


**FW: Carpenters Local 405 - City of San Jose - 865 Embedded Way Industrial Project - Comment Letter for TODAY'S 8/13/2024 City Council meeting, Agenda Item No. 10.2**

City Clerk <city.clerk@sanjoseca.gov>

Tue 8/13/2024 8:59 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Hind Bak [REDACTED]

**Sent:** Tuesday, August 13, 2024 8:46 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>; Keyon, David <david.keyon@sanjoseca.gov>; Nguyen, Nhu <Nhu.Nguyen@sanjoseca.gov>; Mitchell Tsai <[REDACTED]>; Jeremy Herwitt <[REDACTED]>; Mitchell M. Tsai Attorney at Law, P.C. <[REDACTED]>; Shah, Rina <Rina.Shah@sanjoseca.gov>

**Subject:** Carpenters Local 405 - City of San Jose - 865 Embedded Way Industrial Project - Comment Letter for TODAY'S 8/13/2024 City Council meeting, Agenda Item No. 10.2

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Good morning city staff,

Please find attached our Firm's Comment Letter for the 865 Embedded Way Industrial Project, Agenda Item 10.2, at today's City Council meeting. We would appreciate confirmation of receipt of this email.

Thank you,  
--Hind

**Hind Baki**

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**\*\*Please note that Hind Baki is out of office on Fridays; for any urgent matters, please contact [info@mitchtsailaw.com](mailto:info@mitchtsailaw.com)\*\***

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**VIA E-MAIL**

August 13, 2024

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**RE: Agenda Item No. 10.2: Environmental Appeal of City of San Jose's  
865 Embedded Way Industrial Project (Project File Nos. H22-022,  
ER22-113)**

Dear Mayor Mahan, Honorable Councilmembers, and David Keyon,

On behalf of Carpenters Local Union 405 (“**Local 405**”) this office is submitting these further comments regarding the Environmental Appeal of the May Initial Study/Mitigated Negative Declaration (“**IS/MND**”) for the City of San Jose’s (“**City**”) 865 Embedded Way Industrial Project (“**Project**”), and the City’s written responses to prior written comments submitted on the Project. Contrary to the assertions in the City’s July 24, 2024, Memorandum concerning the Project, (the “**Staff Memo**”) the MND was not prepared in full compliance with CEQA and the preparation of an Environmental Impact Report (“**EIR**”) for the Project is required.

The Project proposes a Site Development Permit (File No. H22-022) to allow the construction of a one-story, 121,400-square-foot industrial/manufacturing warehouse on a vacant 10.17-acre project site located at 865 Embedded Way in San Jose, California 95138 (APN 679-01-020) (“**Site**”). The Project also includes a connection to an existing 26-foot-wide drive aisle that extends from the eastern Embedded Way driveway through the adjacent eastern industrial property at 875 Embedded Way and currently terminates at the southeastern boundary of the Site. A total of 300 parking

spaces would be provided in a surface parking lot surrounding the proposed building. The Project requires the removal of 11 trees on-site, two of which are ordinance-size.

Local 405 represents thousands of union carpenters in San Jose and has a strong interest in well-ordered land use planning and in addressing the environmental impacts of development projects. Individual members of Local 405 live, work, and recreate in the City and surrounding communities and would be directly affected by the Project's environmental impacts.

Local 405 expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearing or proceeding related to the Project. Gov. Code, § 65009, subd. (b); Pub. Res. Code, § 21177, subd. (a); see *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1203; see also *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

Local 405 incorporates by reference all of its prior comments, as well as all comments related to the Project or its California Environmental Quality Act (“**CEQA**”) review, including the IS/MND. See *Citizens for Clean Energy v. City of Woodland* (2014) 225 Cal.App.4th 173, 191 (finding that any party who has objected to the project's environmental documentation may assert any issue timely raised by other parties). This correspondence shall further serve to respond to the City's July 24, 2024, Staff Memo concerning the appeal of the Project's approval, and the recommendations set forth therein.

## **I. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.**

### **A. Background Concerning the California Environmental Quality Act.**

The California Environmental Quality Act is a California statute designed to inform decision-makers and the public about the potential significant environmental effects of a project. 14 California Code of Regulations (“**CEQA Guidelines**”), § 15002, subd. (a)(1).<sup>1</sup> At its core, its purpose is to “inform the public and its responsible

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<sup>1</sup> The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, section 15000 et seq., are regulatory guidelines promulgated by the state Natural Resources Agency for the implementation of CEQA. Cal. Pub. Res. Code, § 21083. The CEQA Guidelines are given “great weight in interpreting CEQA except when . . . clearly unauthorized or erroneous.” *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 217.

officials of the environmental consequences of their decisions *before* they are made.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

CEQA directs public agencies to avoid or reduce environmental damage, when possible, by requiring alternatives or mitigation measures. CEQA Guidelines, § 15002, subds. (a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Board of Port Comes* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights Improvement Assn.*, 47 Cal.3d at p. 400. The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines, § 15002, subd. (a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding 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” specified in Public Resources Code section 21081. See CEQA Guidelines, § 15092, subds. (b)(2)(A)-(B).

Determining whether an EIR complies with CEQA’s information disclosure requirements presents a question of law subject to independent review by the courts. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102, 131. As the court stated in *Berkeley Jets*, prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process. 91 Cal.App.4th at p. 1355 (internal quotations omitted).

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. *Communities for a Better Environment v. Richmond* (2010) 184 Cal.App.4th 70, 80 (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450). The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. *Id.* For the EIR to serve these goals it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an

adequate opportunity to comment on that presentation before the decision to go forward is made. *Id.*

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the “fair argument” standard under which an EIR must be prepared whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; *Friends of “B” St. v. City of Hayward* (1980) 106 Cal.3d 988, 1002.

The fair argument test stems from the statutory mandate that an EIR be prepared for any project that “may have a significant effect on the environment.” PRC, § 21151; see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.App.3d 68, 75; accord *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 884. Under this test, if a proposed project is not exempt and may cause a significant effect on the environment, the lead agency must prepare an EIR. PRC, §§ 21100 (a), 21151; CEQA Guidelines, § 15064 (a)(1), (f)(1). An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may have a significant effect on the environment. *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 785. In such a situation, the agency must adopt a negative declaration. PRC, § 21080, subd. (c)(1); CEQA Guidelines, §§ 15063 (b)(2), 15064(f)(3).

“Significant effect upon the environment” is defined as “a substantial or potentially substantial adverse change in the environment.” PRC, § 21068; CEQA Guidelines, § 15382. A project may have a significant effect on the environment if there is a reasonable probability that it will result in a significant impact. *No Oil, Inc.*, 13 Cal.3d at p. 83 fn. 16; see *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309. If any aspect of the project may result in a significant impact on the environment, an EIR must be prepared even if the overall effect of the project is beneficial. CEQA Guidelines, § 15063(b)(1); see *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.

This standard sets a “low threshold” for preparation of an EIR. *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 207; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 580; *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *Sundstrom*, 202 Cal.App.3d at p.

310. If substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen*, 23 Cal.App.5th at p. 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 183; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491; *Friends of "B" St.*, 106 Cal.App.3d 988; CEQA Guidelines, § 15064(f)(1).

1. *Background Concerning Initial Studies, Negative Declarations and Mitigated Negative Declarations.*

CEQA and CEQA Guidelines are strict and unambiguous about when an MND may be used. A public agency must prepare an EIR whenever substantial evidence supports a “fair argument” that a proposed project “may have a significant effect on the environment.” Pub. Res. Code, §§ 21100, 21151; CEQA Guidelines, §§ 15002, subds. (f)(1)-(2), 15063; *No Oil, Inc.*, 13 Cal.3d at p. 75; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112.

Essentially, should a lead agency be presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. CEQA Guidelines, §§ 15064, subds. (f)(1)-(2); see *No Oil Inc., supra*, 13 Cal.3d at p. 75 (internal citations and quotations omitted). Substantial evidence is defined as “***enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.***” CEQA Guidelines, § 15384(a). A lead agency may adopt an MND only if “there is no substantial evidence that the project will have a significant effect on the environment.” CEQA Guidelines, § 15074(b).

Evidence supporting a fair argument of a significant environmental impact triggers preparation of an EIR regardless of whether the record contains contrary evidence. *League for Protection of Oakland's Architectural and Historical Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905. “Where the question is the sufficiency of the evidence to support a fair argument, deference to the agency’s determination is not appropriate[.]” *County Sanitation*, 127 Cal.App.4th at 1579 (quoting *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-1318).

Further, it is the duty of the lead agency, not the public, to conduct the proper environmental studies. “The agency should not be allowed to hide behind its own failure to gather relevant data.” *Sundstrom*, 202 Cal.App.3d at p. 311. “Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” *Id.*; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1382 (lack of study enlarges the scope of the fair argument which may be made based on the limited facts in the record).

Thus, refusal to complete recommended studies lowers the already low threshold to establish a fair argument. The court may not exercise its independent judgment on the omitted material by determining whether the ultimate decision of the lead agency would have been affected had the law been followed. *Environmental Protection Information Center v. Cal. Dept. of Forestry* (2008) 44 Cal.4th 459, 486 (internal citations and quotations omitted). The remedy for this deficiency would be for the trial court to issue a writ of mandate. *Id.*

Both the review for failure to follow CEQA’s procedures and the fair argument test are questions of law, thus, the de novo standard of review applies. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

“Whether the agency’s record contains substantial evidence that would support a fair argument that the project may have a significant effect on the environment is treated as a question of law. *Consolidated Irrigation Dist.*, 204 Cal.App.4th at p. 207; Kostka and Zischke, *Practice Under the Environmental Quality Act* (2017, 2d ed.) at § 6.76.

In an MND context, courts give no deference to the agency. Additionally, the agency or the court should not weigh expert testimony or decide on the credibility of such evidence—this is one of the EIR’s functions. As stated in *Pocket Protectors v. City of Sacramento* (2004):

Unlike the situation where an EIR has been prepared, neither the lead agency nor a court may “weigh” conflicting substantial evidence to determine whether an EIR must be prepared in the first instance. Guidelines section 15064, subdivision (f)(1) provides in pertinent part: if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. Thus, as *Claremont* itself



recognized, [c]onsideration is not to be given contrary evidence supporting the preparation of a negative declaration.

124 Cal.App.4th 903, 935 (internal citations and quotations omitted).

In cases where it is not clear whether there is substantial evidence of significant environmental impacts, CEQA requires erring on the side of a “preference for resolving doubts in favor of environmental review.” *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332. “The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

As explained below, the IS/MND fails to make certain essential findings. Further, for a number of findings that the IS/MND does make, it fails to support such findings with sufficient analysis and substantial evidence, or it fails to incorporate adequate mitigation measures. Therefore, there is a fair argument that the Project will have a significant effect on the environment, triggering the “low threshold” standard for preparation of an EIR.

B. The City’s Staff Report for the Appeal Continues to Misapply the Substantial Evidence Standard.

In its Staff Memo for this Appeal, the City continues to assert that the comments provided by Local 405 (and other commenting parties) failed to provide substantial evidence of a fair argument under CEQA that the Project would have significant environmental impacts. Staff Memo at p. 3. However, the City misconstrues the standard under CEQA in that it asserts no EIR for the Project can be required absent the appealing parties demonstrating substantial evidence that the Project “would result in significant, adverse, un-mitigable impacts.” *Id.* With regard to the requirements for the preparation of an EIR, the CEQA guidelines and California law do not make any reference to “un-mitigable impacts” and do not require a showing that a project “would” result in such impacts. Rather, all that is required to trigger the preparation of an EIR for a project is substantial evidence of a ***fair argument*** that a project ***may*** have a significant effect on the environment. Again, California law underscores the ***low threshold*** required for the preparation of an EIR. Here, that threshold has clearly been met, based on the various deficiencies identified in the City’s MND for the Project. Tellingly, the City’s Staff Memo regarding this appeal contains no response to

Local 405's arguments as to the proper substantial evidence standard applicable to the Project and the City's failure to apply it.

Further, a commenting party need not provide "its own" substantial evidence to support a fair argument that a project will have a significant impact. Rather, that evidence can be contained in any of the documents associated with and prepared for a project (including CEQA environmental documents), as is the case here. Again, a strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the "fair argument" standard, under which an agency must prepare an EIR whenever ***substantial evidence in the record*** supports a fair argument that a project may have a significant effect on the environment. *Quail Botanical Gardens Found., Inc. v City of Encinitas* (1994) 29 CA4th 1597, 1602; *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 1002.

Here, Local 405 commented regarding the MND and the data and information set forth therein, and raised arguments regarding the Project's perceived significant environmental impacts based on that information and documentation. The City is not at liberty to summarily dispose of those comments simply because its analysis has led it to differing conclusions regarding the Project's impacts. The MND constitutes a significant component of the "evidence in the record," and to the extent that other fair arguments regarding the Project's environmental impacts can be drawn from the information presented therein, Local 405 (and other commenting parties) are not required to supply any additional evidence in support of those fair arguments. More importantly, the City, as the lead agency for the Project, cannot simply dismiss other fair arguments regarding environmental impacts that arise from the evidence in the record, and it is the City's obligation to instead carefully weigh and consider any other such arguments before making a determination as to whether further environmental review is warranted.

C. There Is a Fair Argument that the Project May Have a Significant Traffic Impact.

To dispose of the need to prepare an EIR, the IS/MND relies on mitigation measure MM TRAN-1.1 to support its contention that the Project would have a less than significant impact with mitigation incorporated as it pertains to CEQA Guidelines Section 15064.3 and its required VMT evaluation of a project's transportation impacts. IS/MND, p. 161. Yet, mitigation measure MM TRAN-1.1 is inadequate for an EIR, given that it is unenforceable, illusory, and infeasible. It also improperly

delegates the City's affirmative duty to ensure the reduction of traffic impacts onto the Project's Applicant and further improperly delegates the approval of any traffic mitigation plans to the City's Public Works department, rather than the elected decision-makers. MM TRAN-1.1 also improperly defers mitigation.

CEQA's standard under Public Resources Code section 21064.5 requires an IS/MND to show that:

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

Local 405 reiterates that the proposed mitigation measures are illusory given they only require that the Project Applicant submit plans at some future point which the City may then review. These measures further place the burden on the Applicant to "ensure" that the proposed changes result in a reduction of VMT. Simply put, there is no definitive and measurable commitment to mitigation at all. Even under the EIR-related CEQA Guidelines section 15126.4(a)(1)(B), this is improper since, *inter alia*, the City does not commit to mitigation but rather relies on the Applicant to mitigate. As a result, the public is being denied the opportunity to assess the City's analysis behind the claimed adequacy of the proposed mitigation measures, as the specific plans for implementing the mitigation measures have not yet been prepared. The City's April 2024 and July 2024 Responses to Public Comments fail to cure these material defects.

Indeed, the proposed mitigation measures are improperly deferred and vague as they still defer the formulation of mitigation measures or final design thereof to a later time, shift that burden to the Applicant, and further do not adequately explain how removing the pork-chop islands or installing raised median islands will improve pedestrian safety and calm traffic to such a degree that such measures will "clearly" reduce VMT to the requisite level of insignificance, as required for an IS/MND.

As stated previously, the IS/MND fails to meet CEQA's pre-conditions and requirements even in the case of an EIR. CEQA forbids deferred mitigation. CEQA Guidelines, § 15126.4, subd. (a)(1)(B). CEQA allows deferral of details of mitigation

measures only “when it is impractical or infeasible to include those details during the project’s environmental review.” *Id.* CEQA further requires that the lead agency:

- (1) [C]ommits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard[.]

CEQA Guidelines, § 15126.4, subd. (a)(1)(B).

Here, Local 405 maintains that the City has failed each of these preconditions and requirements, as the IS/MND fails to show why the development of the traffic calming plans or pedestrian improvements could not be developed before the issuance of the IS/MND, what impacts they will have individually or cumulatively, if such plans would indeed be feasible, and the specific performance criteria that Applicant will have to meet.

Indeed, the City has proposed to defer the development and implementation of the Public Improvement Plan called for in the Project’s mitigation measures until after the Project’s environmental review has been completed. Specifically, the proposed revised version of MM-TRAN-1.1 states, in relevant part:

The multi-modal infrastructure improvements shall be part of a Public Improvement Plan prepared by the project applicant that demonstrates how the multi-modal improvements will be implemented and the schedules for completing the improvements. Prior to issuance of any certificates of occupancy, the project applicant shall submit the Public Improvement Plan to the Director of Public Works or the Director’s designee for review and approval. The implementation of the multi-modal improvements shall be verified by the Director of Public Works or the Director’s designee for review and approval.

See July 19, 2024, Responses to Public Comments at p. 69.

The City has simply no justification for the deferment of the Public Improvement Plan until after the conclusion of the environmental review process for the Project, given that the IS/MND’s determination of “less than significant impacts with mitigation” is entirely contingent upon the establishment and implementation of that Public Improvement Plan.

It also remains unclear from the City’s revisions to the mitigation measure whether the City is continuing to remove itself from the process of approving the Public Improvement Plan prior to the Applicant’s implementation of any multi-modal

infrastructure improvements. To that end, MM-TRAN-1.1 now refers twice to the “Director’s designee for review and approval,” including in the final sentence cited above. The multiple instances of that verbiage suggest that the Director of Public Works may only assign a “designee for review and approval” in connection with the submission of the Project’s Public Improvement Plan and the verification of implementation of multi-modal improvements under it, but that the Public Works department may not actually review and approve the Public Improvement Plan called for by MM-TRAN-1.1 prior to the issuance of the Project’s certificates of occupancy.

Under that reading of the ambiguous language of the mitigation measure, the City would be continuing its withdrawal from impact mitigation process for the Project. This reasonable interpretation of the language of MM-TRAN-1.1 would still vest the Applicant with all of the discretionary authority over the contents of the Public Improvement Plan. Thus, according to the language of further revised mitigation measure, the City’s sole role with regard to the Public Improvement Plan could continue to be mere verification the Applicant’s implementation of the multi-modal improvements that the Applicant determined were appropriate for incorporation into the Project.

Moreover, the IS/MND improperly fails to provide any analysis whatsoever of the potential environmental impacts that would result from the implementation of the proposed mitigation measures, including the multi-modal infrastructure improvements that the mitigation measure demands. In the absence of providing that requisite analysis, and by deferring aspects of the mitigation measure, the City has improperly denied the public of the requisite opportunity to fully evaluate the environmental impacts of the Project prior to a final agency determination being made.

Lastly, the City’s Staff Memo concerning the appeal of this Project fails to justify and explain the City’s use of its outdated 2018 VMT Evaluation Tool in conducting the transportation impact analysis for the Project. The only explanation the City provides in the Staff Memo in response to public comments on this issue is that the “Final Transportation Analysis” was prepared and approved by the Department of Public Works approximately 6 weeks before the City’s updated VMT Evaluation Tool was released on May 16, 2023. However, the IS/MND for this Project was released on December 21, 2023, more than 7 months after the updated VMT Evaluation Tool was released. As such, the “Final Transportation Analysis” could certainly have been

updated to reflect the material changes in the City's applicable VMT data and standards that were presented in the City's updated 2023 VMT Evaluation Tool. Further, the expert analysis presented in public comments on this Project presents a fair argument that the Project's transportation mitigation measures are inadequate. Thus, the City can provide no cognizable justification for its failure to update its transportation analysis based on the updated 2023 VMT Evaluation Tool and then revise the mitigation measures in the IS/MND in accordance with those findings. The City's failure to take this necessary action gives rise to further substantial evidence in the record that the Project may have a significant transportation impact based on the City's updated 2023 VMT Evaluation Tool.

For the reasons set forth previously and hereinabove, Local 405 maintains that the IS/MND fails to prove that the Project's traffic impacts will be mitigated to a less than significant level with the incorporation of the proposed mitigation measures. In fact, the IS/MND suggests the opposite, necessitating the preparation of an EIR. The City's responses to comments and further revisions to the proposed mitigation measures fail to address the concerns previously raised by Local 405.

D. There Is a Fair Argument that the Project May Have Significant Air Quality, GHG Emission, Noise, and Wildlife/Biological Impacts, Requiring Mandatory Findings of Significance and the Preparation of an EIR.

Again, given that the Project may have significant traffic impacts that are not accurately disclosed or mitigated against in the IS/MND, then its traffic-related impacts are also derivatively understated and may be significant, thereby requiring the preparation and circulation of an EIR.

There is an acknowledged direct correlation between the increase in traffic impacts and an increase in the associated air quality, GHG emission, and noise impacts. See e.g., *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 413 ("it is reasonable to assume" that a project enabling physical residential development would have reasonably foreseeable indirect air and other impacts).

As stated in the Office of Planning Research's ("**OPR**") technical advisory in 2018:

VMT and Greenhouse Gas Emissions Reduction. Senate Bill 32 (Pavley, 2016) requires California to reduce greenhouse gas (GHG) emissions 40 percent below 1990 levels by 2030, and Executive Order B-16-12 provides

a target of 80 percent below 1990 emissions levels for the transportation sector by 2050. The transportation sector has three major means of reducing GHG emissions: increasing vehicle efficiency, reducing fuel carbon content, and reducing the amount of vehicle travel.

Similarly, there is an acknowledged nexus between the increase in traffic and in related air quality, GHG impacts, noise, water/flooding impacts, and impacts on human health and the natural environment, including wildlife and waterways. As described in the 2018 OPR Technical advisory:

VMT and Other Impacts to Health and Environment. VMT mitigation also creates substantial benefits (sometimes characterized as “co-benefits” to GHG reduction) in both in the near-term and the long-term. Beyond GHG emissions, increases in VMT also impact human health and the natural environment. Human health is impacted as increases in vehicle travel lead to more vehicle crashes, poorer air quality, increases in chronic diseases associated with reduced physical activity, and worse mental health. Increases in vehicle travel also negatively affect other road users, including pedestrians, cyclists, other motorists, and many transit users. The natural environment is impacted as higher VMT leads to more collisions with wildlife and fragments habitat. Additionally, development that leads to more vehicle travel also tends to consume more energy, water, and open space (including farmland and sensitive habitat). This increase in impermeable surfaces raises the flood risk and pollutant transport into waterways.

As such, there is a fair argument that the Project here may have significant GHG emissions, air quality, energy, water, noise and other impacts, including impacts on human beings and the natural environment.

#### *1. GHG Emissions*

Local 405 reiterates that the IS/MND fails to analyze, to any degree sufficient to constitute compliance with CEQA, the Project’s potential GHG emissions impacts. The IS/MND instead offers a conclusory statement that will not result in a significant impact with regards to GHG emissions because the “Project construction would occur over a period of approximately 10 months and would result in the release of 140 MTCO<sub>2</sub>e.” IS/MND, p. 99. Based on that figure, the IS/MND then contends

that the Project construction activity and resulting GHG emissions “would not interfere with the implementation of Senate Bill 32. *Id.* Considering this conclusory statement, and wholesale lack of analysis on this issue, the IS/MND requires substantial revisions, or an EIR must be prepared.

The IS/MND’s finding of no GHG impacts clearly lacks adequate support and analysis, and an EIR is required to not only disclose the Project’s respective impacts, but also relate those to the adverse health impacts and impacts to the human beings that the Project may have. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.

## 2. *Wildlife and Biological Impacts*

Based on the known potential for occurrence of special-status species on or near the project site, Local 405 reiterates that additional site surveys must be completed prior to the Project’s building phase to adequately determine whether and to what extent protected species may be present on the Site. Moreover, despite the position detailed in the City’s Staff Memo and Responses to Comments, the Santa Clara Valley Habitat Plan (and the Applicant’s payment of fees associated therewith) cannot and does not act as a CEQA-compliant substitute for implementation of necessary mitigation measures pertaining to biological resources impacted by the Project. Rather, the appropriate course for mitigation of any potential adverse impacts of the Project on sensitive biological resources would be the establishment of mitigation measures that would include comprehensive and seasonally appropriate biological surveys prior to and during the construction of the project.

Again, the IS/MND acknowledges that the “Bay checkerspot butterfly and Crotch’s bumble bee ... may occasionally forage or breed on the site and, therefore, the species cannot be deemed absent.” IS/MND at p. 50. It also notes the potential for yellow warblers and white-tailed kites to occur at the site. *Id.* Thus, the IS/MND admits to the potential for occurrence of special status species on or near the Project site, and given that potential for occurrence, CEQA requires that the IS/MND, at minimum, be revised to craft specific mitigation measures aimed at ensuring a reduction in Project impacts to such species to the maximum extent possible.

## 3. *Noise Impacts*

As stated in CEQA, Guidelines section 15126.4(a)(1)(B), “[c]ompliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based



on substantial evidence in the record, to reduce the significant impact to the specified performance standards.” See also *Californians for Alternatives to Toxics v. Department of Food & Agric.* (2005) 136 Cal.App.4th 1 (the court set aside an EIR for a statewide crop disease control plan because it did not include an evaluation of the risks to the environment and human health from the proposed program but simply presumed that no adverse impacts would occur from use of pesticides in accordance with the registration and labeling program of the California Department of Pesticide Regulation); *Ebbetts Pass Forest Watch v Department of Forestry & Fire Protection* (2008) 43 Cal. App. 4th 936, 956 (fact that Department of Pesticide Regulation had assessed environmental effects of certain herbicides in general did not excuse failure to assess effects of their use for specific timber harvesting project).

Here, the IS/MND and the City’s Staff Memo continue to rely on the Project’s “implementation of GP Policy EC-1.7, Municipal Code requirements, and the City’s Standard Permit Conditions” to conclude that the Project’s “temporary construction noise impacts would be reduced to a less-than-significant level.” However, based on the authority outlined above and for the reasons set forth in greater detail below, Local 405 maintains that it is improper for the IS/MND to merely rely on Applicant’s compliance with regulatory measures, in lieu of implementing specific noise mitigation measures, to then conclude that the Project will have less than significant impacts when the City’s own noise study identified potentially significant impacts. Anticipated regulatory compliance, on its own, does not constitute adequate mitigation of a potentially significant impact under CEQA. The City’s Staff Memo concerning the Project fails to directly address Local 405’s arguments in this regard.

Again, noise regulations do not capture all the noise impacts of the Project, including construction and operation. Moreover, the regulatory measures are not Project-specific and are focused on the Project itself—as such, they fail to consider issues specific to the Project, such as location, size, proposed mitigation measures, as well as the Project’s *cumulative* impacts along with other related projects. Further, as discussed previously, the IS/MND’s traffic impacts are understated, and therefore traffic noise impacts have not been fully accounted for.

Further still, the Project’s reliance on regulatory compliance with the referenced regulations is misplaced because there is no evidence that such ordinances were to control noise outside of the building’s envelope, such as, for example, traffic noise or increase in ambient noises due to the Project’s construction and operation. *California*

*Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 (the building codes do not address the question of whether the Project is even *safe* to build, “whether a building should be constructed at all, how large it should be, where it should be located, whether it should incorporate certain resources, or anything else external to the building’s envelope.”)

Accordingly, Local 405 maintains that there is a fair argument that the Project may have a significant noise impact and as such, the Project’s potential noise impacts should be thoroughly analyzed and evaluated in an Environmental Impact Report pursuant to CEQA. At a minimum, Local 405 submits that the IS/MND must be revised and recirculated with respect to the Project’s noise impacts to reflect greater analysis beyond applying the Project’s regulatory compliance as a substitute for sufficient mitigation of noise impacts.

## **II. THE CITY MUST, AT A MINIMUM, REVISE AND RECIRCULATE THE IS/MND.**

Section 15073.5 of the CEQA Guidelines provides that a negative declaration must be recirculated whenever the document must be substantially revised. A substantial revision includes the identification of new, avoidable significant effects requiring mitigation measures or project revisions to be added to reduce the effect to less than significant levels or upon the agency determining that a proposed mitigation measure or project change would not reduce a potential impact to insignificance.

Additionally, when new information is brought to light showing that an impact previously discussed in an IS/MND and found to be insignificant with or without mitigation in the IS/MND’s analysis has the potential for a significant environmental impact supported by substantial evidence, the IS/MND must consider and resolve the conflict in the evidence. See *Visalia Retail, L.P. v. City of Visalia* (2018) 20 Cal. App. 5th 1, 13, 17; see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109.

Here, in light of the IS/MND’s failure to substantiate all of its findings, provide adequate mitigation measures, and fully assess all relevant factors, Local 405 resubmits that the Project requires significant revisions and resolution of conflicts in evidence. Therefore, at a minimum, the City must revise and recirculate the IS/MND if it does not prepare an EIR.

A. The IS/MND Fails to Mitigate the Project's Significant Impacts.

If a project has a significant effect on the environment, an agency may approve the project only upon finding 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.” CEQA Guidelines, § 15092, subds. (b)(2)(A)-(B).

CEQA mitigation measures proposed and adopted are required to describe what actions will be taken to reduce or avoid an environmental impact. CEQA Guidelines, § 15126.4, subd. (a)(1)(B) (providing “[f]ormulation of mitigation measures should not be deferred until some future time”). While the same Guidelines section 15126.5(a)(1)(B) acknowledges an exception to the rule against deferrals, such exception is narrowly proscribed to situations where it is impractical or infeasible to include those details during the project’s environmental review. Moreover, CEQA allows deferral of details of mitigation measures only “when it is impractical or infeasible to include those details during the project’s environmental review.” *Id.* CEQA further requires “that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard[.]” CEQA Guidelines, § 15126.4, subd. (a)(1)(B).

As discussed above, the Project fails to mitigate its significant impacts, improperly defers critical aspects of proposed mitigation measures, and fails to analyze the impacts associated with its proposed mitigation measures. Therefore, at minimum, the IS/MND must be revised or otherwise an EIR prepared.

### **III. CONCLUSION**

Based on the foregoing, Local 405 resubmits that the City should prepare an EIR for the Project given that there is a fair argument that the Project will result in significant environmental impacts. However, at the very least, the City must revise the IS/MND to address the aforementioned concerns and those previously raised. Local 405 respectfully requests that the City Council overturn the Planning Director’s approval

of the Project and direct that the City complete additional environmental review in compliance with CEQA.

Sincerely,




Jeremy H. Herwitt  
Attorneys for Carpenters Local Union 405

**Fw: Agenda Item 10.2 Appeal of the 865 Embedded Way Industrial Project Initial Study Mitigated Negative Declaration (H22-022 & ER22-113)**

City Clerk <city.clerk@sanjoseca.gov>

Tue 8/13/2024 10:50 AM

To:Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (782 KB)

6679-008acp - Comments on Appeal - 865 Embedded Way and Exhibits A-B (8-13-24).pdf;

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**From:** Alisha C. Pember <[REDACTED]>

**Sent:** Tuesday, August 13, 2024 10:08 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>; Christopher.burton@sanjose.gov <Christopher.burton@sanjose.gov>; Keyon, David <david.keyon@sanjoseca.gov>; Nguyen, Nhu <Nhu.Nguyen@sanjoseca.gov>

**Cc:** Richard M. Franco <[REDACTED]> Kelilah D. Federman <[REDACTED]>

**Subject:** Agenda Item 10.2 Appeal of the 865 Embedded Way Industrial Project Initial Study Mitigated Negative Declaration (H22-022 & ER22-113)

[External Email]

Good morning,

Please find attached **Comments re Agenda Item 10.2 Appeal of the 865 Embedded Way Industrial Project Initial Study Mitigated Negative Declaration (H22-022 & ER22-113)** and **Exhibits A-B**.

We are also providing a Dropbox link containing supporting references:

<https://www.dropbox.com/scl/fo/63kjal0son8ldlib8h2m/ADtnCNUhEx054M0zdShyGnM?rlkey=omxaeqk4l34xh6qmbw19qujb&st=xqntish2&dl=0>

A hard copy of our Comments and Exhibits A-B will go out today via overnight delivery.

If you have any questions, please contact Kelilah Federman.

Thank you.

Alisha Pember

Alisha C. Pember

Adams Broadwell Joseph & Cardozo

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August 13, 2024

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Vice Mayor Rosemary Kamei  
Councilmembers Sergio Jimenez;  
Omar Torres; David Cohen; Pam  
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### **Re: Agenda Item 10.2 Appeal of the 865 Embedded Way Industrial Project Initial Study Mitigated Negative Declaration (H22-022 & ER22-113)**

Dear Honorable Mayor Mahan, Vice Mayor Kamei, Councilmembers Jimenez, Torres, Cohen, Ortiz, Davis, Doan, Candelas, Foley, Batra, City Clerk Taber Planning Director Burton, Principal Planner Keyon, and Planner Nguyen:

On behalf of Appellants Silicon Valley Residents for Responsible Development ("Silicon Valley Residents" or "Appellants"), we submit these comments on Agenda Item 10.2 for the August 13, 2024 San Jose City Council ("Council") hearing. These comments respond to the Staff Report<sup>1</sup> addressing Silicon Valley Residents' Appeal ("Appeal") of the San Jose Planning Director's May 1, 2024 environmental clearance determination for the 865 Embedded Way Industrial Project ("Project") (H22-022, ER22-113) ("Project") proposed by Oppidan, Inc. ("Applicant"), based on the Initial Study/Mitigated Negative Declaration

<sup>1</sup> City of San Jose, Memorandum from Christopher Burton to Honorable Mayor and City Council Meeting August 13, 2024 Item: 10.2 H22-022 & ER22-113 - Public Hearing on the Environmental Appeal of the 865 Embedded Way Industrial Project Initial Study supporting a Mitigated Negative Declaration as the Environmental Clearance for Approval of a Site Development Permit (hereinafter "Staff Report").

(“MND”) prepared by the City of San Jose (“City”) pursuant to the California Environmental Quality Act (“CEQA”).<sup>2</sup>

We reviewed the Staff Report and the MND and reference documents with our experts and conclude that **substantial evidence supports a fair argument that the Project will result in potentially significant transportation impacts and significant air quality and public health impacts from construction and operational emissions requiring preparation of an environmental impact report (“EIR”).** We prepared these comments with the assistance of our technical experts James Clark and traffic and transportation expert Norman L. Marshall. Dr. Clark’s technical comments and curriculum vitae are attached hereto as Exhibit A.<sup>3</sup> Mr. Marshall’s comments and curriculum vitae are attached hereto as Exhibit B.<sup>4</sup>

**Silicon Valley Residents respectfully requests that the City Council uphold this appeal, vacate the Planning Director’s May 1, 2024 decision to approve the Site Development Permit and the MND prepared for the Project, and prepare a legally adequate EIR for the Project to address all potentially significant impacts of the Project before the Project is approved.**

## **I. PROJECT BACKGROUND**

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

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<sup>2</sup> Pub. Resources Code (“PRC”) §§ 21000 et seq.; 14 Cal. Code Regs. (“CCR” or “CEQA Guidelines”) §§ 15000 et seq.

<sup>3</sup> See **Exhibit A**, Letter from James Clark Ph.D., to Kelilah Federman ABJC, Response To Findings Of H-22-022 & ER22-113 – Public Hearing On The Environmental Appeal of The 865 Embedded Way Industrial Project IS/MND, City of San Jose, California (August 12, 2024) (“Clark Comments August 2024”).

<sup>4</sup> See **Exhibit B**, Letter from Norman Marshall to Kelilah Federman ABJC, 865 Embedded Way Industrial Project (August 12, 2024) (“Marshall Comments August 2024”).



## II. STATEMENT OF INTEREST

Appellant Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public health and environmental impacts of the Project. The association includes: the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and District Council of Ironworkers and their members and their families; and other individuals that live and/or work in the City of San Jose and Santa Clara County. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

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

## III. LEGAL BACKGROUND

The Staff Report prepared for the August 13, 2024 City Council hearing on the Project misstates the legal standard 18 times.<sup>5</sup> The Staff Report falsely states that because Appellants failed to "provide substantial evidence supporting a fair argument that the project would result in *significant unavoidable* impacts requiring preparation of an EIR... no further response or additional CEQA analysis is required and the preparation of an EIR is not warranted."<sup>6</sup> Appellants bear no burden to prove the impacts of the Project are significant and unavoidable. In fact, Appellants presented substantial evidence that the impacts of the Project are significant and can be avoided, through feasible mitigation measures proposed in our prior comments to the City.

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<sup>5</sup> Staff Report, Exhibit F - Final Response to Late Comments and Consequent Appeals and Errata, p. 14, 20, 34, 37, 39, 48, 66, 67, 68.

<sup>6</sup> Staff Report, Exhibit F - Final Response to Late Comments and Consequent Appeals and Errata, p. 66.

The correct legal standard, and the reason Appellants appealed the Planning Director's determination, is that, **a lead agency "shall" prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.**<sup>7</sup> Courts have held that if "no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR."<sup>8</sup> The fair argument standard creates a "low threshold" favoring environmental review through an EIR, rather than through issuance of a negative declaration.<sup>9</sup> An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>10</sup>

"Substantial evidence" required to support a fair argument is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."<sup>11</sup> Substantial evidence in these comments, in our prior comments and those of our expert consultants demonstrate that the Project will result in significant environmental impacts related to air quality, health risk, and transportation, requiring preparation of an EIR.

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<sup>7</sup> Pub. Resources Code, §§ 21080, subd. (d), 21082.2, subd. (d); CEQA Guidelines, §§ 15002, subd. (k)(3), 15064, subds. (f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602 (*Quail Botanical*).

<sup>8</sup> See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

<sup>9</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>10</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (*Friends of B Street*) ("If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact").

<sup>11</sup> CEQA Guidelines, § 15384, subd. (a).

#### IV. THE MND FAILS TO PROVIDE A COMPLETE PROJECT DESCRIPTION

CEQA requires that an Initial Study include a description of the project and an identification of the environmental setting.<sup>12</sup> “An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency’s action.”<sup>13</sup> Accordingly, a lead agency may not hide behind its failure to provide a complete and accurate project description.<sup>14</sup> “Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal ... and weigh other alternatives in the balance.”<sup>15</sup> Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus minimizing the project’s impacts and undermining meaningful public review.<sup>16</sup>

The Staff Report provides that “[t]he project description in the IS/MND clearly states that the project would involve the construction of an industrial/manufacturing warehouse designed for R&D uses.”<sup>17</sup> The MND describes the project as an industrial/manufacturing warehouse but analyzes the Project’s impacts under a less intense use for research and development (R&D). Without a designated end user, this ambiguity leads to uncertainties about the project’s future use and potential impacts, particularly concerning differences in impacts between a warehouse and an R&D facility. Condition of Approval 38 and MM TRAN-1.2 provide that the City must prepare and submit a Transportation Demand Management Plan, which would be based on the Project’s ultimate end use, whether R&D or warehouse.<sup>18</sup> This further undermines the City’s conclusion that its assessment of the Project as an R&D facility accurately reflects the future use of the Project.

Transportation expert Norm Marshall writes that even following responses to comments in the Staff Report, “[t]here is a high degree of uncertainty about the

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<sup>12</sup> CEQA Guidelines, § 15063, subd. (d).

<sup>13</sup> *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.

<sup>14</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 (“*Sundstrom*”).

<sup>15</sup> *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.

<sup>16</sup> See, e.g., *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

<sup>17</sup> Staff Report Exhibit F -Final Response to Late Comments and Consequent Appeals and Errata, p. 47.

<sup>18</sup> Staff Report Exhibit B - Site Development Permit, File No. H22-022, p. 16 of 24; Staff Report Exhibit A - 865 Embedded Way Industrial Project Initial Study and Mitigated Negative Declaration.

project use and its impacts.”<sup>19</sup> The Project Description must be revised to reflect the actual expected uses of the Project in order to accurately describe the Project and assess its impacts. The inadequate Project Description has numerous effects including a failure to analyze or mitigate VMT impacts. Mr. Marshall demonstrates that due to the uncertain Project Description, “[m]ost of the calculated VMT reduction is based on the assumption that 25 percent of employees would commute in company-paid vanpools. With an unidentified tenant and use, this assumption is wildly optimistic and likely impossible to achieve.”<sup>20</sup> Without an adequate Project Description, the Project’s impacts cannot be adequately analyzed and the MND’s mitigation measures do not sufficiently mitigate the Project’s transportation impacts.

## **V. AN EIR IS REQUIRED FOR THE PROJECT BECAUSE THERE IS SUBSTANTIAL EVIDENCE SUPPORTING A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT AIR QUALITY IMPACTS**

Dr. Clark’s comments provide substantial evidence supporting a fair argument that the Project results in significant air quality impacts from oxides of nitrogen (NO<sub>x</sub>).<sup>21</sup> Dr. Clark’s comments demonstrate an exceedance of BAAQMD thresholds for NO<sub>x</sub> emissions during construction of the Project.<sup>22</sup> Substantial evidence in Clark’s comments demonstrate that the MND’s modeling using a daily average emissions scenario underestimates the Project’s significant NO<sub>x</sub> emissions.<sup>23</sup> The Bay Area Air Quality Management District recommends that “for construction projects that are less than one year duration, Lead Agencies should annualize impacts over the scope of actual days that peak impacts are to occur, rather than the full year.”<sup>24</sup> Here, Project construction is anticipated to last ten months.<sup>25</sup> Thus, a daily average was not the correct threshold, but rather a daily maximum correctly characterizes the Project’s significant emissions. Dr. Clark calculated that the daily emissions of NO<sub>x</sub> during the winter months of the Project exceed applicable BAAQMD thresholds and result in a significant impact under

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<sup>19</sup> Marshall Comments, p. 1.

<sup>20</sup> *Id.*

<sup>21</sup> Clark Comments, p. 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Bay Area Air Quality Management District CEQA Guidelines (May 2017), p. 2-3, [https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa\\_guidelines\\_may2017-pdf.pdf](https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf).

<sup>25</sup> MND, Section 3.2.8.

CEQA.<sup>26</sup> Per Dr. Clark's analysis, the emissions from the construction phase will exceed BAAQMD's threshold of 54 lbs/day for NOx and will create a significant air quality impact for the community.<sup>27</sup>

The Staff Report states that the "IS/MND did not assume Tier 4 interim equipment when determining the project's impacts."<sup>28</sup> This is not correct. In fact, when estimating the Project's expected construction emissions, the MND's air quality analysis assumed that Project construction equipment would include Tier 4 Interim emission controls.<sup>29</sup> The MND does not include such emission controls as a mitigation measure, nor is there any other enforceable mechanism requiring such controls. Without Tier 4 Interim emission controls, the Project's construction emissions will be higher than disclosed. Further, substantial evidence in Dr. Clark's comments demonstrate that Project emissions will exceed the air district's significance thresholds.<sup>30</sup> Consequently, the MND's assessment of construction and operational emissions is flawed and underestimates the potentially significant air quality impact associated with construction of the Project.

CEQA requires that mitigation measures be fully enforceable through permit conditions, agreements or other legally binding instruments.<sup>31</sup> When adopting a mitigated negative declaration, the lead agency is required to adopt "a program for reporting on or monitoring the changes which it has either required in the project or made a condition of approval to mitigate or avoid significant environmental effects."<sup>32</sup> Tier 4 interim equipment is not included in the Project's Mitigation Monitoring and Reporting Program ("MMRP"). The EIR should require that "All diesel-powered construction equipment shall use Tier 4 Final construction equipment, to be confirmed on site by the on-site construction supervisor during each day of use." If a Tier 4 final engine is not available for select construction equipment, controls shall be installed on the highest tier equipment available to achieve Tier 4 Final standards. Tier 4 Final (2015) construction equipment has significantly lower NOx and ROG emissions than either Tier 3 or "transitional Tier 4" (2011) equipment. General Plan Policy MS-10.1 requires projects to "identify and implement feasible air emission reduction measures." The Project fails to

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<sup>26</sup> Clark Comments, p. 6.

<sup>27</sup> *Id.*

<sup>28</sup> Staff Report, Exhibit F -Final Response to Late Comments and Consequent Appeals and Errata, p. 55.

<sup>29</sup> Clark Comments, pp. 3-4.

<sup>30</sup> *Id.* at pg. 6.

<sup>31</sup> 14 CCR §15126.4(a)(2).

<sup>32</sup> CEQA Guidelines § 15074(d).

implement all feasible mitigation to reduce the Project's construction air emissions to less than significant levels. Project construction and operational emissions should be analyzed and mitigated in an EIR before the Project can lawfully be approved.

**VI. AN EIR IS REQUIRED FOR THE PROJECT BECAUSE THERE IS SUBSTANTIAL EVIDENCE SUPPORTING A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT TRANSPORTATION IMPACTS**

Substantial evidence supports a fair argument that the Project will have significant unmitigated transportation impacts. Mr. Marshall found that the VMT mitigation measures would not reduce Project VMT as much as the MND estimates.<sup>33</sup> Particularly, the MND relies on the assumption that the vanpool program achieve a 25 percent employee participation rate.<sup>34</sup> As Mr. Marshall demonstrates in his comments, this assumption is wildly optimistic and likely unattainable, particularly given the unidentified tenant and use of the project.<sup>35</sup> The MND provides no evidence supporting this assumption and how it plans to achieve a 25 percent participation rate with an unidentified tenant and use, and the Staff Report notably fails to address this issue.

Additionally, Mr. Marshall highlights deficiencies in the proposed monitoring of the efficacy of the VMT mitigation measures. While the MND outlines a monitoring approach based on trip counts, Mr. Marshall explains why this method is insufficient for accurately measuring VMT reduction.<sup>36</sup> Mr. Marshall demonstrates that in order for the mitigation to be adequate, a monitoring process that encompasses each of the VMT-reducing measures identified in the mitigation plan must be required.<sup>37</sup> This can be implemented through auditing each traffic demand management ("TDM") measure to ensure compliance and effectiveness in reducing VMT.<sup>38</sup>

Based on Mr. Marshall's analysis, the MND's conclusions with respect to the Project's transportation are not supported by substantial evidence. Mr. Marshall's

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<sup>33</sup> Marshall Comments August 2024, p. 5.

<sup>34</sup> MND, pg. 11.

<sup>35</sup> Marshall Comments August 2024, p. 5.

<sup>36</sup> *Id.* at pp. 5-6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

comments provide a fair argument supported by substantial evidence that the Project will have significant transportation impacts. These impacts must be analyzed, disclosed, and mitigated in an EIR before the City can approve the Project.

## **VII. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO APPROVE THE PROJECT'S SITE DEVELOPMENT PERMIT**

Under San Jose Municipal Code ("SJMC") section 20.100.630, the Site Development Permit requires that the City make certain findings, including that the permit as approved is consistent with and will further the policies of the General Plan.<sup>39</sup> The City must also find that "[t]he environmental impacts of the project, including, but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, *even if insignificant for purposes of the California Environmental Quality Act (CEQA)*, will not have an unacceptable negative effect on adjacent property or properties."<sup>40</sup>

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

These impacts also create inconsistencies with General Plan policies. Specifically, our analysis of the MND reflected in these comments show that the Project fails to comply with several key goals and policies in the Envision San José 2040 General Plan,<sup>41</sup> including the following.

### Air Quality

MS-10.1	Assess projected air emissions from new development in conformance with the Bay Area Air Quality Management District (BAAQMD) CEQA
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<sup>39</sup> SJMC § 20.100.630(A)(1).

<sup>40</sup> SJMC § 20.100.630 (A)(6) (emphasis added).

<sup>41</sup> Available at:

<https://www.sanjoseca.gov/home/showpublisheddocument/22359/637928744399330000>

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

The MND's approach to assessing air quality impacts contradicts several key General Plan policies, including MS-10.1, and MS-13.1, both of which emphasize the importance of implementing enforceable mitigation measures to protect air quality. MS-10.1 mandates the implementation of feasible air emission reduction measures in accordance with BAAQMD guidelines and state and federal standards. MS-13.1 requires the inclusion of dust, particulate matter, and construction equipment exhaust control measures as conditions of approval for various permits, including site development permits. The MND's failure to incorporate enforceable mitigation measures to address the Project's construction emissions directly contradicts this policy.

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

## VIII. CONCLUSION

CEQA requires that an EIR be prepared if there is substantial evidence that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment.<sup>42</sup> As discussed herein, there is substantial evidence supporting a fair argument that the Project would result in significant adverse impacts that were not identified in the MND, and that are not adequately analyzed or mitigated. The MND also fails to contain the basic information and analysis required by CEQA, deficiencies which "cannot be dismissed as harmless or

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<sup>42</sup> Pub. Res. Code § 21151; 14 CCR §15063(b)(1).



August 13, 2024  
Page 11

insignificant defects.”<sup>43</sup> Moreover, the serious flaws in the MND preclude the City from making the required findings to approve the Project’s site development permit.

We urge the City to grant this appeal and fulfill its responsibilities under CEQA by withdrawing the MND and preparing a legally adequate EIR to address the potentially significant impacts described in Silicon Valley Residents’ comments and those of our expert consultants. It is critical that the Council exercise their decision making authority to ensure that the City complies with CEQA, protects the rights and health of its constituents, and that all potentially significant Project impacts are analyzed, disclosed, and substantially mitigated prior to approval.

Sincerely,



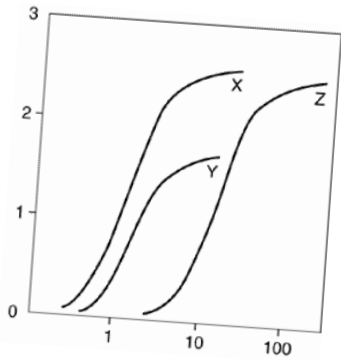
Kelilah D. Federman

Attachments  
KDF:acp

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<sup>43</sup> *Bakersfield Citizens for Local Control v. Bakersfield* (“*Bakersfield*”) (2004) 124 Cal. App. 4th 1184, 1220.

# **EXHIBIT A**



**Clark & Associates**  
Environmental Consulting, Inc.

**OFFICE**  
12405 Venice Blvd  
Suite 331  
Los Angeles, CA 90066

**PHONE**  
310-907-6165

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310-398-7626

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jclark.assoc@gmail.com

August 12, 2024

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

**Attn: Ms. Kelilah Federman**

**Subject: Response To Findings Of H-22-022 & ER22-113 – Public Hearing On The Environmental Appeal of The 865 Embedded Way Industrial Project IS/MND, City of San Jose, California**

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Dear Ms. Federman:

At the request of Adams Broadwell Joseph & Cardozo (ABJC), Clark and Associates (Clark) has reviewed materials related to the above referenced project.

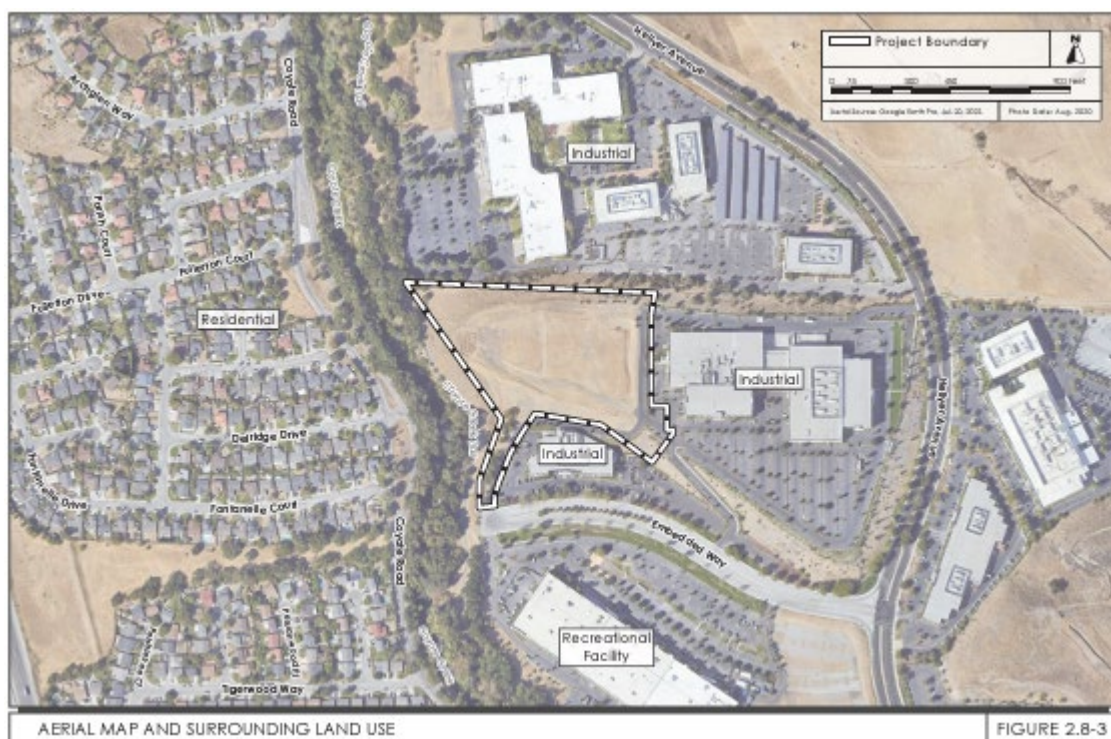
Clark's review of the materials in no way constitutes a validation of the conclusions or materials contained within the IS/MND. If we do not comment on a specific item, this does not constitute acceptance of the item.

**Project Description:**

The project consists of a Site Development Permit (File No. H22-022) to allow the construction of a one-story 121,400 square foot industrial/manufacturing warehouse on a vacant 10.17-acre project site. The project would include a connection to an existing 26-foot-wide drive aisle that extends from the eastern Embedded Way driveway through the adjacent eastern industrial property (875 Embedded Way) and currently terminates at the southeastern boundary of the project site. A total of 300 parking spaces would be provided in the surface parking

lot surrounding the proposed building. The project would include the removal of 11 trees on-site, 2 of which are ordinance-size.

According to the Air Quality Study of the IS/MND, the northern side of the proposed building would include 12 truck loading docks and the southeast corner of the building would include a 472-horsepower (HP) diesel emergency fire pump. While a designated end use has not been determined for the proposed building, the project is designed for a research and development (R&D) use. The land use and zoning designation allow for a variety of industrial uses, such as R&D, manufacturing, assembly, testing, and offices. For purposes of this study, the project was assumed to be an R&D facility.<sup>1</sup>



**Figure 1: Proposed Site Location**

Staff's responses to ABJC's appeal fails to rectify the issues raised in the appeal and ignores substantial evidence demonstrating a potentially significant air quality impact associated with Project construction.

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<sup>1</sup> Illingworth & Rodkin, Inc. 2022. 865 Embedded Way Industrial Project Air Quality Assessment, San Jose, California. Dated August 5, 2022. Pg 2.

## Specific Comments:

### 1. Response To Point B.11: The MND's Air Quality Impact Analysis Improperly Concludes that Construction Emissions Are Less Than Significant

For the CalEEMOD analysis presented in the Air Quality Analysis of the Project Construction Phase, the model includes the three initial phases of the project (demolition, site preparation, and grading) as occurring concurrently. Necessary equipment is not utilized in the analysis. For example, no air compressors are assumed to be used to apply architectural coatings. This non-standard assumption would severely underestimate emissions. Additionally, the model uses non-standard values for hours of operation for equipment onsite. For example, during the demolition and grading phases, excavators are used 2.5 hours and 3.9 hours per day, respectively. This results in an underestimation of project emissions. When calculated correctly, these emissions exceed applicable significance thresholds.

#### 3.0 Construction Detail

##### Construction Phase

Phase Number	Phase Name	Phase Type	Start Date	End Date	Num Days Week	Num Days	Phase Description
1	Demolition	Demolition	2/8/2023	2/22/2023	5	11	
2	Site Preparation	Site Preparation	2/8/2023	2/28/2023	5	15	
3	Grading	Grading	2/8/2023	3/30/2023	5	37	
4	Trenching	Trenching	3/30/2023	7/7/2023	5	72	
5	Building Construction	Building Construction	7/11/2023	10/6/2023	5	64	
6	Paving	Paving	10/2/2023	11/6/2023	5	26	
7	Architectural Coating	Architectural Coating	10/4/2023	10/20/2023	5	13	

Acres of Grading (Site Preparation Phase): 16.31

Acres of Grading (Grading Phase): 53.88

Acres of Paving: 0

Figure 2: Construction Schedule In CalEEMOD Analysis





## OffRoad Equipment

Phase Name	Offroad Equipment Type	Amount	Usage Hours	Horse Power	Load Factor
Architectural Coating	Air Compressors	0	0.00	78	0.48
Demolition	Concrete/Industrial Saws	0	0.00	81	0.73
Building Construction	Cranes	1	4.70	231	0.28
Demolition	Excavators	2	2.50	158	0.38
Grading	Excavators	3	3.90	158	0.38
Building Construction	Forklifts	2	6.00	89	0.38
Building Construction	Generator Sets	0	0.00	84	0.38
Grading	Graders	4	4.40	187	0.38
Paving	Pavers	1	1.20	130	0.38
Paving	Paving Equipment	1	3.10	132	0.38
Paving	Rollers	1	2.50	87	0.38
Demolition	Rubber Tired Dozers	1	1.80	247	0.40
Grading	Rubber Tired Dozers	3	1.90	247	0.40
Site Preparation	Rubber Tired Dozers	2	1.20	247	0.40
Grading	Scrapers	0	0.00	367	0.38
Building Construction	Tractors/Loaders/Backhoes	3	9.00	97	0.37
Grading	Tractors/Loaders/Backhoes	3	2.40	97	0.37
Site Preparation	Tractors/Loaders/Backhoes	2	1.20	97	0.37
Building Construction	Welders	4	2.80	46	0.48
Demolition	Tractors/Loaders/Backhoes	1	1.80	97	0.37
Site Preparation	Graders	5	3.00	187	0.41
Grading	Concrete/Industrial Saws	3	0.30	81	0.73
Trenching	Tractors/Loaders/Backhoes	2	0.50	97	0.37
Trenching	Excavators	2	0.80	158	0.38
Building Construction	Aerial Lifts	4	4.00	63	0.31
Paving	Tractors/Loaders/Backhoes	1	4.30	97	0.37
Architectural Coating	Aerial Lifts	2	4.00	63	0.31

Excavators used  
6.4 hrs/day

Rubber tired  
dozers used 4.7  
hrs/day

Tractors/Loaders/  
Backhoes used  
5.2 hrs/day

The Air Quality Study in the MND does not present accurate unmitigated construction emissions modeling. Using the accurate equipment input values (and not including the Tier 4 interim mitigation measures which are not required), assuming standard operational usage rates, and using the latest version of CalEEMOD (2022.1.1.22), an unmitigated analysis of the construction emissions demonstrates that the project results in significant air quality impacts. (Partial results reproduced below and full results attached as appendix to this letter).

	ROG	NO <sub>x</sub>	CO	SO <sub>2</sub>	PM <sub>10T</sub>	PM <sub>2.5T</sub>
	lbs/day	lbs/day	lbs/day	lbs/day	lbs/day	lbs/day
Daily, Summer (Max)						
Unmitigated	6.28	<b>64.40</b>	59.86	0.14	28.50	14.24
Daily, Winter (Max)						
Unmitigated	11.11	<b>114.72</b>	92.24	0.21	48.38	23.99

Average Daily (Max)						
Unmitigated	4.71	11.96	12.76	0.03	3.93	1.98
Threshold	54	54			82	54
Exceeds (Daily Max)	No	Yes			No	No
Threshold	54	54			82	54
Exceeds (Average Daily)	No	No			No	No

	ROG	NO <sub>x</sub>	CO	SO <sub>2</sub>	PM10T	PM2.5T
	tons/yr	tons/yr	tons/yr	tons/yr	tons/yr	tons/yr
Annual (Max)						
Unmitigated	0.86	2.18	2.33	0.00	0.72	0.36
Threshold	10	10			15	10
Exceeds (Annual Max)	No	No			No	No

As shown in the table above, emissions of oxides of nitrogen (NO<sub>x</sub>) will exceed the BAAQMD thresholds for construction for daily emissions during the winter phase of construction. This is based on the scheduling proposed in which there are overlapping tasks being performed in winter months (e.g., demolition, site preparation, and grading activities). Averaging of the daily emissions from the model output over the total days of construction would underestimate the impacts of emissions from the Project construction phase, specifically NO<sub>x</sub> emissions. In BAAQMD's CEQA Guidance it states that "The Air District recommends that for construction projects that are less than one year duration, Lead Agencies should annualize impacts over the scope of actual days that peak impacts are to occur, rather than the full year.<sup>2</sup> There are only 10 months of construction for this Project and therefore averaging over the year is not appropriate.<sup>3</sup> The Daily Maximum value is the correct threshold against which to measure project emissions.

Without a binding commitment to only use Tier 4 interim and above construction equipment for all phases of the Project, the emissions from the construction phase will exceed BAAQMD's threshold of 54 lbs/day for NO<sub>x</sub> and will create a significant air quality impact for the community. An environmental impact report (EIR) should be prepared for the Project which accurately calculates construction and operational emissions, and fully mitigates resultant impacts.

The EIR should require that "All diesel-powered construction equipment shall use Tier 4 Final construction equipment, to be confirmed on site by the on-site construction supervisor during each day of use." If a Tier 4 final engine is not available for select construction equipment, controls shall be installed on the highest tier equipment available to achieve Tier 4 Final standards. Tier 4 Final (2015) construction equipment has significantly lower NO<sub>x</sub> and ROG emissions than either Tier 3 or

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<sup>2</sup> [https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa\\_guidelines\\_may2017-pdf.pdf](https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf).

<sup>3</sup> MND, Section 3.2.8.



“transitional Tier 4” (2011) equipment.

## **Conclusion**

The facts identified and referenced in this comment letter lead me to reasonably conclude that the Project will result in significant impacts if allowed to proceed. An EIR should be prepared to address these substantial concerns.

Sincerely,

A large black rectangular redaction box covering the signature area.

James Clark

## **EXHIBIT B**



794 Sawnee Bean Road  
Thetford Center VT 05075  
Norman Marshall, President  
(802) 356-2969  
nmarshall@smartmobility.com

August 12, 2024

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

**Subject: 865 Embedded Way Industrial Project**

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Dear Ms. Federman,

In April 2024, I reviewed trip generation and vehicle miles traveled (VMT) impacts and proposed VMT mitigation of the Mitigated Negative Declaration for the 865 Embedded Way Industrial Project ("MND") prepared by the City of San Jose. I made the following findings:

- 1) There is a high degree of uncertainty about the project use and its impacts.
- 2) The MND proposes a VMT mitigation package that is only adequate if using the previous version of the City's VMT Evaluation Tool, and falls short of the threshold for Research and Development (R&D) use with the City's updated VMT tool.
- 3) Most of the calculated VMT reduction is based on the assumption that 25 percent of employees would commute in company-paid vanpools. With an unidentified tenant and use, this assumption is wildly optimistic and likely impossible to achieve. Mitigation should be replanned with a more plausible set of measures.
- 4) The MND's proposed monitoring for mitigation measures is insufficient and should be revised. For example, the percentage of commuters using the vanpools should be certified. Counting trips and comparing them to a baseline, as proposed in the MND, would provide no information about VMT reduction, particularly if an unrealistically high trip generation rate is used as the baseline.

The City of San Jose staff have prepared a Memorandum dated July 22, 2024 including Exhibit F responding to comments concerning this project.

In response to my comment #4 concerning the use of a trip bank in monitoring, the program described in the MND has been revised: Exhibit F (p. 48) states:

The text of MM TRAN-1.2 has been revised (refer to Section 3.0 Revisions to the Text of the Initial Study, below) to clarify that the TDM plan and trip cap metric prepared for the project must be based on the ultimate end use, whether R&D or warehouse, prior to issuance of any certificate of occupancy. This text edit acknowledges that the different uses may occupy the space but that the TDM Plan required of MM TRAN-1.2 will be based on the use of the space receiving an occupancy permit.

This is an improvement over the previous language. However, the proposed monitoring cannot demonstrate compliance with SB 743. The revised language is:

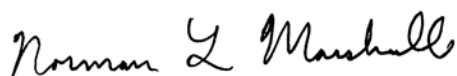
The TDM plan shall be submitted to the Director of Public Works Director's designee and the Director of Planning, Building and Code Enforcement or the Director's designee for review and approval and shall include a trip cap for VMT monitoring purposes. The trip cap shall be prepared by a traffic engineer and be based on the specific intended use for the project. The monitoring shall be based on annual trip generation counts that demonstrate the vehicle trips generated by the project are within 10 percent of an established peak hour trip cap that is prepared by a traffic engineer. The annual trip monitoring reports shall be submitted that demonstrate that project-generated VMT is below the significance threshold. If the annual trip monitoring report finds that the project is exceeding the established trip cap, the project shall be required to submit a follow-up report that demonstrates compliance with the trip cap requirements within a period not to exceed six months. (Memorandum Exhibit F, p. 70)

Both the MND and the Memorandum falsely imply that holding project trips to "within 10 percent" of the trip bank, i.e. no more than 110 percent of the baseline trips somehow shows that VMT is reduced by the required 19.6 percent (R&D use, MND and reproduced in Exhibit E, p. 363). This is not supported.

True VMT monitoring requires monitoring each of the components of the VMT program. With the mitigation listed in the MND, over 90 percent of the VMT reduction in the MND is achieved with the vanpool measure. The MND assumes that 25 percent of employees will commute by company-paid vanpool. The actual percentage of employees should be compared to the TDM plan. Each of the other TDM measures should be audited similarly.

With an unidentified tenant and building use, this vanpool participation assumption is wildly optimistic and likely impossible to achieve. Mitigation should be replanned with a more plausible set of measures.

Sincerely,

A handwritten signature in black ink that reads "Norman L. Marshall". The signature is written in a cursive, flowing style.

Norman L. Marshall

## Resume

### **NORMAN L. MARSHALL, PRESIDENT**

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[nmarshall@smartmobility.com](mailto:nmarshall@smartmobility.com)

#### **EDUCATION:**

Master of Science in Engineering Sciences, Dartmouth College, Hanover, NH, 1982

Bachelor of Science in Mathematics, Worcester Polytechnic Institute, Worcester, MA, 1977

#### **PROFESSIONAL EXPERIENCE: (33 Years, 19 at Smart Mobility, Inc.)**

Norm Marshall helped found Smart Mobility, Inc. in 2001. Prior to this, he was at RSG for 14 years where he developed a national practice in travel demand modeling. He specializes in analyzing the relationships between the built environment and travel behavior and doing planning that coordinates multi-modal transportation with land use and community needs.

#### **Regional Land Use/Transportation Scenario Planning**

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Portland Area Comprehensive Transportation System (PACTS) – the Portland Maine Metropolitan Planning Organization. Updating regional travel demand model with new data (including AirSage), adding a truck model, and multiclass assignment including differentiation between cash toll and transponder payments.

Loudoun County Virginia Dynamic Traffic Assignment – Enhanced subarea travel demand model to include Dynamic Traffic Assignment (Cube). Model being used to better understand impacts of roadway expansion on induced travel.

Vermont Agency of Transportation-Enhanced statewide travel demand model to evaluate travel impacts of closures and delays resulting from severe storm events. Model uses innovative Monte Carlo simulations process to account for combinations of failures.

California Air Resources Board – Led team including the University of California in \$250k project that reviewed the ability of the new generation of regional activity-based models and land use models to accurately account for greenhouse gas emissions from alternative scenarios including more compact walkable land use and roadway pricing. This work included hands-on testing of the most complex travel demand models in use in the U.S. today.

Climate Plan (California statewide) – Assisted large coalition of groups in reviewing and participating in the target setting process required by Senate Bill 375 and administered by the California Air Resources Board to reduce future greenhouse gas emissions through land use measures and other regional initiatives.

Chittenden County (2060 Land use and Transportation Vision Burlington Vermont region) – led extensive public visioning project as part of MPO's long-range transportation plan update.

Flagstaff Metropolitan Planning Organization – Implemented walk, transit and bike models within regional travel demand model. The bike model includes skimming bike networks including on-road and off-road bicycle facilities with a bike level of service established for each segment.

Chicago Metropolis Plan and Chicago Metropolis Freight Plan (6-county region)— developed alternative transportation scenarios, made enhancements in the regional travel demand model, and used the enhanced

model to evaluate alternative scenarios including development of alternative regional transit concepts. Developed multi-class assignment model and used it to analyze freight alternatives including congestion pricing and other peak shifting strategies.

### **Municipal Planning**

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City of Grand Rapids – Michigan Street Corridor – developed peak period subarea model including non-motorized trips based on urban form. Model is being used to develop traffic volumes for several alternatives that are being additionally analyzed using the City's Synchro model

City of Omaha - Modified regional travel demand model to properly account for non-motorized trips, transit trips and shorter auto trips that would result from more compact mixed-use development. Scenarios with different roadway, transit, and land use alternatives were modeled.

City of Dublin (Columbus region) – Modified regional travel demand model to properly account for non-motorized trips and shorter auto trips that would result from more compact mixed-use development. The model was applied in analyses for a new downtown to be constructed in the Bridge Street corridor on both sides of an historic village center.

City of Portland, Maine – Implemented model improvements that better account for non-motorized trips and interactions between land use and transportation and applied the enhanced model to two subarea studies.

City of Honolulu – Kaka'ako Transit Oriented Development (TOD) – applied regional travel demand model in estimating impacts of proposed TOD including estimating internal trip capture.

City of Burlington (Vermont) Transportation Plan – Led team that developing Transportation Plan focused on supporting increased population and employment without increases in traffic by focusing investments and policies on transit, walking, biking and Transportation Demand Management.

### **Transit Planning**

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Regional Transportation Authority (Chicago) and Chicago Metropolis 2020 – evaluated alternative 2020 and 2030 system-wide transit scenarios including deterioration and enhance/expand under alternative land use and energy pricing assumptions in support of initiatives for increased public funding.

Capital Metropolitan Transportation Authority (Austin, TX) Transit Vision – analyzed the regional effects of implementing the transit vision in concert with an aggressive transit-oriented development plan developed by Calthorpe Associates. Transit vision includes commuter rail and BRT.

Bus Rapid Transit for Northern Virginia HOT Lanes (Breakthrough Technologies, Inc and Environmental Defense.) – analyzed alternative Bus Rapid Transit (BRT) strategies for proposed privately-developing High Occupancy Toll lanes on I-95 and I-495 (Capital Beltway) including different service alternatives (point-to-point services, trunk lines intersecting connecting routes at in-line stations, and hybrid).

### **Roadway Corridor Planning**

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I-30 Little Rock Arkansas – Developed enhanced version of regional travel demand model that integrates TransCAD with open source Dynamic Traffic Assignment (DTA) software, and used to model I-30 alternatives. Freeway bottlenecks are modeled much more accurately than in the base TransCAD model.

South Evacuation Lifeline (SELL) – In work for the South Carolina Coastal Conservation League, used Dynamic Travel Assignment (DTA) to estimate evaluation times with different transportation alternatives in coastal South Caroline including a new proposed freeway.

Hudson River Crossing Study (Capital District Transportation Committee and NYSDOT) – Analyzing long term capacity needs for Hudson River bridges which a special focus on the I-90 Patroon Island Bridge where a microsimulation VISSIM model was developed and applied.

## **PUBLICATIONS AND PRESENTATIONS (partial list)**

DTA Love: Co-leader of workshop on Dynamic Traffic Assignment at the June 2019 Transportation Research Board Planning Applications Conference.

Forecasting the Impossible: The Status Quo of Estimating Traffic Flows with Static Traffic Assignment and the Future of Dynamic Traffic Assignment. *Research in Transportation Business and Management* 2018.

Assessing Freeway Expansion Projects with Regional Dynamic Traffic Assignment. Presented at the August 2018 Transportation Research Board Tools of the Trade Conference on Transportation Planning for Small and Medium Sized Communities.

Vermont Statewide Resilience Modeling. With Joseph Segale, James Sullivan and Roy Schiff. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

Assessing Freeway Expansion Projects with Regional Dynamic Traffic Assignment. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

Pre-Destination Choice Walk Mode Choice Modeling. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

A Statistical Model of Regional Traffic Congestion in the United States, presented at the 2016 Annual Meeting of the Transportation Research Board.

## **MEMBERSHIPS/AFFILIATIONS**

Associate Member, Transportation Research Board (TRB)

Member and Co-Leader Project for Transportation Modeling Reform, Congress for the New Urbanism (CNU)