under CEQA, lead agencies must consider a project’s impacts on air quality, including whether the project will “expose sensitive receptors to substantial pollutant concentrations.”<sup>27</sup> The IS/MND’s air quality analysis relies on emissions calculated with the California Emission Estimator Model (“CalEEMod”) 2016.3.2. The model uses site-specific information, such as land use type, meteorological data, total lot acreage, project type and typical equipment associated with project type to calculate a project’s construction and operational emissions.

After reviewing the IS/MND, SWAPE concluded that “several of the values inputted into the model were not consistent with information disclosed in the IS/MND” and that the IS/MND incorrectly evaluates diesel particulate matter emissions.<sup>28</sup> As a result, the IS/MND completely fails to identify and mitigate against a potentially significant health risk impact resulting from Project emissions. The City must remedy this failure by preparing an EIR with the potentially significant impact disclosed, analyzed, and mitigated.

1. The IS/MND underestimates air quality impacts

In their review, SWAPE determined that at least seven inputs from the IS/MND’s CalEEMod analysis were underestimated and did not reflect disclosed information about the Project from the IS/MND. They also determined that certain mitigation measures outlined by the IS/MND are unverified and therefore may underestimate the Project’s construction and operational emissions. If adjusted, the revised CalEEMod conclusions result in the finding of a potentially significant health risk impact, explained in section II(A)(3). Thus, there is substantial evidence

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<sup>27</sup> CEQA Guidelines, Appendix G, Section III: Air Quality.

<sup>28</sup> SWAPE Comments, p. 2.

to support a fair argument that the Project will result in a significant impact, triggering the requirement for the preparation of an EIR.<sup>29</sup>

a) *Multiple CalEEMod inputs contradict Project estimations from the IS/MND*

SWAPE notes that while the current use of the site includes three commercial buildings totaling 147,081 square feet, the IS/MND's CalEEMod inputs model an existing site of 161,000 square feet of retail buildings, an overestimation of 13,919 square feet.<sup>30</sup> SWAPE also found that this overestimation was included in the IS/MND's traffic report, which leads to the overestimation of the amount of existing trips and underestimates the amount of net new trips for the Project.<sup>31</sup> Thus, through both of these overestimations, the IS/MND underestimates the Project's construction and operational emissions, which leads to an inadequate analysis of health impacts.

Additionally, SWAPE indicates that the IS/MND's CalEEMod's output files contain an approximately 60% reduction in the CO<sub>2</sub> intensity factor, despite the IS/MND only claiming a 60% reduction by 2030.<sup>32</sup> The 60% reduction will therefore only likely occur at least 6 to 8 years *after* the Project would be completed. As SWAPE notes, "[t]his overestimates the reduction as stated in the IS/MND," and causes the MND to underestimate Project emissions.<sup>33</sup> Moreover, the MND's justification for this reduction is based solely on the California Renewable Portfolio Standard and the IS/MND contains no other means for verifying that this reduction will be accomplished. An IS/MND may not completely defer analysis of potential environmental impacts to an outside regulatory scheme.<sup>34</sup> Revised modeling and verification of emission reductions must be provided in an EIR.

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<sup>29</sup> *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 935; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–1318; CEQA Guidelines § 15064(f)(5).

<sup>30</sup> SWAPE Comments, p. 5.

<sup>31</sup> SWAPE Comments, p. 3.

<sup>32</sup> SWAPE Comments, p. 6.

<sup>33</sup> SWAPE Comments, p. 6.

<sup>34</sup> See *Californians for Alternatives to Toxics v. Dep't of Food & Agric.* (2005) 38 Cal. Rptr. 3d 638, 648; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882 (court rejected assertion that noise level under proposed project would be insignificant simply by virtue of being consistent with general plan standards for zone in question).

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The IS/MND also incorrectly models the Project's land use type and size and the material export from construction. The IS/MND's land use type and size modeling underestimates the size of the Project and also models some of the Project's land use as "Day-Care Center," which SWAPE shows "is not considered a Retail land use, but rather an Educational land use."<sup>35</sup> The IS/MND also mistakenly reverses the material export and import numbers from construction in its modeling.<sup>36</sup> Both of these errors in modelling may "may underestimate the Project's construction-related emissions and should not be relied upon to determine Project significance."<sup>37</sup>

SWAPE also notes that multiple additional modeling inputs are unsubstantiated and will likely lead to underestimation of Project emissions. The IS/MND's modeling extends the Project's construction phases, without providing a construction schedule to verify the extension, which potentially "results in an underestimation of the maximum daily emissions associated with construction."<sup>38</sup> The modeling also modifies the number of hauling trips required for construction, without justifying or explaining the change, which may impact the IS/MND's analysis of both the exhaust emissions associated with on-road vehicle use and fugitive dust emissions.<sup>39</sup>

Finally, SWAPE determined that the pass-by trips expected to occur throughout the Project's operation were double counted by the IS/MND's analysis, and therefore, the Project's operational emissions were underestimated.<sup>40</sup> According to Appendix A of the CalEEMod User's Guide, the primary trips utilize the complete trip lengths associated with each trip type category.<sup>41</sup> Diverted trips are assumed to take a slightly different path than a primary trip and are assumed to be 25% of the primary trip lengths. Pass-by trips are assumed to be 0.1 miles in length and are a result of no diversion from the primary route.<sup>42</sup> Here, the IS/MND counts the pass-by trips both in its CalEEMod analysis *and* in its Traffic Report instead of only

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<sup>35</sup> SWAPE Comments, p. 7.

<sup>36</sup> SWAPE Comments, p. 7-8.

<sup>37</sup> SWAPE Comments, p. 7-8.

<sup>38</sup> SWAPE Comments, p. 6-7.

<sup>39</sup> SWAPE Comments, p. 8.

<sup>40</sup> SWAPE Comments, p. 8.

<sup>41</sup> "CalEEMod User's Guide, Appendix A: Calculation Details for CalEEMod." *SCAQMD, available at: <http://www.aqmd.gov/docs/default-source/caleemod/caleemod-appendixa.pdf?sfvrsn=2>*, p. 20

<sup>42</sup> "CalEEMod User's Guide, Appendix A: Calculation Details for CalEEMod." *SCAQMD, available at: <http://www.aqmd.gov/docs/default-source/caleemod/caleemod-appendixa.pdf?sfvrsn=2>*, p. 20

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dividing the trip purpose between primary and diverted trips in the CalEEMod model.<sup>43</sup> And as a result, “the model underestimates the emissions associated with these trips and should not be relied upon to determine Project significance.”<sup>44</sup>

- b) *Multiple mitigation measures are unverified and may result in underestimated emissions*

Next, SWAPE identified at least three mitigation measures that are inadequately verified in the CalEEMod inputs, which may result in the IS/MND underestimating the Project’s air emissions. The Project’s CalEEMod output files demonstrate that the model included two mobile-related operational mitigation measures that relied on consistency with CAPCOA’s Quantifying Greenhouse Gas Mitigation Measures.<sup>45</sup> However, after analysis of the CAPCOA mitigation measures and the IS/MND’s consistency with those measures, SWAPE argues that “the IS/MND fails to justify the mobile-related operational mitigation measures included in the Project’s CalEEMod model.”<sup>46</sup> Further, the IS/MND includes an area-related mitigation measure that is neither justified in the CalEEMod User’s Guide nor even mentioned in the IS/MND.<sup>47</sup> For all these mitigation measures, SWAPE therefore concludes that “the inclusion of these measures in the model are unsubstantiated and the model should not be relied upon to determine Project significance.”<sup>48</sup>

2. The Health Risk Assessment relied upon by the IS/MND cannot constitute substantial evidence

SWAPE’s analysis indicates that the IS/MND’s construction health risk assessment (“HRA”) is incomplete, that the IS/MND was in error in not completing an operational HRA, and both assessments must be disclosed and analyzed in an EIR in order to be relied upon by the City.

The IS/MND concludes that:

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<sup>43</sup> SWAPE Comments, p. 9.

<sup>44</sup> SWAPE Comments, p. 9.

<sup>45</sup> SWAPE Comments, p. 10.

<sup>46</sup> SWAPE Comments, p. 11.

<sup>47</sup> SWAPE Comments, p. 9-10.

<sup>48</sup> SWAPE Comments, p. 11.

[W]ith implementation of the [Mitigation Measure III-1], the proposed project would not have the potential to expose sensitive receptors to substantial pollutant concentrations and a less-than-significant impact would occur.”<sup>49</sup>

However, this conclusion relies on a faulty analysis, shown above, that the CalEEMod model incorrectly underestimates construction emissions. The City must revise the air analysis before it can reliably compute the health risks associated with the Project’s construction.

Additionally, in drawing its conclusion, the IS/MND claims that no operational HRA was needed because:

The proposed project would not involve any land uses or operations that would be considered major sources of TACs, including DPM. As such, the proposed project would not generate any substantial pollutant concentrations during operations.<sup>50</sup>

However, SWAPE explains that this explanation “does not justify the omission of an operational HRA.”<sup>51</sup> The IS/MND’s analysis here stands in contrast with the “recommendations set forth by the Office of Environmental Health and Hazard Assessment’s (OEHHA) most recent *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments*, which was formally adopted in March of 2015, as referenced by the IS/MND.”<sup>52</sup> OEHHA recommends that exposure from projects lasting more than 6 months should be evaluated for the duration of the project and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (MEIR).<sup>53</sup> There is a multi-family apartment complex located only approximately 2 meters from the Project, which constitutes an existing sensitive receptor. Failing to prepare an operational HRA to calculate health risk impacts to this sensitive receptor is inconsistent with the OEHHA guidance and thus, the IS/MND has failed to provide substantial evidence that no health risk is associated with the Project.<sup>54</sup>

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<sup>49</sup> Delta Fair Village IS/MND, p. 29-30.

<sup>50</sup> IS/MND, p. 27.

<sup>51</sup> SWAPE Comments, p. 13.

<sup>52</sup> SWAPE Comments, p. 13.

<sup>53</sup> SWAPE Comments, p. 13.

<sup>54</sup> See SWAPE Comments, p. 13.

SWAPE's also found that the IS/MND failed "to sum the excess cancer risk calculated for each age group for both Project construction and operation."<sup>55</sup> Although the health risk was conducted to nearby, existing third trimester, infant, child, and adult receptors for construction-related emissions, the HRA fails to evaluate the cumulative lifetime cancer risk to nearby, existing receptors as a result of Project construction *and* operation together.<sup>56</sup> Failure to analyze this health risk is against the guidance cited in the IS/MND and must be disclosed and analyzed before certification of the Project can be made.

Finally, SWAPE concludes that without conducting a quantified HRA for nearby, existing sensitive receptors as a result of Project construction and operation, the IS/MND fails to compare the excess health risk to the BAAQMD's specific numeric threshold of ten in one million.<sup>57</sup> Without correction, the IS/MND fails to comply with OEHHA guidance and its analysis fails to constitute substantial evidence that no significant health risk will result from the Project.

3. A screening-level HRA correcting for the errors in the IS/MND's CalEEMod inputs indicates a potentially significant health risk impact

In contrast to the IS/MND's HRA, SWAPE prepared a screening level HRA using corrected inputs for diesel particulate matter and assumptions "[c]onsistent with recommendations set forth by the 2015 OEHHA guidance."<sup>58</sup> With this data, shown below, SWAPE projects that over the course of Project construction and operation, the excess cancer risks posed to adults, children, infants, and during the third trimester of pregnancy "are approximately 12, 79, 76, and 2.8 in one million. The excess cancer risk over the course of a residential lifetime (30 years), utilizing age sensitivity factors, is approximately 170 in one million. The infant, child, adult, and lifetime cancer risks all exceed the BAAQMD threshold of 10 in one million, thus resulting in a potentially significant impact not previously addressed or identified by the IS/MND."<sup>59</sup>

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<sup>55</sup> SWAPE Comments, p. 13.

<sup>56</sup> SWAPE Comments, p. 13.

<sup>57</sup> SWAPE Comments, p. 13.

<sup>58</sup> SWAPE Comments, p. 17.

<sup>59</sup> SWAPE Comments, p. 17.

**The Maximally Exposed Individual at an Existing Residential Receptor**

Activity	Duration (years)	Concentration (ug/m3)	Breathing Rate (L/kg-day)	ASF	Cancer Risk with ASFs*
Construction	0.25	0.2427	361	10	2.8E-06
<i>3rd Trimester Duration</i>	<i>0.25</i>			<i>3rd Trimester Exposure</i>	<i>2.8E-06</i>
Construction	0.97	0.2427	1090	10	3.3E-05
Operation	1.03	0.3027	1090	10	4.4E-05
<i>Infant Exposure Duration</i>	<i>2.00</i>			<i>Infant Exposure</i>	<i>7.6E-05</i>
Operation	14.00	0.3027	572	3	7.9E-05
<i>Child Exposure Duration</i>	<i>14.00</i>			<i>Child Exposure</i>	<i>7.9E-05</i>
Operation	14.00	0.3027	261	1	1.2E-05
<i>Adult Exposure Duration</i>	<i>14.00</i>			<i>Adult Exposure</i>	<i>1.2E-05</i>
<b>Lifetime Exposure Duration</b>	<b>30.00</b>			<b>Lifetime Exposure</b>	<b>1.70E-04</b>

Under the fair argument legal standard, an EIR is required whenever “there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial.”<sup>60</sup> Thus, the City must include this potentially significant impact in its analysis of air quality impacts in an EIR. Without doing so, the Project’s environmental analysis violates CEQA’s mandate to disclose and mitigate the Project’s potentially significant impacts.

**B. The MND fails to disclose, analyze, and mitigate the Project’s Greenhouse Gas impacts**

Bay Area Air Quality Management District (“BAAQMD”) guidance on greenhouse gas (“GHG”) analysis, which the IS/MND purports to follow, states that a proposed construction project should be found to cause a significant impact where the project would (1) generate greenhouse gas emissions that exceed the applicable

<sup>60</sup> 14 C.C.R. § 15063(b)(1) (emphasis added).  
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significance threshold or (2) conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases.<sup>61</sup>

We reviewed the IS/MND's GHG analysis with the assistance of SWAPE. As described below, our review found that the IS/MND's GHG analysis violates the law and is not supported by substantial evidence for three main reasons. First, the IS/MND fails to use a threshold which is applicable to the Project's built-out year, in violation of CEQA. Second, the IS/MND's GHG analyses rely on several incorrect assumptions that result in a substantial underestimation of Project-related GHGs and if corrected, the GHGs from the Project exceed the applicable GHG significance threshold. Third, the IS/MND fails to demonstrate consistency with the Antioch CAP, which the IS/MND considers an "applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases."

1. The GHG analysis relies on an inapplicable threshold in violation of CEQA

Under the CEQA Guidelines, which have been recently updated, a lead agency must analyze a project's impacts on GHG emissions.<sup>62</sup> The Guidelines allow for several approaches to this analysis, both qualitative and quantitative. The Guidelines explicitly mandate, however, that the "analysis should consider a timeframe that is appropriate for the project. The agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes."<sup>63</sup> Moreover, California Courts have acknowledged that "over time, consistency with year 2020 goals will become a less definitive guide, especially for long-term projects that will not begin operations for several years [after 2020]."<sup>64</sup> "Consistency with the State's long-term climate stabilization objectives . . . will often be appropriate . . . under CEQA,' provided the analysis is '*tailored . . . specifically to a particular project.*'"<sup>65</sup>

The IS/MND's analysis relies on the tiered approach developed by the BAAQMD for assessing the impacts of land use development projects. If a project is

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<sup>61</sup> BAAQMD CEQA Air Quality Guidelines, May 2017 at p. 2-2, available at [https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa\\_guidelines\\_may2017-pdf.pdf?la=en](https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en).

<sup>62</sup> 14 CCR §15064.4.

<sup>63</sup> 14 CCR §15064.4(b)

<sup>64</sup> *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th at 223.

<sup>65</sup> *Id.* (emphasis added).

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within the jurisdiction of an agency that has a “qualified” GHG reduction strategy, the project can assess consistency of its GHG emissions impacts with the reduction strategy. BAAQMD has adopted screening criteria and significance criteria for development projects that would be applicable for the proposed project. If a project exceeds the BAAQMD Guidelines’ GHG screening-level sizes, the proposed project would be required to conduct a GHG emissions analysis using the BAAQMD significance criteria of 1,100 million metric tons of carbon dioxide equivalent per year per year (MTCO<sub>2</sub>e per year) or 4.6 MTCO<sub>2</sub>e/yr per service population (residential population + employees). Here, the MND determined that “BAAQMD’s established thresholds are appropriate for analysis of the proposed project,” analyzed the Project’s annual emissions, and found GHG emissions per year per service population were below the “bright-line” threshold.<sup>66</sup>

BAAQMD’s significance threshold, however, is not applicable to the Project, and relying on it violates CEQA. BAAQMD’s thresholds, included in the district’s 2017 CEQA Guidelines, were developed to comply with the state reduction target as it is embodied in AB 32,<sup>67</sup> which mandates that statewide greenhouse gas emissions be reduced to 1990 levels by the target year 2020.<sup>68</sup> In 2016, the state passed SB 32,<sup>69</sup> which codified a new statewide 2030 GHG emissions reduction target of 40% below 1990 levels. Following the new legislation, the California Air Resources Board (“CARB”) adopted in December 2017 a new scoping plan to outline the strategy needed to achieve SB 32 GHG targets. These are the binding “state regulatory scheme” that the CEQA Guidelines require agencies to account for.

The BAAQMD Guidelines do not account for or include any numeric threshold for compliance with SB 32 or the scoping plan and are therefore not applicable to projects that will be built and operated beyond the AB 32 target year.<sup>70</sup> Because the Project’s first fully operational year would be 2021, and it would continue to operate many years beyond that, the City must analyze the Project for

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<sup>66</sup> MND, p. 47, 49.

<sup>67</sup> See California Environmental Quality Act Air Quality Guidelines, Bay Area Air Quality Management District, May 2017, at p. D-27.

<sup>68</sup> California Air Resources Board, Assembly Bill 32 Overview; available at: <https://www.arb.ca.gov/cc/ab32/ab32.htm>.

<sup>69</sup> [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB32](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32)

<sup>70</sup> See also *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497.

its compatibility with the state's mandated goals for, at the very least, the year 2030.<sup>71</sup>

BAAQMD *itself* advises lead agencies not to rely on its numeric significance thresholds and instead advises they make significance determinations based on the most recent state greenhouse gas reduction targets. For example, in recent comment letters to lead agencies, BAAQMD stated as follows:

The Air District encourages the City to make a significance determination for greenhouse gas impacts based on the most recent State greenhouse gas targets and CEQA guidance. The Air District's 2010 CEQA guidelines are based on the State's 2020 greenhouse gas targets. These targets have been superseded by the State's 2030 and 2050 climate stabilization goals and by the most recent draft of the AB 32 Scoping Plan written by the California Air Resources Board.<sup>72</sup>

The GHG impact analysis should include an evaluation of the Plan's consistency with the California Air Resources Board 2017 Scoping Plan and State and Air District climate stabilization goals for 2030 and 2050. Please be advised that the Air District is in the process of updating the CEQA guidelines/thresholds and current thresholds for GHGs should not be used for this plan.<sup>73</sup>

BAAQMD is in the process of updating its current CEQA Guidelines and thresholds of significance.<sup>74</sup> The IS/MND must be revised to analyze the Project's compatibility with the reduction targets set in SB 32, which go beyond those set in AB 32. As it is now, the IS/MND's analysis violates both CEQA and the Supreme Court rulings on GHG analysis and cannot constitute substantial evidence.

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<sup>71</sup> SWAPE Comments, p. 21.

<sup>72</sup> Greg Nudd, BAAQMD, Letter to Joshua McMurray, Oakley, CA, Oakley Logistics Center Project, March 21, 2019; available at: [http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/2019\\_03\\_21\\_city\\_of\\_oakley\\_oakley\\_logistics\\_center\\_nop-pdf.pdf?la=en](http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/2019_03_21_city_of_oakley_oakley_logistics_center_nop-pdf.pdf?la=en).

<sup>73</sup> Greg Nudd, BAAQMD, Letter to Alicia Parker, City of Oakland, RE: Downtown Oakland Specific Plan - Notice of Preparation of a Draft Environmental Impact Report, February 15, 2019; available at: [http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/downtown\\_oakland\\_specific\\_plan\\_eir\\_notice\\_of\\_preparation\\_021519-pdf.pdf?la=en](http://www.baaqmd.gov/~media/files/planning-and-research/ceqa-letters/2019/downtown_oakland_specific_plan_eir_notice_of_preparation_021519-pdf.pdf?la=en)

<sup>74</sup> BAAQMD, CEQA Guidelines Update Underway; available at: <http://www.baaqmd.gov/plans-and-climate/california-environmental-quality-act-ceqa/updated-ceqa-guidelines>.



2. The IS/MND significantly underestimates GHG emissions from the Project
  - a) *The IS/MND's GHG analysis relies upon an incorrect and unsubstantiated air model, unsubstantiated assumptions, and unsubstantiated mitigation measures that underestimate GHGs associated with the Project*

Similar to the conclusion reached in section II(A) of these comments, the IS/MND's analysis of GHGs relies on underestimated inputs, unsubstantiated assumptions about the Project's retail components, and unsupported mitigation measures that significantly underestimate the GHG emissions associated with the Project. The City must correct for these underestimations in an EIR to adequately analyzed the GHG impacts from the Project.

- b) *A revised analysis of GHG emissions shows the Project exceeds applicable GHG thresholds*

The IS/MND finds that GHG emissions from the Project will total 2,227.2 MT CO<sub>2</sub>e/year or, after dividing by the IS/MND's proposed service population, comes to 3.31 MT CO<sub>2</sub>e/year/service population. Based on BAAQMD's outdated 2020 GHG significance threshold, the IS/MND concludes that the Project will not have a significant impact from GHG emissions. As we have indicated above, there are two problems with this analysis: first, the BAAQMD threshold cannot apply to the project, and second, the total GHG emissions is underestimated.

In its letter, SWAPE recommends the use of a "widely-accepted 2030 'substantial progress'" service population efficiency threshold of 2.6 MT CO<sub>2</sub>e/year/service population.<sup>75</sup> Using this substantial progress threshold alone, the IS/MND's own 3.31 MT CO<sub>2</sub>e/year/service population GHG emissions calculation would exceed the significance threshold.

SWAPE also provides its own updated modeling analysis of the Project's GHG emissions, taking into consideration the underestimated or unsupported inputs described above. This modeling shows GHG emissions of 2,907.2 MT CO<sub>2</sub>e/year and approximately 4.3 MT CO<sub>2</sub>e/year/service population,<sup>76</sup> which would

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<sup>75</sup> SWAPE Comments, p. 19.

<sup>76</sup> SWAPE Comments, p. 23.

far exceed the 2.6 MT CO<sub>2</sub>e/year/service population threshold. This significant impact was not disclosed nor mitigated for in the IS/MND.

An MND is improper, and an EIR must be prepared, when a fair argument can provide substantial evidence that the project may have a significant environmental impact.<sup>77</sup> Thus, the City must prepare an EIR to fully analyze and disclose the potentially significant impact for the Project's greenhouse gas emissions.

3. The Antioch CAP Measures are Not Properly Incorporated in The Project

The IS/MND claims “the proposed project would comply with several emissions reductions strategies included in the City's Community Climate Action Plans,” and that, “projects that are in compliance with the Climate Action Plans would be considered compliant with the GHG reduction goals required by AB 32.”<sup>78</sup> This claim was relied upon, in part, for the City's conclusion that “the proposed project would not be considered to generate GHG emissions, either directly or indirectly, that may have a significant impact on the environment, or conflict with any applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of GHGs.”<sup>79</sup>

CEQA states that for an IS/MND to rely on a Climate Action Plan (“CAP”) in its analysis, it must identify which requirements apply to the Project and make those requirements binding and enforceable to the Project by listing them as mitigation measures, if they are not already binding and enforceable in the City's CAP:

An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project. If there is substantial evidence that the effects of a particular project may be cumulatively considerable

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<sup>77</sup> *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944.

<sup>78</sup> IS/MND, p. 49.

<sup>79</sup> IS/MND, p. 50.

notwithstanding the project's compliance with the specified requirements in the plan for the reduction of greenhouse gas emissions, an EIR must be prepared for the project.<sup>80</sup>

Here, the IS/MND fails to demonstrate consistency with the City's CAP as required by CEQA. Although the IS/MND mentions certain steps taken in coordination with the CAP's city-wide measures, it fails to incorporate any project-level measures or include any of the CAP's measures as binding mitigation in the IS/MND, as required by CEQA Guidelines §§ 15064.4(b)(3) and 15183.5(b)(1).<sup>81</sup> SWAPE also indicates that the IS/MND fails to demonstrate consistency with those city-wide measures it does analyze<sup>82</sup> and omits analysis of consistency with dozens of the City CAP's strategies.<sup>83</sup> Without more, the IS/MND has not provided substantial evidence of consistency with the City's CAP.

### **C. The MND Fails to Disclose, Analyze, and Mitigate Against Potential Hazards and Hazardous Materials at the Project Site**

CEQA requires lead agencies to consider whether a project would “create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials.”<sup>84</sup> Likewise, CEQA requires lead agencies to determine whether projects create “a significant hazard to the public or the environment through reasonably foreseeable upset or accident conditions involving the release of hazardous materials into the environment.”<sup>85</sup>

The IS/MND states that there are no significant impacts due to the possible release of hazardous materials at the Project site. However, the only information the IS/MND relies upon to make this determination is that: “The project site is not located on a site that is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5.14.”<sup>86</sup> This is insufficient. SWAPE notes that, “consistent with professional due diligence procedures commonly used in CEQA matters, a Phase I ESA, completed by a licensed environmental professional is necessary for inclusion in an MND to identify recognized environmental

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<sup>80</sup> 14 CCR § 15183.5 (emphasis added).

<sup>81</sup> SWAPE Comments, p. 20.

<sup>82</sup> SWAPE Comments, p. 20-22.

<sup>83</sup> SWAPE Comments, p. 22.

<sup>84</sup> CEQA Guidelines Appendix G Section IX: Hazards and Hazardous Materials.

<sup>85</sup> CEQA Guidelines Appendix G Section IX: Hazards and Hazardous Materials.

<sup>86</sup> MND, p. 52.

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conditions, if any, at the proposed Project site.”<sup>87</sup> This is particularly relevant given that “aerial photographs obtained in the review of the Project show evidence of ground disturbance in the following years: 1937, 1949, 1965, and 1971.”<sup>88</sup> Thus, without preparing a Phase I ESA, there is a fair argument that the IS/MND has not fully analyzed or disclosed the potential impacts from hazards or hazardous materials.

### III. Conclusion

The IS/MND is inadequate as an environmental document because the City fails to properly disclose, analyze and mitigate the Project’s significant impacts on air quality, public health, GHGs, and hazardous materials. Further, substantial evidence supports a fair argument that potentially significant impacts will result from the Project’s air quality and greenhouse gas emissions. The City cannot approve the Project until it prepares and circulates an EIR that resolves these issues and complies with CEQA’s requirements.

Thank you for your consideration of these comments.

Sincerely,



Aaron M. Messing

AMM:acp  
Attachments

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<sup>87</sup> SWAPE Comments, p. 2.

<sup>88</sup> SWAPE Comments, p. 2.