ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062
nlotan@adamsbroadwell.com

SACRAMENTO OFFICE
520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

DANIEL L. CARDOZO
CHRISTINA M. CARO
YAIR CHAVER
SARA F. DUDLEY
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
KYLE C. JONES
RACHAEL E. KOSS
NIRIT LOTAN

MARC D. JOSEPH
Of Counsel

April 15, 2019

Via Email and Overnight Mail

Daniel Fama, Senior Planner
City of Campbell
70 N. 1st Street
Campbell, CA, 95008
danielf@cityofcampbell.com

Re: **In-N-Out Burger Project, SCH# 2018072028 at 499 E. Hamilton Avenue, Campbell**

Dear Mr. Fama:

We are writing on behalf of Campbell Concerned Citizens regarding the February 2019 Draft Environmental Impact Report SCH# 2018072028 ("DEIR") prepared for In-N-Out Burgers' ("Applicant") proposed Campbell In-N-Out Burger Project ("Project"). The Project is located at 499 E. Hamilton Avenue in the City of Campbell ("City") (referred to as the "Site"). The Project involves demolishing the existing restaurant building on the Project Site and redeveloping the Site with a 3,812-square-foot drive-thru fast-food restaurant, including a 28-car double stacking drive-thru lane. The proposed fast-food restaurant would operate seven days a week, from 10:00 a.m. to 1:00 a.m. Sunday through Thursday and from 10:00 a.m. to 1:30 a.m. Friday and Saturday.

As explained in these comments, the DEIR does not comply with the requirements of the California Environmental Quality Act ("CEQA") in several respects:

First, the DEIR fails to properly analyze and mitigate impacts from greenhouse gas emissions. This is because the DEIR's analysis uses an inapplicable threshold of significance in violation of CEQA and because the DEIR analysis relies on a number of erroneous and unsupported assumptions which underestimate the Project's actual impacts. As shown below, substantial evidence supports the

conclusion the Project will result in significant impacts from greenhouse gas emissions that must be disclosed and mitigated.

Second, the DEIR fails to properly analyze and mitigate potentially significant transportation and traffic impacts. The DEIR's analysis is not supported by substantial evidence, and in some cases is contradicted by the evidence. As a result, the Project's potentially significant impacts are underestimated and in some instances are completely ignored. In addition, the mitigation measures proposed for the significant impacts the DEIR does acknowledge fail to comply with CEQA. This is either because they are speculative and unenforceable, or because they fail to actually mitigate the impacts below the level of significance.

Finally, the DEIR fails to properly analyze and mitigate significant impacts from noise. This is because the mitigation measures proposed in the DEIR are unenforceable and lack performance standards, and because the DEIR fails to support its conclusion regarding the mitigation effectiveness with substantial evidence.

For each of these reasons, the City may not approve the Project until a revised environmental review document is prepared and re-circulated for public review and comment.

These comments were prepared with the assistance of air quality and GHG expert Petra Pless, D.Env.[1]; traffic and civil engineer Gay Lawrence Pang of Pang Engineering[2] and noise expert Derek L. Watry of Wilson Ihrig.[3] Dr. Pless, Mr. Pang and Mr. Watry's comments and curriculum vitae are attached hereto as Exhibits A, B and C respectively, and are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments of the experts, in addition to our comments.

---

[1] **Exhibit A**: A letter from Petra Pless to Nirit Lotan Re: Review of Draft Environmental Impact Report for In-N-Out Burger Project, City of Campbell, SCH#: 2018072028, February 13, 2019, April 10, 2019 ("**Dr. Pless comments**")

[2] **Exhibit B**: A letter from Gay Lawrence Pang to Tanya Gulesserian Re: In-N-Out Burger, 499 East Hamilton Avenue, Campbell, CA, April 5, 2019 ("**Pang Engineering comments**")

[3] **Exhibit C**: A letter from Derek L. Watry to Nirit Lotan Re: City of Campbell – In-N-Out Burger Project Draft EIR (SCH#: 2018072028) Review and Comment on Construction Noise Analysis, April 9, 2019 ("**Wilson Ihrig Comments**")

I. STATEMENT OF INTEREST

Campbell Concerned Citizens is an unincorporated association of City of Campbell property and business owners and individuals that may be adversely affected by the potential public health and safety hazards and environmental and public service impacts of the Project. The association includes Gulesserian Enterprises Hamilton Center LLC who owns property and operates business on East Hamilton Avenue adjacent to the Project Site in the City of Campbell and other individuals who work, live and recreate in the City of Campbell. The coalition members may be adversely affected by the potential public health and environmental impacts of the Project, including, but not limited to, transportation, air emissions and noise.

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances).[4] The EIR is the very heart of CEQA.[5] "The foremost principle in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[6]

CEQA has two primary purposes, none of which is fulfilled by the DEIR. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.[7] "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR "protects not only the environment but also informed self-government."[8] The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."[9]

---

[4] See, e.g., PRC § 21100.
[5] *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.
[6] *Comtys. for a Better Env' v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("*CBE v. CRA*").
[7] 14 CCR § 15002(a)(1).
[8] *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.
[9] *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures.[10] The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced."[11] If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns."[12]

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. *A clearly inadequate or unsupported study is entitled to no judicial deference.*"[13] As the courts have explained, "a prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."[14]

III. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE AND MITIGATE SIGNIFICANT IMPACTS FROM GREENHOUSE GAS EMISSIONS

The DEIR's greenhouse gas ("GHG") analysis states that the proposed Project would result in a significant impact if it would (1) generate greenhouse gas emissions, either directly or indirectly, that may have a significant effect on the environment (GHG-1) or (2) conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases (GHG-2).[15]

---

[10] 14 CCR§ 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.
[11] 14 CCR §15002(a)(2).
[12] PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).
[13] *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), *quoting, Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.
[14] *Berkeley Jets*, 91 Cal.App.4th at 1355; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.
[15] DEIR, p. 4.6-19.

We reviewed the GHG analysis with the assistance of Dr. Petra Pless, an expert on air quality and GHG. As described below, our review found that the DEIR's GHG analysis under GHG-1 violates the law and is not supported by substantial evidence. In addition, substantial evidence supports the conclusion that the project will result in significant impacts from GHG emissions, that must be mitigated.

The DEIR's conclusions are not supported for two main reasons. First, the DEIR fails to use a threshold which is applicable to the Project's built-out year, in violation of CEQA. Second, even for the threshold the DEIR did use, its GHG analyses rely on several incorrect assumptions that result in a substantial underestimatation of Project-related GHGs, as described below.

A. The GHG Analysis Relies on Inapplicable Threshold in Violation of CEQA

Under the CEQA Guidelines, which have been recently updated, a lead agency must analyze a project's impacts on GHG emissions.[16] The Guidelines allow for several approaches to this analysis, both qualitative and quantitative. The Guidelines explicitly mandate, however, that the "analysis should consider a timeframe that is appropriate for the project. The agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes.[17]"

The DEIR analysis relies on the tiered approach developed by the Bay Area Air Quality Management District ("BAAQMD") for assessing the impacts of land use development projects. Under this approach, projects are first analyzed using a "bright-line" screening threshold of 1,100 metric tons of carbon dioxide-equivalents per year ("MTCO2e/year"). If the project's annual emissions go beyond this threshold, it should be analyzed under an efficiency threshold.[18] The DEIR analyzed the Project's annual emissions and found they were below the "bright-line" threshold, ending the analysis there.

---

[16] 14 CCR §15064.4.
[17] 14 CCR §15064.4(b)
[18] Dr. Pless comments, p. 4. The Guidelines also allow for a CAP consistency analysis, but it is not applicable here.

BAAQMD's bright-line threshold, however, is not applicable to the Project, and relying on it violates CEQA. BAAQMD's thresholds, included in the district's 2017 CEQA Guidelines, were developed to comply with the state reduction target as it is embodied in AB 32,[19] which mandates that statewide greenhouse gas emissions be reduced to 1990 levels by the target year 2020.[20] In 2016, the state passed SB32,[21] which codified a new statewide 2030 GHG emissions reduction target of 40% below 1990 levels. Following the new legislation, the California Air Resources Board ("CARB") adopted in December 2017 a new scoping plan to outline the strategy needed to achieve SB 32 GHG targets. These are the binding "state regulatory scheme" that the CEQA Guidelines require agencies to account for.

The BAAQMD Guidelines do not account for or include any numeric threshold for compliance with SB 32 or the scoping plan and are therefore not applicable to projects that will be built and operated beyond the AB 32 target year.[22] Because the Project's first fully operational year would be 2021, and it would continue to operate many years beyond that, the City must analyze the Project for its compatibility with the state's mandated goals for, at the very least, the year 2030.[23]

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

> The Air District encourages the City to make a significance determination for greenhouse gas impacts based on the most recent State greenhouse gas targets and CEQA guidance. The Air District's 2010 CEQA guidelines are based on the State's 2020 greenhouse gas targets. These targets have been superseded by the State's 2030 and 2050 climate stabilization goals and by

---

[19] See, California Environmental Quality Act Air Quality Guidelines, Bay Area Air Quality Management District, May 2017, at p. D-27.
[20] California Air Resources Board, Assembly Bill 32 Overview; available at: https://www.arb.ca.gov/cc/ab32/ab32.htm, accessed April 3, 2019.
[21] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32
[22] See also *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497.
[23] Dr. Pless comments, p. 16.

the most recent draft of the AB 32 Scoping Plan written by the California Air Resources Board.[24]

The GHG impact analysis should include an evaluation of the Plan's consistency with the California Air Resources Board 2017 Scoping Plan and State and Air District climate stabilization goals for 2030 and 2050. Please be advised that the Air District is in the process of updating the CEQA guidelines/thresholds and current thresholds for GHGs should not be used for this plan.[25]

BAAQMD is in the process of updating its current CEQA Guidelines and thresholds of significance.[26] Dr. Pless states that" [i]t is reasonable to assume that these significance thresholds would be considerably more stringent than the current ones to achieve the more ambitious goals of greenhouse gas reductions," which were established by Executive Order S-3-05 and SB32.[27] This is yet another reason why the DEIR cannot rely on BAAQMD's bright-line threshold.

The Draft EIR must be revised to analyze the Project's compatibility with the reduction targets set in SB 32, which go beyond those set in AB 32. As it is now, the DEIR's analysis violates both CEQA and the Supreme Court rulings on GHG analysis.

B. The DEIR's GHG Analysis is not Supported by Substantial Evidence

Even if the DEIR could rely on the bright-line threshold described above (which it cannot), the DEIR fails to support its conclusion regarding compliance with that threshold with evidence, and in fact, the evidence supports the opposite

---

[24] Greg Nudd, BAAQMD, Letter to Joshua McMurray, Oakley, CA, Oakley Logistics Center Project, March 21, 2019; available at: http://www.baaqmd.gov/~/media/files/planning-and-research/ceqa-letters/2019/2019_03_21_city_of_oakley_oakley_logistics_center_nop-pdf.pdf?la=en, accessed April 12, 2019.

[25] Greg Nudd, BAAQMD, Letter to Alicia Parker, City of Oakland, RE: Downtown Oakland Specific Plan - Notice of Preparation of a Draft Environmental Impact Report, February 15, 2019; available at: http://www.baaqmd.gov/~/media/files/planning-and-research/ceqa-letters/2019/downtown_oakland_specific_plan_eir_notice_of_preparation_021519-pdf.pdf?la=en

[26] BAAQMD, CEQA Guidelines Update Underway; available at: http://www.baaqmd.gov/plans-and-climate/california-environmental-quality-act-ceqa/updated-ceqa-guidelines, accessed April 9, 2019.

[27] Dr. Pless comments, p. 6.

conclusion. The DEIR finds that the Project's GHG emissions at buildout in 2021 would be 938 MTCO2e/year, below the 1,100 MTCO2e/year threshold. As Dr. Pless shows, the DEIR's conclusion relies on several material incorrect assumptions that result in a substantial underestimatation of Project-related greenhouse gas emissions.

1. The DEIR's Analysis Underestimates Annual Operational Greenhouse Gas Emissions Based on Incorrect Assumptions for Auto Trip Generation

One of the major sources for the Project's GHG operational emissions is car trips going to and from the Project and using its drive-thru. To analyze the impact of car trips, Dr. Pless explains, the DEIR uses the California Emission Estimator Model ("CalEEMod"). The CalEEMod calculates emissions from cars using the trip generation rates for various land use types from the Institute of Transportation Engineers ("ITE") manual as default assumptions.

Dr. Pless' review of the CalEEMod outputs found the DEIR substituted the model's default values with Project-specific average daily trip generation rates. As shown in the excerpt table below, the DEIR substituted the default values with *considerably lower trip generation rates*, assuming the same trip rate of 428.07 trips per 1,000 square feet per day (trips/ksf-day) for all days of the week. The Draft EIR provides no support for these assumptions:

Table Name	Column Name		Default Value			New Value	
tblVehicleTrips	ST_TR		722.03			428.07	
tblVehicleTrips	SU_TR		542.72			428.07	
tblVehicleTrips	WD_TR		496.12			428.07	

As Dr. Pless states, these Project-specific rates are inconsistent with the DEIR's traffic impact analysis ("TIA"), which recognized that, due to In-N-Out Burger's unusually high popularity, the ITE default numbers are not appropriate. Instead, the TIA relied on surveys of traffic at other In-N-Out locations. The TIA determined an average daily trip generation rate of *937.61 trips/ksf* for weekdays, almost twice that of the default ITE trip generation rate for this land use of

496.12 trips/ksf for weekdays and *more than twice as high than that used as input* to the CalEEMod runs for the Project of 428.07 trips/ksf-day.[28]

Dr. Pless explains that these unjustifiable and unsupported values can be traced back to two incorrect assumptions regarding the Project's trip generation:

a. The DEIR Underestimates Daily Vehicle Trip Generation Due to Improper Accounting for Pass-by Reductions

First, the CalEEMod may apply a reduction to the Project's generated trips by accounting for "pass-by" trips. Pass-by trips are trips which are not entirely new, but a result of only a short diversion from the primary route, e.g., when motorists stop at In N-Out Burger on their way to somewhere else. These trips are accounted for by a "pass-by reduction" or credit. However, Dr. Pless found that the DEIR used for its analysis the *net* trip generation numbers, which are numbers that *already account for* the pass-by trip reduction of 25%. To this number, the CalEEmod applies *another* pass-by trip reduction.[29] The result, explains Dr. Pless, is that the DEIR improperly accounts for the effect of pass-by trip reduction *twice*.[30]

In addition to this significant flaw, Dr. Pless found that the reduction rate that CalEEMod applies to the pass-by trips is *significantly higher* than the default credit that should be given in the model. This is not justified or explained in any way. The following table shows the changes applied to the default values:

1.3 User Entered Comments & Non-Default Data

Table Name	Column Name		Default Value			New Value	
tblVehicleTrips	DV_TP		21.00			6.25	
tblVehicleTrips	PB_TP		50.00			75.00	
tblVehicleTrips	PR_TP		29.00			18.75	

As the table shows, the DEIR substituted the CalEEMod default values with 18.75% for primary trip purpose, 75% for pass-by trip purpose (instead of 50%), and

[28] Dr. Pless comments, p. 7-9.
[29] Dr. Pless comments, p. 9-10.
[30] Dr. Pless comments, p. 12.

6.25% for diverted trip purpose. The Draft EIR fails to provide any explanation for these assumptions.[31]

The result of these two compounded significant flaws, explains Dr. Pless, is that the DEIR assumes an incorrect pass-by rate of 75%, i.e., *three times higher* than that determined by the TIA for the Project of 25%. Thus, Dr. Pless states, "by improperly overestimating the effects of pass-by trips, the Draft EIR substantially underestimates vehicle miles traveled and, consequently, associated greenhouse gas emissions."[32]

b. The Draft EIR Underestimates Daily Vehicle Trip Generation on Weekend Days

In addition to the incorrect assumptions and the underestimation of car trips described above, Dr. Pless shows that the DEIR analysis suffers from another flaw, resulting in further underestimation of the Project's GHG impacts.

It is well established that restaurants, including fast-food restaurants, attract considerably more visitors on weekend days than on weekdays. This fact is reflected in the ITE manual which assumes significantly more daily trips during the weekends than during the weekdays. Moreover, Dr. Pless points out that surveys at other In-N-Out locations show that these types of restaurants serve more customers on Saturdays than on weekdays.[33]

Despite this evidence, the DEIR assumes the *same* trip generation for all days of the week. This unjustifiably serves to underestimate annual number vehicle trips and, thus, annual vehicle miles traveled and greenhouse gas emissions resulting from them.[34]

[31] Dr. Pless comments, p. 11-12.
[32] Dr. Pless comments, p. 12.
[33] Dr. Pless comments, p. 13.
[34] Dr. Pless comments, p. 14.

2. The DEIR Underestimates Annual Operational Greenhouse Gas Emissions Because if Fails to Account for Vehicle Idling Emissions in Drive-Through Queue

The Project would include a 28-car double stacking drive-thru lane. Therefore, explains Dr. Pless, idling emissions from these sources must be calculated separately and accounted for. However, the DEIR fails to provide any estimate of idling emissions, and because the CalEEMod does not account for the extended vehicle idling that would occur while waiting and advancing in the queue at the drive-through lane, the result is that the Project's idling emissions are unaccounted for and the Project's emissions are underestimated.[35]

3. The DEIR's CalEEMod Runs Overestimate the Sequestration Potential of Existing and Newly Planted Trees

CalEEMod provides a module to estimate the one-time change in carbon sequestration capacity due to a project. The impact is accounted for by entering the number of net new trees added to the project site, *i.e.*, the difference between the number of existing trees that would be removed and the number of new trees that would be planted for a project.[36]

Dr. Pless reviewed the module and found it improperly takes credit for significantly more trees that the Project actually contributes: The existing site landscaping includes 30 trees. The Project would involve removal of 27 of these existing trees and planting of 32 new trees, so the net increase is 5 new trees. However, Dr. Pless found that the CalEEMod runs assumed a total of 32 net new trees. This means that the DEIR overestimates the greenhouse gas emission reductions attributable to carbon sequestration from trees by a factor of 6.4.[37]

Moreover, the model does not take into account that newly planted immature trees do not have the same sequestration potential as existing mature trees. Dr. Pless explains that because the CalEEMod run estimates greenhouse gas emissions at Project buildout in 2021, i.e., right after planting the new trees, the model

[35] Dr. Pless comments, p. 15.
[36] Dr. Pless comments, p. 15.
[37] Dr. Pless comments, p. 16.

overestimates the sequestration potential for new trees, and consequently, underestimates Project greenhouse gas emissions for the year 2021.[38]

C. Substantial Evidence Shows that the Project's GHG Emissions Would be Significant and Must Be mitigated

In an effort to properly account for the Project's GHG emissions, Dr. Pless prepared a revised CalEEMod run. Dr. Pless explains that she first prepared a CalEEMod run with the same assumptions relied upon by the Draft EIR to verify all input parameters and then prepared a revised CalEEMod run with conservative assumptions that address some of the above identified issues and otherwise relies on the same input parameters as the Draft EIR.[39] Dr. Pless' assumptions are detailed in her report. The following table shows the result of Dr. Pless's analysis:

Table 2: Mitigated greenhouse gas emissions associated with Project construction and operation according to Draft EIR and revised CalEEMod runs

Emission Category	CalEEMod Draft EIR[a] ($MTCO_2e$/year)	CalEEMod Revised[b] ($MTCO_2e$/year)
Construction (amortized)	4.9[c]	4.9[c]
Area	<0.1	<0.1
Energy	133.2	68.6
Mobile	757.8	1,995.1
Waste	36.1	36.1
Water	4.8	4.6
Total	**937.7**	**2,109.3**
Sequestration	-[d]	-3.5
Total accounting for sequestration	**937.9**	**2,105.7**
BAAQMD significance threshold	**1,100**	**1,100**
Significant?	**no**	**YES**

[38] Dr. Pless comments, p. 16.
[39] Dr. Pless comments, p. 16.

As is seen from the table, when the proper assumptions are employed as required under CEQA, the total mitigated Project GHG would be 2,105.7 MTCO2e/year, by far in excess of the bright-line significance threshold for land use development projects of 1,100 MTCO2e/year established by the BAAQMD and used by the DEIR. In fact, GHG emissions from mobile sources *alone* of 1,995.1 MTCO2e/year significantly exceed the threshold. It should be mentioned again here that the bright-line threshold is, in fact, not applicable to the Project. However, any new threshold which would be applicable to the Project will necessarily be lower than this threshold; thus the Project's emissions will necessarily go beyond the applicable threshold.

To sum, the Draft EIR fails to properly analyze the Project's GHG emissions and relies on substantially erroneous assumptions for its analysis. The City must revise its GHG analysis to properly reflect the correct significance thresholds and applicable target years, and to properly account for and mitigate the Project's actual GHG impacts.

D. The GHG Analysis of Alternatives Must be Revised.

The DEIR's alternatives discussion includes a Project alternative called the "No Drive-Thru" alternative, which the DEIR finds to be the environmentally superior alternative. Under this alternative, a similar size building would be developed but it would not include a drive-thru. The site plan could be reconfigured to add parking spaces and all customers would park their cars and enter the restaurant, in a manner akin to a "fast-casual" restaurant.[40]

The DEIR acknowledges that GHG operational emissions would be less than the proposed Project because the site would not have a drive-thru lane, fewer cars would be idling on-site, and customer turnover would be reduced. It concludes that the "No Drive-Thru Alternative would result in *slightly lessened* impacts to GHG emissions." [41]

The DEIR's alternative analysis must also be revised following the required revisions in the DEIR's GHG analysis, as explained above. Obviously, once the DEIR properly accounts for car-trip and car-idling generated emissions and

[40] DEIR, p. 5-11.
[41] DEIR, p. 5-14.

acknowledges the Project's significant operational impact from GHG emissions, the level of reduction of such emissions achieved under the No Drive Thru alternative may be more significant than what is currently acknowledged.

IV. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE SIGNIFICANT TRANSPORTATION AND TRAFFIC IMPACTS

CEQA requires the City to analyze the Project's direct, indirect and cumulative impacts from traffic generated by the Project. We reviewed the DEIR and the Traffic Impact Analysis (TIA) with the assistance of Gay Lawrence Pang, a Civil and Traffic Engineer of Pang Engineering. Pang Engineering's review found that the City's analysis of transportation impacts is inadequate for several reasons. First, the DEIR fails to properly establish the existing setting for the analysis. Second, the DEIR's analysis is not supported by substantial evidence, and in some cases is contradicted by the evidence. This results in the DEIR's underestimation of the Project's significant impacts, and in some cases, complete disregard of potentially significant impacts. Finally, the mitigation measures proposed in the DEIR fail to comply with CEQA, either because they are speculative and unenforceable, or because they fail to mitigate the impacts below the level of significance.

A. <u>The DEIR Fails to Adequately Establish the Existing Setting For Transportation Impacts</u>

Describing the environmental setting, or baseline, accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. Courts are clear that, "[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."[42] CEQA Guidelines require agencies to describe physical environmental conditions as they exist at the time the notice of preparation is published, in order to "give the public and decision makers the most accurate and

[42] *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

understandable picture practically possible of the project's likely near-term and long-term impacts."[43]

Despite this clear mandate, Pang Engineering's review found the DEIR's environmental setting is lacking as it fails to provide the dates on which traffic counts were performed for the Congestion Management Program ("CMP") intersections that were analyzed in the DEIR, or the effective date of the LOS calculations for those sections. This prevents the public from evaluating the accuracy of the baseline and in turn, of the Project's impacts.[44] The DEIR must be revised to include this information to properly establish its baseline for review.

B. The DEIR Underestimates the Project's Potentially Significant Transportation Impacts and Fails to Account For All Potentially Significant Impacts

Our review of the DEIR found that its analysis and conclusions are not supported by substantial evidence. As a result, the DEIR must be revised to include crucial and missing evidence, correct unsupported assumptions and address the Project's potentially significant impacts that would occur and be evident as a result of using accurate and complete information.

1. The DEIR's Conclusions Regarding Potentially Significant Hazards and Safety Impacts Are Not supported By Substantial Evidence and Substantial Evidence Shows The Project Will Result In Significant Hazards And Safety Impacts

One of the thresholds of significance for the Project is whether the Project would "substantially increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)."[45] Under this threshold, the DEIR acknowledges only two impacts: one for vehicle queues for the eastbound left-turn lane on Hamilton Avenue that would exceed available storage (TRANS-4a) and the other for vehicle queues for the southbound left-turn lane on Almarida Drive that would block the driveway access to the Project (TRANS-4b).[46]

---

[43] 14 CCR § 15125.
[44] Pang Engineering comments, p. 5.
[45] DEIR, p. 4.13-11.
[46] DEIR, p. 4.13-21.

However, Pang Engineering's review of the DEIR and the TIA found that these DEIR conclusions are not supported by the evidence and some are contradicted by the evidence. Moreover, Pang Engineering found that the DEIR failed to account for additional potentially significant impacts on hazards and safety, as described below.

a. The DEIR Conclusions Are Contradicted by The Evidence Regarding Trip Distribution

The DEIR's conclusion is supported in part by the TIA's trip distribution and assignments. That is, in reaching a conclusion regarding the Project's impacts on traffic, the TIA considers not only trip numbers but also how these trips are distributed along the different roadways. However, not only are these assumptions not supported by the evidence, they are contradicted by it.

According to the DEIR, "[t]he Santa Clara County Travel Demand Model outputs were used to estimate trip distribution patterns within the study area by comparing relative traffic on major roadways and then applying manual adjustments based on knowledge of the area."[47]

Pang Engineering compared the trip distribution relied upon in the TIA with the actual counts provided in the TIA appendices and found that there are substantial differences between them: The differences are notable in that the actual trip distribution from the counts are higher westbound or to and from the east, while lower eastbound or to and from the west.[48] In other words, the DEIR is relying on a model's trip distribution when the actual counts contradict the model's assumptions. Pang Engineering further notes that these differences could be explained if the TIA had conducted, e.g., an origin-to-destination survey that would support the conclusion, but no such surveys are presented in the TIA and therefore no evidence supports the DEIR's conclusion.[49]

These unsupported assumptions have direct bearing on trip assignments at the Project's two proposed driveways and as a result, on the Project's impacts on

[47] DEIR, p. 4.13-12.
[48] Pang Engineering comments, p. 4.
[49] Pang Engineering comments, p. 4.

safety and hazards. As Pang Engineering notes, and as is further explained below, there are safety issues at the Project's drive-thru and on-site driveways that are not adequately addressed in the DEIR. The DEIR must be revised to account for the correct trip distribution and for its effect on the hazards and safety impacts of the Project.

b. The DEIR's Conclusions Are Not Supported by Substantial Evidence Because the TIA Did Not Conduct the Necessary Surveys

In order to analyze potential traffic impacts, the TIA provided traffic counts in three other In-N-Out locations in or near Santa Clara County. However, as Pang Engineering explains, those counts only included PM peak hour counts for weekdays and lunch-time traffic counts for weekends. No lunch-time queuing data for weekdays is provided.[50] This information is crucial to assess the potential impacts on queues, especially in the drive-thru lanes. These queues, explain Pang Engineering, can result in significant safety and hazards impacts by creating vehicular stacking onto the on-site aisles and into the public street.

Because this data was not provided, those impacts were not and could not be properly analyzed.[51] Moreover, Pang Engineering conducted a field review in March 2019 during a weekday noon hour for one of the locations that was included in the TIA's traffic counts, In-N-Out on El Camino Road in Mountain View. Pang Engineering's review found that vehicles were stacking into the Oak Lane public street, and that this stacking "conflicts with the public street traffic volumes, has increased delays both on-site and off-site, and creates potential safety issues on the adjacent public street."[52] Therefore, there is substantial evidence that queuing during lunch-time weekday hours may create significant hazards and safety impacts.[53] The TIA and DEIR must be revised to include lunch-time weekday traffic counts and to analyze the Project's impacts from queuing.

[50] Pang Engineering comments, p. 5.
[51] Pang Engineering comments, p. 5.
[52] Pang Engineering comments, p. 5.
[53] Photos from field review are attached as Exhibit D.

c. The DEIR Fails to Account for Potentially Significant Hazards And Safety Impacts from The Project's Driveways

As a result of the above-mentioned analysis omissions and mistake, as well as for other reasons, Pang Engineering's review found that the DEIR fails to acknowledge and to properly mitigate two more potentially significant impacts on hazards and safety resulting from the Project's design. The first is the impact on Almarida Drive. As Pang Engineering explains:

> There are operational issues with the proposed driveways, which in our opinion, have not been adequately addressed in the TIA. For the Almarida Drive driveway, there is an existing Franciscan Apartment "gated" driveway about 15 feet northerly of the proposed project site. Since that driveway is "gated," there is a delay for a vehicle with a desire to enter that driveway. This movement would be in conflict with those vehicles desiring to enter and turn left into the Project driveway, especially during the PM peak hour. The left turn storage in Almarida Drive does not address this issue, which could become a safety issue.[54]

The second potentially significant impact the DEIR fails to address is the impact from the Hamilton driveway. As Pang Engineering explains, the TIA indicates that the intent is that most of the Project's traffic will use this driveway. Therefore, there is a potential storage and safety issue for the inbound vehicles, which would backup traffic onto Hamilton Avenue. This impact is not acknowledged, and no mitigation is proposed for it.[55]

Pang Engineering's comments include proposed feasible mitigation for both additional significant impacts.[56] The DEIR must be first revised to account for and to analyze those impacts, and must then propose appropriate mitigation.

---

[54] Pang Engineering comments, p. 8.
[55] Pang Engineering comments, p. 10.
[56] Pang Engineering comments, p. 8-11.

2. The DEIR Underestimates Impacts by Including Pending Projects in The "Background" Scenario For The Project

According to the DEIR, "[b]ackground operating conditions include existing vehicle turning movements plus trips from approved developments in the area plus trips associated with the prior use on the site."[57] The Santa Clara Valley Transportation Authority ("VTA") TIA Guidelines state in the "Background Conditions" chapter that "[a]pproved projects include not yet completed or occupied projects that have undergone an approval process (i.e., been granted a land use entitlement)."[58]

However, a review of the DEIR analysis reveals that its "Background plus Project Conditions" include not only approved projects, i.e. projects that are already entitled, but also projects that are currently pending, as is acknowledged in the DEIR itself. These projects include the Chick-fil-A Restaurant (2060 South Bascom Avenue, Campbell), the Franciscan Apartment Expansion (601 Almarida Drive, Campbell), the Office Building (95 East Hamilton Avenue, Campbell) and the Cresleigh Homes Mixed-Use Development (540, 558, and 566 East Campbell Avenue and 24 and 34 Dillon Avenue, Campbell).[59]

The fact that projects that are not yet approved are included in the "background plus Project" scenario not only violates the VTA Guidelines, but it also serves to underestimate the Project's impacts by creating a more congested background scenario. As Pang Engineering explains: "Since the "pending" projects have been included as well, the "Background" traffic numbers will be even higher, thus causing a larger base number for the "Background" traffic conditions prior to adding the proposed project trips."[60]

The TIA and the DEIR must be revised to include in the background conditions only approved projects. The Project's impacts should be then evaluated against the correct baseline and addressed accordingly.

---

[57] DEIR, p. 4.13-15.
[58] Santa Clara Valley Transportation Authority, Traffic Impact Analysis Guidelines, October 2014, p. 27.
[59] DEIR, p. 4.13-15.
[60] Pang Engineering comments, p. 6.

Pang Engineering also found that the DEIR's LOS conclusion regarding intersection #4 is counter-intuitive, as it shows that after the Project's trips are *added* to the "background" conditions there is actually an *improvement* in the seconds of delay per vehicle, and the intersection's rating goes up from E+ to D-. This result is, on its face, illogical, and the DEIR must be revised to explain it and support it with substantial evidence.[61]

3. The DEIR's Conclusion Is Not Supported by Substantial Evidence Because Credit for The Existing Use Is Not Clearly Shown

Under the VTA Guidelines, the TIA can take credit for the existing entitled use trip generation, that is, the car trips associated with the entitled (but vacant) Elephant Bar. However, as Pang Engineering shows, the DEIR and the TIA fails to show *where* in the analysis this credit was applied and *how*. The result is that the Elephant Bar impact at critical intersections is not adequately shown.[62]

As Pang Engineering explains, the current analysis suggests that the TIA is understating the actual trip generation of the Project by taking credit for the entitled project beyond its actual impact. The DEIR must be revised to separately account for the "background" scenario, both with and without the Elephant Bar traffic. Only then can the public know what the actual impact of the Project is. As proposed, the DEIR fails to disclose the actual Project impacts and the DEIR's conclusion is not adequately supported, as required by CEQA.

4. The DEIR's Conclusions Regarding Near-Term LOS Impacts Are Not Supported by Substantial Evidence Because They Rely on An Assumption That Is Contradicted By The Evidence

The level of service (LOS) calculations for the Project, which are used to determine the Project's impacts on traffic, are partially relying on the VTA's classifications of CMP intersections. Pang Engineering notes that intersection #4 (Hamilton Ave/Salmar Ave-SR17 SB off-ramp) is coded for its SB right turns as "running free." While this assumption should have been approved by the VTA, Pang Engineering shows that when a large number of vehicles is encountered, as it is

[61] Pang Engineering comments, p. 6-7.
[62] Pang Engineering comments, p. 2.

here (1004 for the SB right turn lane existing conditions), backup could occur at two locations at the intersection.

Pang Engineering conducted a field review in March 2019 during a non-peak hour and found that "the hesitation and delays are considered sufficient to have a portion of the SB right turning vehicles coded NOT to run free."[63] This would have an impact on the intersection LOS and, as a result, it may show that the Project creates a significant impact in the near-term, which is not acknowledged by the DEIR. The DEIR must be revised to reflect the actual existing conditions for the intersection, and to properly analyze and mitigate any potentially significant impacts.

5. The DEIR's Conclusions Regarding the Project's Impact on the Residential Neighborhoods Are Not Supported by Substantial Evidence

A major concern regarding the Project's transportation impacts, raised by many residents, is the Project's impact on the surrounding residential neighborhoods. As many residents showed at the Planning Commission hearing on February 26, 2019, cars that will not be able to make it into the Project's busy driveways or that will be searching for parking will opt for using the surrounding residential streets when they circle for a space.

The DEIR evaluated the impact on residential streets using a Traffic Infusion on Residential Environmental (TIRE) index and concluded that "it is unlikely that the project-related traffic would contribute the volume of traffic at levels that would be noticeable to residents of those streets." The DEIR therefore concludes the impact to be less then significant[64]

However, as Pang Engineering shows, the DEIR failed to disclose the exact location of the counts, vaguely describing them as between David Avenue and Hamilton Avenue. This is a pretty broad section of the area, which also includes busy streets, such as Almarida and Hamilton Avenue itself. Without disclosing the exact location of the counts, therefore, the DEIR conclusions regarding the Project's

[63] Pang Engineering comments, p. 7.
[64] DEIR, p. 4.13-22/23.

impacts on the surrounding residential neighborhoods is not supported by substantial evidence. The DEIR must be revised to provide this information.

C. The DEIR Fails to Mitigate Significant Transportation And Traffic Impacts

Even for those transportation impacts the DEIR does acknowledge, it fails to propose adequate mitigation. This is because the proposed mitigation is either inadequate, relies on unsubstantiated data, or is speculative and not enforceable, as explained below.

1. Mitigation Measure TRANS-1 Will Not Mitigate the Project's Impact Because It Is Unenforceable and Speculative

The DEIR recognizes as significant three impacts for which it proposes one mitigation measure: unacceptable conditions at the (CMP) intersection of Hamilton Avenue/Salmar Avenue-SR 17 southbound offramp under Cumulative Plus Project conditions (TRANS-1 and TRANS-2) and queuing on the SR 17 southbounds off-ramp (TRANS- 4c). To mitigate those three impacts, the DEIR proposes Mitigation Measure TRANS-1 (MM TRANS-1) and concludes that its implementation will reduce the impact to less than significant:

> Mitigation Measure TRANS-1: The project applicant shall provide a financial contribution toward the widening of the southbound approach at the intersection of Hamilton Avenue/Salmar Avenue-SR 17 southbound off-ramp to include three left-turn lanes, one through lane and one right-turn lane. The contribution shall be established by using the method for calculating equitable mitigation measures as outlined in the Guide for the Preparation of Traffic Impact Studies published by Caltrans (December 2002). The project to widen the southbound approach has been previously identified as a local capital improvement project (CIP), regardless of the proposed project, and is also currently listed on Santa Clara County's Measure B list of potential projects. Since it is estimated that the proposed project would contribute 1.65 percent to the cost to implement this improvement based on the method for calculating equitable mitigation measures (as outlined in the Guide for the Preparation of Traffic Impact Studies published by Caltrans in December 2002), the project applicant shall provide a financial contribution equal to 1.65 percent of the final construction cost of the aforementioned ramp

> widening project. The most recent estimate anticipates a project cost of $1,800,000.00, resulting in a financial contribution from the proposed project of approximately $29,700. Payment will be due at the time of local and regional project approvals for the ramp widening project, under the terms of a mitigation measure agreement between the property owner and the City, which shall be secured with a cash deposit in amount of the current financial contribution estimate ($29,700). The mitigation measure agreement shall be prepared at the applicant's cost and executed prior to issuance of building, grading, or demolition permits.[65]

As explained below, there are several problems with this proposed measure:

First and foremost, this mitigation violates CEQA, as it fails to comply with the CEQA requirement that mitigation must be guaranteed and fully enforceable.[66]

The CEQA Guidelines generally allow the payment of fees to mitigate impacts such as cumulative impacts.[67] However, California courts have consistently found that "...a commitment to pay fees without any evidence that mitigation will actually occur is inadequate."[68] Furthermore, courts have held that in order for a project to rely on a fee program for mitigation of impacts, the fee program itself also had to be analyzed in an EIR.[69]

In *Napa Citizens for Honest Government v. Board of Supervisors*, a California court of appeal found that a pre-existing fee program failed to provide the "mitigation cover" to avoid a significance determination for a project's traffic impacts.[70] The County had previously adopted a traffic fee program and had collected over $2 million pursuant to this fee. However, the improvements necessary to fulfill the program totaled over $70 million and although the current project was obligated to pay its fair share of fees, the evidence showed that the necessary improvements would not be funded. As a result, there was no evidence that impacts would be mitigated simply by paying the adopted fee.

---

[65] DEIR, p. 4.13-17.
[66] 14 CCR § 15126.4.(a)(2).
[67] 14 CCR § 15130(a)(3)
[68] *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140 (quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692).
[69] *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026).
[70] *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342.

Here, as in *Napa Citizens*, there is no evidence that the plan to widen the southbound approach of the SR-17 off ramp will be funded or is in any way guaranteed to happen. The measure quotes two potential sources of funding, none of which is adequate under the law and case law.

First, the measure states that the "project to widen the southbound approach has been previously identified as a local capital improvement project (CIP), regardless of the proposed project." The DEIR includes no reference to any documents supporting this assertion. However, a quick review of the City's most recent CIP indicates that the "Hamilton / Hwy 17 Southbound Off Ramp Widening" is listed in the plan as a newly added project, with a medium priority and, most importantly, under the headline of "Unfunded Projects." [71] There is no guarantee, therefore, that this project will ever be funded or fully materialize.

As the second potential source of funding, the DEIR states that the widening project is "also currently listed on Santa Clara County's Measure B list of potential projects." Again, this assertion fails to constitute evidence that mitigation will actually occur, as required under CEQA.

The VTA Board adopted a resolution to propose to the voters a new tax measure for transportation improvement that was approved by the voters in 2016. The resolution includes four attachments with "candidate projects lists." Attachment B is called "Envision Highway Program Candidate List" and includes, among 23 other projects, the SR 17 off-ramp widening project.[72] The fact that the Project is included in a list of candidate projects for an approved tax measure does not provide any guarantee that the project is going to be executed, or when:

Measure B is a tax measure that will be collected over the next 30 years. The VTA Board of Directors will allocate the funds collected based on guidelines the Board adopted. The Guidelines for the Highway Interchanges Program explain that VTA Board of Directors will allocate funding on a 2-year cycle and that VTA staff will work with local agency staff to identify and prioritize projects.[73] It is obviously a long and complicated process which involves a lot of discretion until a project that is included in the list will be constructed. The City failed to provide any evidence that

---

[71] https://www.ci.campbell.ca.us/ArchiveCenter/ViewFile/Item/731.
[72] http://yesmeasureb.com/uploads/articles/VTA.pdf (accessed April 11, 2019).
[73] http://www.vta.org/measure-b-2016 (accessed April 11, 2019).

the widening project is making any such progress, let alone is guaranteed to be constructed.

Furthermore, the DEIR provided no evidence that the widening project has undergone CEQA analysis,[74] nor has the DEIR identified any final CEQA analysis on a programmatic level for a fee-based traffic mitigation program that would cover this road section, as required by CEQA.[75]

The DEIR fails to adequately demonstrate that the mitigation program relied upon will occur and, specifically, whether it has been analyzed under CEQA and is sufficiently funded. Therefore, the City failed to require feasible mitigation to reduce the Project's significant impacts from increased traffic to less than significant levels. The DEIR must be revised and recirculated to reflect accurate analysis and conclusions.

Second, Pang Engineering points out two additional problems with the proposed measure. First, the estimated cost of construction is not adequately documented in the DEIR, and there is a strong reason to believe that more lanes would be needed, therefore a higher cost should be considered. Pan Engineering also points to missing data, such as the right of way costs and inflation factor, and argues that the actual costs are likely to be higher than indicated.[76]

Finally, Pang Engineering show that even according to the TIA's own calculations, it seems the proposed mitigation, even if it will eventually be built, will not properly address the impact. This is because the TIA acknowledges a *very significant storage length* that would be needed for the expected traffic on the southbound ramp (*over a mile and a half* for some of the lanes) that is *not shown to be addressed* under the current widening proposal. Pang Engineering therefore concludes that the "apparent need for more storage length, which is acknowledged in the TIA, is not addressed, and no realistic mitigation measures have been proposed."[77]

---

[74] *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026.
[75] *Id.*
[76] Pang Engineering comments, p. 12.
[77] Pang Engineering comments, p. 14.

The DEIR must therefore be revised to include mitigation measures that are feasible, enforceable and will properly address the impacts created by the Project.

2. Mitigation Measure TRANS-4a Will Not Mitigate the Project's Impact as It Relies on Unsubstantiated Assumptions

As explained above, the trip distribution assumptions for the TIA are not supported and are contradicted by the evidence. Mitigation Measure TRANS-4a proposes to extend the eastbound left-turn lane at Almarida/Hamilton Avenue by additional 50 feet to accommodate the increase in queue length. However, Pang Engineering explains that, when the correct trip distribution assumptions are used, they show that significantly more traffic will be using this lane, either to make a left turn to Almarida or a U-turn on Hamilton, and the proposed lane would not be long enough to accommodate the traffic. Therefore, this measure would not mitigate the impact below the level of significance and it must be revised.[78]

3. Mitigation Measure TRANS-4b Will Not Mitigate the Project's Impact Below the Level of Significance

This measure proposes to install "keep clear" pavement markings on southbound Almarida Drive at the northern project driveway to maintain access to the Project site. As Pang Engineering shows, the fact that there are already "keep clear" signs on the road indicates an existing queuing problem. The City cannot rely on mitigation measures for other Projects without substantial evidence that the measure would also mitigate the impacts for proposed Project. Because there will be an *increase* in the number of daily and PM peak hour trips, simply re-installing the signs will not address the stacking problem.[79] Pang Engineering proposes a redesign of the site plan to address the issue.[80]

In sum, the DEIR's transportation analysis fails to properly disclose, analyze and mitigate the Project's significant transportation and traffic impacts. The DEIR must be revised and recirculated after addressing those issues, as required under CEQA.

---

[78] Pang Engineering comments, p. 13.
[79] Pang Engineering comments, p. 13.
[80] Pang Engineering comments, p. 11.

D. The DEIR's Alternative Analysis Must be Revised

In addition, as explained above, the DEIR also includes a Project alternative called the "No Drive-Thru" alternative, which would not include a drive-thru lane and could allow for site reconfiguration.[81] The DEIR finds that this alternative would reduce PM peak hour trips by 13.3 percent. Despite that, the DEIR finds this alternative "would not avoid the project's significant impacts associated with intersection levels of service, queueing and CMP policy conflicts."[82]

As with the GHG emissions analysis, the alternative discussion must be revised following the revision of the transportation analysis. As explained above, the analysis at present ignores potentially significant impacts from hazards and queuing. Eliminating the drive-thru lane might have an impact on these issues, and a new site configuration might further reduce the impacts, as explained in Pang Engineering comments. Therefore, the alternative analysis must also be revised to reflect this alternative's potential added benefits.

V. THE DEIR FAILS TO ANALYZE AND MITIGATE SIGNIFICANT NOISE IMPACTS FROM PROJECT CONSTURCTION AND OPERATION

The proposed Project includes the demolition of the existing restaurant building on the site, grading and excavation of 5,800 cubic yards of soil, site preparation and construction of a new restaurant building. Noise-sensitive receptors in the vicinity of the project include the residences immediately to the north and west, as well as the Campbell Parent's Participation Preschool approximately 150 feet to the west and the Noah's Ark Children's Learning daycare center approximately 75 feet to the northwest.[83]

We reviewed the DEIR's noise analysis with the assistance of Derek Watry of Wilson Ihrig, an expert on noise analysis and mitigation. As described below, our review found that the City's noise analysis violates the law and fails to mitigate the Project's significant noise impacts, as required by CEQA.

---

[81] DEIR, p. 5-11.
[82] DEIR, p. 5-16.
[83] DEIR, p. 4.10-5.

A. The DEIR Fails to Establish Clear Threshold of Significance for Construction Noise

The CEQA Guidelines define a "threshold of significance" as follows:

> an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.[84]

As Mr. Watry shows, neither the DEIR not the Technical Noise Report ("TNR") properly establish a clear threshold that enables the determination of the significance of construction noise impacts:

> The only absolute noise level standard cited is 50 dBA, but this is characterized as "intended to prevent, to the greatest extent possible, the use of non-standard construction equipment, loud stereos, unnecessary idling, or equipment that is not appropriately muffled, and not to overall construction noise, in general, during allowable hours." (...) This qualification leaves the DEIR with no absolute standard of significance against which to ascertain whether any proposed mitigation measures will be sufficient.[85]

The City finds, however, that the construction noise impact would be significant without mitigation.[86] Mr. Watry finds that this conclusion, while not established using a proper threshold of significance, is nevertheless a required finding. As he explains, "unmitigated construction noise levels for the better part of 6 months will exceed the existing ambient by up to 30 dB. That is certainly a substantial temporary increase in ambient noise (...)". Mr. Watry states that a 5 to 10 dB increase above the existing ambient noise level is a reasonable threshold to set, and the construction noise of the Project goes significantly over this threshold.[87]

---

[84] 14 CCR § 15064.7(a).
[85] Wilson Ihrig comments, p. 3.
[86] DEIR, p. 4.10-9.
[87] Wilson Ihrig comments, p. 3.

B. The DEIR's Conclusion Regarding Noise Impact Mitigation is Not Supported by the Evidence and Violates CEQA

To mitigate the significant impact from construction noise, the DEIR proposes Mitigation Measure NOISE-1 (MM NOISE-1). This measure lists six proposed measures, none of which will adhere to CEQA's mandate that mitigation must be guaranteed and fully enforceable.[88] This is because, as Mr. Watry shows, "the proposed mitigation measures are vague, qualified, and lack any performance standards to guarantee their effectiveness."[89]

The first mitigation measure under MM NOISE-1 is "[e]nsure that construction equipment is properly muffled according to industry standards and is in good working condition."[90] Mr. Watry explains that while unmuffled equipment may have been common in the 1970s, by 2006 mufflers were factory-fitted to most heavy construction equipment. It is unlikely that the 2006 Federal Highway Administration data, which is the data used to determine the baseline noise from construction equipment, is for unmuffled equipment. Therefore, concludes Mr. Watry, there is no evidence that the use of mufflers would markedly decrease noise levels.[91]

MM NOISE-1 goes on to list three more measures:

- Place noise-generating construction equipment and locate construction-staging areas away from sensitive uses, *where feasible.*
- Use electric air compressors and similar power tools rather than diesel equipment, *where feasible.*
- Operate all stationary construction equipment (e.g., air compressors, generators, impact wrenches, etc.) as far away from residential uses *as possible* and shield such equipment with temporary sound barriers, sound aprons, or sound skins.[92]

As Mr. Watry shows, these three measures all have the *potential* to reduce noise. However, because they are all qualified by "where feasible" or "as possible",

---

[88] 14 CCR § 15126.4.(a)(2).
[89] Wilson Ihrig comments, p. 3.
[90] DEIR, p. 4.10-9.
[91] Wilson Ihrig comments, p. 3-4.
[92] DEIR, p. 4.10-9. Emphasis added.

and lack any performance standards, there is no indication of their actual impact or whether it would be feasible or possible to perform them in a way that will reduce the impact. There is also no quantitative analysis to indicate the noise reduction these measures can or will achieve. Therefore, these measures are left for the discretion of the Applicant, and are completely unenforceable.

The fifth proposed mitigation measure is to "[t]urn off construction-related equipment, including heavy-duty equipment, motor vehicles, and portable equipment, when not in use for more than 5 minutes."[93] Mr. Watry shows this measure will not reduce either the maximum or average noise levels in the area. Specifically, Mr. Watry explains it will not reduce the average noise levels because the engine turn off is *already accounted for in the noise calculations* by use of the "usage factor."[94]

The sixth and last measure states the following:

> Clearly post construction hours, allowable workdays, and the phone number of the job superintendent at all construction entrances to allow for nearby residents and other noise sensitive land uses to contact the job superintendent. If the City or the job superintendent receives a complaint, the superintendent shall investigate, take appropriate corrective action, and report the action taken to the reporting party.[95]

As Mr. Watry notes, actions such as posting of construction hours, providing a phone number for complaints etc. have no bearing on the noise generated by construction and do not demonstrably reduce noise levels.

In sum, none of the mitigation measures proposed by the DEIR includes any performance standards, binding requirements or quantitative analysis of its impact to comply with CEQA's mandate that mitigation must be enforceable. Moreover, most of them are qualified by language that renders them completely unenforceable. Therefore, the DEIR fails to show the noise impact from Project construction will be mitigated to less than significant, and the City's conclusion in the DEIR violates CEQA.

---

[93] DEIR, p. 4.10-9.
[94] Wilson Ihrig comments, p. 4.
[95] DEIR, p. 4.10-9.

C. The DEIR Fails to Properly Mitigate the Project's Operational Noise

As mentioned above, the Project would be located very close to many noise-sensitive receptors, including residential units immediately to the north and west. The proposed restaurant would operate seven days a week, from 10:00 a.m. to 1:00 a.m. Sunday through Thursday and from 10:00 a.m. to 1:30 a.m. Friday and Saturday.[96] These types of establishments are known to create many noise impacts, including noise from patrons shouting, operating stereos in their cars, slamming doors, and honking in the drive-thru lane. The DEIR discusses and dismisses these potential impacts in one short paragraph:

> It is possible that noise from future patrons' car stereos could intermittently *exceed the 65 dBA exterior noise limit at the nearby receptor property lines.* Periodic noise limit exceedances from car stereo noise is not typically evaluated in noise studies due to the intermittent nature of the source and the inability to predict the intensity and frequency of potential occurrences. Nonetheless, there is a potential for future patrons to play their stereos at loud volumes in the parking lot or drive-thru lane, *which could pose a nuisance for nearby residents, particularly during nighttime hours.* Therefore, as a condition of approval, the City will require installation of signage at the northern and western perimeters at a spacing of at least every 5 parking spaces and at every 50 feet along the edge of the drive-thru advising patrons to turn down car stereos.[97]

The DEIR therefore acknowledges that operational noise might create a significant impact for nearby residences (although it does not account for all the potential sources of operational noise). The DEIR, however, fails completely to establish that the condition of approval it cites will reduce this impact to below the threshold of significance.

CEQA requires that projects mitigate their impacts and, if this cannot feasibly be done, the agency should adopt a statement of overriding considerations.[98] Here, the DEIR includes no support for the assumption that

---

[96] DEIR, p. 3-7.
[97] DEIR, p. 4.10-7. Emphasis added.
[98] 14 CCR § 15093.

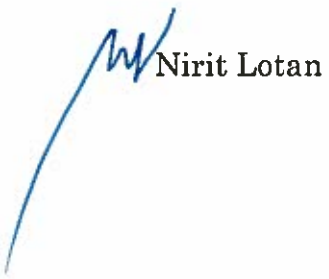
simply by posting signs the noise impacts for the adjacent noise-sensitive uses will be mitigate below the 65-dBA exterior noise threshold. Thus, the DEIR's conclusion is not supported by substantial evidence. The DEIR must be revised to include mitigation measures that can be shown to reduce the impact below the threshold of significance.

VI. CONCLUSION

The DEIR is inadequate as an environmental document because the City fails to properly disclose, analyze and mitigate the Project's significant impacts on GHGs, transportation and noise. The City cannot approve the Project until it prepares and re-circulates a revised DEIR that resolves these issues and complies with CEQA's requirements.

Thank you for your consideration of these comments.

Sincerely,



Nirit Lotan

NL:acp
Attachments