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May 31, 2018

Via Email and Hand Delivery

Chair Michael Murray
 Honorable Members of the Planning Commission for the City of Napa
 c/o Patty Baring
 City Hall, Council Chambers
 955 School Street
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By Email Only

Erin Morris, Planning Manager: emorris@cityofnapa.org

Re: Special Meeting Agenda Item No. 7.A: Trinitas Mixed-Use Project – 2610 & 2620 Napa Valley Corporate Drive (File No. P16-0054)

Dear Chair Murray, Honorable Members of the Planning Commission for the City of Napa, Ms. Morris:

On behalf of **Napa Residents for Responsible Development** (“Napa Residents”), we submit these comments regarding Special Meeting Agenda Item No. 7.A: Trinitas Mixed-Use Project – 2610 & 2620 Napa Valley Corporate Drive, File No. P16-0054, SCH #2017072005 (“Project”). The Project is proposed by Pacific Hospitality Group (“Applicant”). We previously submitted comments on the Draft Environmental Impact Report (“DEIR”) for the Project on February 26, 2018 (“DEIR Comments”), and preliminary comments on the Final Environmental Impact Report (“FEIR”) to the Planning Commission on May 17, 2018. We incorporate our prior comments by reference.¹

¹ Napa Residents reserves the right to supplement these comments at later hearings and proceedings on this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v.*

May 31, 2018
Page 2

Napa Residents respectfully requests that the Commission continue this hearing to a later date due to the City's failure to provide timely access to numerous documents and studies that the City is relying upon to support its proposed CEQA findings, as well as documents referenced in, but not attached to, the Staff Report.

As discussed below, the City failed to timely provide Napa Residents with several documents that are referenced in the Staff Report and relied upon in the FEIR, including several new biological studies. Napa Residents submitted a Public Records Act ("PRA") request on May 23, 2018 for all new technical studies prepared for the Project. The City failed to provide the requested documents, and failed to include them in the current Staff Report. The public therefore remains uninformed regarding the basis for several of the City's proposed CEQA findings regarding biological resources, in violation of CEQA. The City also failed to provide its responses to our May 17, 2018 comment letter until after close of business on May 29, 2018, leaving inadequate time for Napa Residents and its consultants to fully consider the responses prior to this hearing. This hearing must be continued in order to provide Napa Residents and the public the opportunity to consider the evidence that the City asserts it is relying upon for its CEQA conclusions.

The Staff Report also fails to resolve issues raised in Napa Residents' DEIR comments and May 17, 2018 comments to the Planning Commission regarding the FEIR's failure to adequately analyze the Project's significant cumulative impacts to biological resources, and inadequate mitigation for impacts to wetlands. The City must revise and recirculate the FEIR to adequately address these and other issues identified in Napa Residents' previous comments before the Planning Commission may consider approving the Project.

Finally, Napa Residents supports the Staff Report's proposed recommendations to remove floor area ratio ("FAR") averaging ("Alternative 2A"), and to remove hotel uses from the portion of the Project site located in Airport Land Use Commission ("ALUC") Zone C ("Alternative 2B"). However, these alternatives are among three alternative recommendations proposed in the Staff Report. Without a binding requirement to comply with FAR zoning and ALUC Zone C

Bakersfield (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

May 31, 2018
Page 3

regulations, the Project will remain in violation of City and County land use policies. Both requirements must be included as binding Conditions of Approval.

We prepared these comments with the assistance of conservation biologist and wildlife ecologist Scott Cashen.² Napa Residents reserves the right to submit supplemental comments to the City following our receipt and review of the outstanding studies, reports, and other documents relied upon in the FEIR and Staff Report.

I. THE CITY FAILED TO DISCLOSE CRITICAL STUDIES THAT IT RELIES ON TO SUPPORT THE FEIR'S CONCLUSIONS AND PROPOSED CEQA FINDINGS

The City failed to timely provide Napa Residents with several documents that are referenced in the Staff Report and relied upon in the FEIR, including documents we recently requested via a Public Records Act request to the City. The City's actions violate both the Public Records Act and CEQA's basic requirement that an agency must disclose all evidence relied upon in its CEQA analysis and CEQA findings to the public.

On May 23, 2018, Napa Residents submitted a Public Records Act request to the City seeking *immediate access*, pursuant to Gov. Code § 6253(a), to all public records referring or related to Trinitas Project since January 23, 2018, including but not limited to:

- All public comments received by the City regarding the Project that are not included in the Project's FEIR, including but not limited to all public comments received by the City at or in conjunction with the May 17, 2018 Planning Commission hearing on the Project.
- All surveys and technical reports prepared by or on behalf of the City's EIR consultant related to the Project that are not included in the Project's DEIR or FEIR, including but not limited to the 2018 fairy shrimp study referenced by Ms. Shana Shaffner during the May 17 Planning Commission hearing on the Project.

² Mr. Cashen's technical comments and curriculum vitae are attached hereto as Exhibit A.

May 31, 2018
Page 4

- All documents related to the construction status of the Meritage Commons Project, to be located at 850 and 875 Bordeaux Way, also known as the Meritage Resort Expansion Project (PL15-0071).
- All other documents related to the Project that were not previously provided in response to our January 23, 2018 Public Records Act request.³

As of the time of this writing, Napa Residents has not received any documents from the City in response to its May 23, 2018 Public Records Act request, including the five biological resources studies that were conducted after the release of the DEIR that are referenced in Attachment 7 of the Staff Report as part of the City's responses to Napa Residents' May 17, 2018 comments. These studies include:

- Reconnaissance level survey by Bargas Environmental Consulting (referred to as the "Bargas Report" in the FEIR).
- Dry season and wet season surveys for vernal pool fairy shrimp (Response to FEIR comments, p. 105).
- Wetland delineation (Response to FEIR comments, p. 106).
- Rare plants survey (Response to FEIR comments, p. 69).
- Swainson's hawk surveys (Response to FEIR comments, pp. 22 and 83).

Section 6253(a) of the Public Records Act requires public records to be "open to inspection at all times during the office hours of the state or local agency" and provides that "every person has a right to inspect any public record."⁴ The City's responses to our May 17, 2018 comments are dated May 23, 2018, and reference these documents. Therefore, the documents were clearly in existence at the time our Public Records Act request was submitted to the City. The City's failure to provide immediate access to these records violates the Public Records Act.

The City also failed to timely provide Attachment 7 to the Staff Report to the public. Attachment 7 includes the City's 167-page response to our May 17, 2018 comment letter. The City did not provide Attachment 7 to Napa Residents until after close of business on Tuesday, May 29, 2018, in response to an email from the undersigned which advised the City of its omission from the Staff Report.

³ A copy of our May 23, 2018 Public Records Act request is attached hereto as Exhibit B.

⁴ Gov. Code § 6253(a).

May 31, 2018

Page 5

Attachment 7 still remains incomplete, as the version provided to Napa Residents failed to attach any of the recent biological studies that the City is relying on to conclude that the Project's impacts to sensitive biological resources, including impacts to the federally threatened vernal pool fairy shrimp and the State-listed threatened and federally designated Bird of Conservation Concern, Swainson's hawk, are less than significant. As a result, Napa Residents and its technical consultants have been unable to fully evaluate the Staff Report, the City's responses to its comments, or the adequacy of the FEIR.

The City's failure to disclose these studies to Napa Residents and the public violates CEQA. An agency may not rely on hidden studies or documents that it fails to disclose to the public to support its CEQA analysis and CEQA findings.⁵ CEQA requires an EIR to provide the reader with the analytic bridge between its ultimate findings and the facts in the record.⁶ The City has failed to comply with this requirement by failing to disclose the FEIR's supporting evidence and analysis to the public. Moreover, if the biological studies and other technical documents relied upon in the FEIR and Staff Report are not in the City's possession, and the Commission has not independently reviewed them, the Commission is similarly unable to exercise its independent judgment in making a recommendation to the City Council, as required by CEQA.⁷

In order to comply with CEQA and afford the public the necessary opportunity to consider the City's CEQA analysis, this hearing must be continued. The FEIR must also be recirculated to include all evidence and underlying analysis that the City is relying upon to support the FEIR's conclusions regarding the severity of the Project's environmental impacts.

⁵ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

⁶ *Topanga Ass'n for a Scenic Comty. v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733.

⁷ Pub. Res. Code ("PRC") § 21082.1(c); 14 Cal. Code Regs. ("CCR") §15090(a).

May 31, 2018
Page 6

II. THE PROJECT MUST BE REVISED AS RECOMMENDED IN THE STAFF REPORT TO COMPLY WITH MANDATORY LAND USE POLICIES

The Staff Report includes two alternative recommendations for Commission consideration – Alternative 2A, which would add a Condition of Approval that the Project be revised to reduce the floor area of the Project by approximately 10,000 square feet to eliminate the need for floor area ration (“FAR”) averaging, and Alternative 2B, which would require the Project be revised to shift the portion of the hotel currently depicted in ALUC Zone C (approximately 12,400 square feet) out of Zone C.⁸ As discussed below, the Commission should require both conditions to be adopted in order to remedy the Project’s inconsistencies with City land use policies.

A. Floor Area Ratio.

The maximum permitted FAR in the IP-A and B Zoning Districts, where the Project is to be located is 0.40.⁹ The May 17, 2018 Staff Report previously explained that this FAR is consistent with these zones’ permitted industrial, research, and development uses, where a typical structure is generally a single story industrial building with surface parking.¹⁰ The FAR for the Trinitas Project is 0.42, which exceeds the 0.40 maximum by over 8,000 sq. ft. of building area.¹¹

The FEIR and May 17 Staff Report initially proposed to allow the Applicant to “average” the FAR for the Project site with the FAR allowed for its other two adjoining projects – Meritage Commons and the Meritage Resort – in order to render the Project’s excess FAR consistent with City zoning requirements. The FEIR and Staff Report initially relied on Municipal Code Section 17.52.120, which allows averaging of the FAR where a project site encompasses several buildings on several lots. However, Section 17.52.120 only allows averaging of FAR for lots that

⁸ Staff Report, p. 8.

⁹ See May 17, 2018 Staff Report, p. 11; see City of Napa Muni. Code sec. 17.52.120, Density and floor area ratio calculations.

¹⁰ *Id.*

¹¹ *Id.*

May 31, 2018
Page 7

are part of a single development project.¹² Meritage Commons and the Meritage Resort were separately permitted by the City prior to preparation of the EIR for the Trinitas Project. Although Napa Residents has previously commented that the Trinitas Project, Meritage Commons, and the Meritage Resort are all part of a single development project by the Applicant that should have been analyzed in a single CEQA document, the City continues to deny this fact.

In response to Napa Residents' prior comments, and to concerns raised by Commissioners at the May 17, 2018 Commission hearing, the City now proposes the adoption of Alternative 2A, which would which would add a Condition of Approval that the Project be revised to reduce the floor area of the Project by approximately 10,000 square feet to eliminate the need for FAR averaging.

Napa Residents supports the reduction in FAR to comply with the applicable zoning requirement of 0.40 FAR. The City cannot, on the one hand, refuse to analyze the impacts of the three components of the Meritage Project as a whole, while at the same time seek to rely on an FAR averaging provision that is restricted to use by a single project. Alternative 2A must be adopted. The City must also continue to remedy the defects in its piecemealed CEQA analysis that were identified in Napa Residents' prior comments.

B. ALUC Policies.

Napa Residents previously commented that the Project's hotel uses are likely to result in violations of ALUC Zone C regulations, which the FEIR failed to disclose as a significant impact. The FEIR and May 17, 2018 Staff Report explained that approximately 12,400 square feet of the proposed Residence Inn portion of the hotel building is located within ALUC Zone C.¹³ ALUC Zone C establishes a threshold of 50 persons per acre maximum for structures within ALUC Zone C.¹⁴ Based on calculations in the FEIR, the projected density for the portion of the Residence Inn located within Zone "C" is 46.5 persons per acre, just below the 50 persons per acre

¹² See City of Napa Muni. Code sec. 17.52.120.C ("In cases where a project site encompasses several buildings on several lots, the floor area ratio may be combined and averaged over the entire project site.")

¹³ *Id.*

¹⁴ Staff Report, p. 10.

May 31, 2018
Page 8

maximum.¹⁵ However, this assumption was based on an unsupported assumption of 80% room occupancy, with the threshold of 50 persons per acre being exceeded at 86% occupancy.¹⁶

Neither the FEIR nor the Staff Report's proposed Conditions of Approval include any restriction to limit occupancy of the Residence Inn to less than 86%. Thus, Napa Residents concluded reasonably foreseeable that operation of the Residence Inn will result in levels of occupancy that violate the ALUC Zone C regulations, resulting in a land use inconsistency and significant CEQA impact.¹⁷

In response to these comments, the Staff Report proposes the adoption of Alternative 2B, which would require the Project be revised to shift the portion of the hotel currently depicted in ALUC Zone C (approximately 12,400 square feet) out of Zone C.¹⁸ Alternative 2B is consistent with the economically foreseeable goal of the Applicant to reach up to a 100% occupancy level at the hotel in order to maximize profits. By relocating hotel uses outside of ALUC Zone C, Alternative 2B would also ensure that hotel occupancy that meets or exceeds 86% does not violate ALUC Zone C regulations. Accordingly, Napa Residents supports the adoption of Alternative 2B. Only in this way can the City ensure that the Project does not violate critical airport safety regulations.

III. THE FEIR'S BIOLOGICAL RESOURCES ANALYSIS AND MITIGATION PLAN REMAIN INADEQUATE

A. Failure to Disclose Biological Resources Studies.

As discussed above, the City failed to provide Napa Residents with the six new biological resources surveys that the FEIR and Staff Report rely on to conclude that the Project's biological resources impacts will be reduced to less than significant levels, including the following studies:

1. Reconnaissance level survey by Bargas Environmental Consulting (referred to as the "Bargas report" in the FEIR).

¹⁵ Staff Report, p. 10; pg. 5.7-22 of the FEIR.

¹⁶ *Id.*

¹⁷ See Napa Residents May 17, 2018 comments, p. 8.

¹⁸ Staff Report, p. 8.

May 31, 2018
Page 9

2. Dry-season surveys for vernal pool fairy shrimp.
3. Formal wetland delineation.¹⁹
4. Rare plants surveys.²⁰
5. Wet-season surveys for vernal pool fairy shrimp.²¹
6. Swainson's hawk surveys.²²

The City is therefore in violation of CEQA's public disclosure requirements, and Napa Residents remains unable to fully evaluate the adequacy of the FEIR and its responses to comments regarding several biological resources issues. We reserve the right to supplement our comments following receipt of these reports.

B. Unsupported Wetland Mitigation Ratio.

Napa Residents reviewed the FEIR and the City's most recent May 23, 2018 responses to comments in conjunction with Mr. Cashen. Based on this review, we continue to conclude that the FEIR fails to support its proposed mitigation measures for impacts to wetlands, and wetland-dependent species the vernal pool fairy shrimp, with substantial evidence. Specifically, the FEIR's reliance on a 2:1 mitigation ratio to mitigate significant impacts from lost wetland habitat violates CEQA because the City lacks substantial evidence to support its conclusion that a 2:1 ratio is adequate to mitigate admittedly significant impacts.²³

As Mr. Cashen explains, numerous factors determine the mitigation ratio needed to mitigate a project's impacts to wetlands (or other jurisdictional waters) to less than significant levels, including:

- (1) whether there will be a time lag between wetland functions lost at the Project site and wetland functions gained at the compensatory mitigation site;

¹⁹ City's May 23, 2018 Response to FEIR comments, p. 106.

²⁰ *Id.*, p. 69.

²¹ *Id.*, p. 25.

²² *Id.*, pp. 22 and 83.

²³ PRC §§ 21002.1(a), 21100(b)(3).

May 31, 2018
Page 10

- (2) whether in-kind mitigation is required (i.e., compensatory mitigation will consist of vernal pools);
- (3) whether compensation wetlands will be in close proximity and within the same watershed as the Project site;
- (4) whether the mitigation site will include buffers around the compensatory wetlands; and
- (5) the mitigation method (i.e., wetland creation, restoration, enhancement, or preservation) that will be implemented.²⁴

The FEIR fails to include any evidence or analysis related to any of these factors. Therefore, Mr. Cashen concludes that it is impossible for either the City or the public to evaluate the efficacy of the FEIR's proposed 2:1 mitigation ratio because the City has not provided any information that would establish facts to dictate selection of the appropriate ratio.²⁵ As Mr. Cashen explains, "without this information, there is inadequate evidence on which to derive an appropriate mitigation ratio, and no substantial evidence to support the City's reliance on the MMRP's proposed 2:1 mitigation ratios included in Mitigation Measures BIO-7 and BIO-8."²⁶

CEQA requires that mitigation measures effectively reduce the impacts they are designed to address.²⁷ The Court of Appeal recently affirmed that mitigation ratios that are incorporated in mitigation measures for project impacts resulting from lost habitat must be supported by substantial evidence. In *Save Panoche Valley v. San Benito County ("Panoche")*,²⁸ the court upheld a 3:1 mitigation ratio for lost kangaroo rat habitat based on biological surveys of proposed mitigation lands prepared by the lead agency. Similarly, in *Banning Ranch Conserv'y v. Newport Beach*,²⁹ the court upheld an EIR's reliance on a 2:1 mitigation ratio for replacing gnatcatcher habitat where it was based on scientific studies and direct observations by the lead agency's biologist. Here, the FEIR failed to include any biological analysis of the efficacy MM BIO-7 and MM BIO-8, and failed to identify the basis for its selection of 2:1 habitat replacement in the first place. The FEIR

²⁴ See Exhibit A, p. 3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ PRC §§ 21002.1(a), 21100(b)(3); 14 CCR § 15064(a)(2).

²⁸ (2013) 217 Cal. App. 4th 503, 528.

²⁹ (2012) 211 Cal. App. 4th 1209, 1232.

May 31, 2018
Page 11

therefore lacks the basic information required by CEQA that the EIR's in the *Panoche* and *Banning Ranch* cases contained which allowed the court to uphold the 2:1 and 3:1 mitigation ratios adopted by those agencies.

Moreover, bare conclusions, such as those contained in the FEIR's discussion of its 2:1 mitigation ratio, violate CEQA's basic requirements that conclusions in an EIR must be supported by substantial evidence.³⁰ The courts have held that conclusory statements "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind" are insufficient to support a finding of insignificance.³¹ An EIR must provide the reader with the analytic bridge between its ultimate findings and the facts in the record.³² The FEIR fails to bridge this gap. Because it fails to include a biological analysis of the viability of the 2:1 ration proposed in MM BIO-7 and MM BIO-8, the FEIR fails to comply with CEQA, and the City's proposed CEQA findings that these measures would adequately mitigate the loss of wetlands caused by the Project are unsupported.

C. The FEIR Fails to Disclose and Mitigate Significant Cumulative Impacts to Swainson's Hawk.

The City does not dispute that the Project site provides foraging habitat for the Swainson's hawk. However, the FEIR fails to require any mitigation measures for the incremental loss of Swainson's hawk habitat that will be caused by the Project. Instead, the FEIR incorrectly concludes that the Project's cumulative impacts are insubstantial, and that no mitigation is required, based on an unsupported rationale that the foraging habitat that will be eliminated by the Project represents only 0.1% of the mean home range of a Swainson's hawk.³³ As a result, the FEIR dismisses the Project's cumulative impacts on Swainson's hawk as insignificant by claiming that they are a "drop in a bucket" of overall hawk habitat. This approach has been rejected by the courts, and fails to comply with CEQA's requirement that a project mitigate impacts that are "cumulatively considerable."³⁴

³⁰ PRC § 21081.5; 14 CCR § 15091(b).

³¹ *People v. County of Kern* (1974) 39 Cal. App. 3d 830, 841-842.

³² *Topanga Ass'n for a Scenic Comty. v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733.

³³ DEIR, p. 5.3-47.

³⁴ PRC § 21083(b)(2); 14 CCR § 15130; *Friends of Oroville v. City of Oroville* (2013) 219 Cal. App. 4th 832, 841-42; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 721.

May 31, 2018
Page 12

As Mr. Cashen explains, the FEIR's contention that the Project would impact only a small portion of a bird's home range wholly ignores the cumulative impact from the incremental loss of habitat caused by the Project in conjunction with existing development and in conjunction with each newly approved development project within the City and County.³⁵ As he further explains, the FEIR's approach also contradicts well-established evidence demonstrating that persistence of the Swainson's hawk in California is threatened by the incremental, unmitigated loss of habitat from numerous "small" projects.³⁶

CDFW mitigation guidelines call for the provision of compensatory habitat mitigation for all projects that would impact ***five or more acres of foraging habitat***.³⁷ The CDFW mitigation guidelines are based on scientific evidence, and recognize that incremental reductions in Swainson's hawk foraging habitat can have significant impacts on the viability of the species. Thus, the CDFW mitigation guidelines set a significance threshold of five acres as the basis for requiring mitigation for cumulative loss of foraging habitat.

The Project would impact 11.5 acres of foraging habitat, more than double the five-acre threshold designated by CDFW as triggering the need for compensatory mitigation. The Project will therefore have a significant cumulative impact as described in the CDFW guidelines. The FEIR fails to disclose this significant cumulative impact, and fails to require *any* mitigation for lost foraging habitat. This cumulative impact must be disclosed in a recirculated EIR, and mitigation measures incorporated to require compensation for the 11.5 acres of foraging habitat lost to the Project.

IV. CONCLUSION

We urge the Planning Commission to continue this hearing and remand the Project to City Staff to prepare and circulate a revised EIR which includes all studies and evidence relied upon for its significance conclusions, which identifies all of the Project's potentially significant impacts, and which requires all feasible

³⁵ Exhibit A, p. 4.

³⁶ *Id.*

³⁷ *Id.*; see <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83992>

May 31, 2018
Page 13

mitigation measures and analyzes all feasible alternatives to reduce impacts to a less than significant level.

If a Statement of Overriding Considerations is adopted for the Project, we urge the City to consider whether the Project will result in employment opportunities for highly trained workers. The Planning Commission cannot recommend approval of the Project until the City prepares a revised EIR that resolves these issues and complies with CEQA's requirements.

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

Sincerely,



Christina M. Caro

CMC:

Attachments

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