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Via E-Mail

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**RE:** Dove Hill Medical Care Project (Project Files Nos. PDC14-051 and PD16-019)

Dear Director Hughey and Ms. Le:

I am writing on behalf of the **Laborers International Union of North America, Local Union 270** and its members living in and around the City of San Jose ("LIUNA") regarding the Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the Dove Hill Medical Care Project ("Project") (Project Files Nos. PDC14-051 and PD16-019). After reviewing the IS/MND, and with the assistance of expert reviews by wildlife biologist Dr. Shawn Smallwood and environmental consulting firm SWAPE, it is clear that there is a "fair argument" that the Project may have unmitigated adverse environmental impacts. SWAPE's and Dr. Smallwood's comments (attached hereto as, respectively, Exhibits A and B), as well as the comments below, identify substantial evidence of a fair argument that the Project may have significant environmental impacts. Accordingly, an environmental impact report ("EIR") is required to analyze these impacts and to propose all feasible mitigation measures to reduce those impacts. We urge the Department of Planning, Building & Code Enforcement ("DPBCE") to decline to approve the IS/MND, and to prepare an EIR for the Project prior to any Project approvals.

## **I. PROJECT BACKGROUND**

Salvatore Caruso Design Corporation proposes to construct a convalescent hospital facility with two buildings containing a total of 155 patient rooms and up to 248 beds. The proposed Project also would include a dining hall, multipurpose room and other ancillary uses, surface parking areas, new landscaping, walkways, and landscaped common outdoor open space. IS/MND, p. 8. Each of the two buildings would contain a back-up diesel generator *Id.*, p. 15. The Project would result in an increase of about 759 vehicle trips per day. The Project would be located on about

three-acres of a 21-acre site. The other 18 acres of the site would remain private open space currently zoned for agriculture and consisting of grassland being used as pasture for horses. *Id.* The Project would be located immediately adjacent to U.S. Highway 101. The Project would include demolishing several existing structures within the 3-acre Project area. The 3-acre Project site is currently designated in the General Plan as Public/Quasi Public. The zoning is Agriculture (A). The Project proposes to rezone the site as A(PD) Planned Development.

## II. LEGAL STANDARD

As the California Supreme Court held, “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.” *Communities for a Better Env’t v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 [“CBE v. SCAQMD”], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505. “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” Pub. Res. Code [“PRC”] § 21068; see also 14 CCR § 15382. An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” *No Oil, Inc., supra*, 13 Cal.3d at 83. “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.” *Communities for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 [“CBE v. CRA”].

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.” *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” *Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392. The EIR process “protects not only the environment but also informed self-government.” *Pocket Protectors*, 124 Cal.App.4th at 927.

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” PRC § 21080(d); see also *Pocket Protectors*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs. § 15371), only if there is

not even a “fair argument” that the project will have a significant environmental effect. PRC, §§ 21100, 21064. Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440. A mitigated negative declaration is proper only if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and . . . there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” PRC §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331. In that context, “may” means a reasonable possibility of a significant effect on the environment. PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors, supra*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.

Under the “fair argument” standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency’s decision. 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. The “fair argument” standard creates a “low threshold” favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

The “fair argument” standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency’s decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274. The Courts have explained that “it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo, with a

preference for resolving doubts in favor of environmental review.” *Pocket Protectors*, 124 Cal.App.4th at 928.

### **III. There is a Fair Argument that the Project May Have Unmitigated Adverse Environmental Impacts.**

#### **A. The MND’s air quality analysis is not based on substantial evidence because it applies BAAQMD Guidelines which expressly state they do not apply when a project includes emergency generators.**

The Project relies solely on screening criteria developed by the Bay Area Air Quality Management District (“BAAQMD”) as the basis for concluding that the Project would not have any significant air quality impacts as a result of its construction and operation. IS/MND, pp. 38-39. The IS/MND points to Table 3-1 of the BAAQMD Guidelines, entitled “Operational-Related Criteria Air Pollutant and Precursor Screening Level Sizes.” BAAQMD Guidelines, pp. 3-2 – 3-3. The IS/MND relies on screening criteria for a “congregate care facility.” Under the Guidelines, a congregate care facility with less than 657 dwelling units (“du”) is presumed not to have significant operational emissions of reactive organic gases (“ROGs”). *Id.*, p. 3-2. For construction emissions, the Guideline establishes a screening level of 240 du for a congregate care facility below which ROG emission will not be significant.

The City’s use of the BAAQMD screening levels as evidence of no significant air quality impacts is incorrect and not based on substantial evidence for several reasons.

First, Table 3-1 of the BAAQMD Guideline expressly cautions that the screening levels are not sufficient when a project includes back-up generators. The note to Table 3-1 states that “[e]missions from engines (e.g., **back-up generators**) and industrial sources subject to Air District Rules and Regulations embedded in the land uses are not included in the screening estimates and must be added to the above land uses.” BAAQMD Guidelines, pp. 3-3 (emphasis added). Because the IS/MND fails to include the emissions from testing and operating the back-up generators proposed for the Project, its air quality conclusion is unsupported by substantial evidence and errs as a matter of law. SWAPE Comments, pp. 1-3.

Second, the BAAQMD screening criteria do not address emissions associated with demolition activities: “These screening levels are generally representative of new development on greenfield sites without any form of mitigation measures taken into consideration.” BAAQMD Guidelines, pp. 3-2. Because the “analysis” does not address the demolition activities proposed as part of the Project, it is not supported by substantial evidence and errs as a matter of law. SWAPE Comments, pp. 1-3.

Third, the Project is not a “congregate care facility.” According to an industry source, “[a] congregate care facility is typically for residents 55 years of age or older, where limited or no assistance with daily living activities is needed and a state issued

license is not required.” <http://thejchgroup.com/blog/what-is-a-congregate-care-facility/>. This is not equivalent to the proposed convalescent hospital facility. Because the screening criteria relied upon by the IS/MND do not reflect the actual Project, the IS/MND’s air quality discussion and conclusion is not supported by substantial evidence and errs as a matter of law.

Because the screening level table does not provide criteria that address back-up generators and the proposed demolition activities, and the criteria referenced in the IS/MND are not for a facility that is remotely similar to the proposed project, the IS/MND is not supported by substantial evidence and a fair argument exists that the Project may have significant air quality impacts.

**B. There is substantial evidence of a fair argument that the Project may have significant health risk impacts from its emissions of toxic air contaminants.**

The IS/MND claims that construction of the Project will only result in an increased cancer risk of 0.1 in a million. IS/MND, pp. 39-40. Comparing that figure to BAAQMD’s threshold of significant for toxic air contaminants of ten in one million, the IS/MND concludes that the Project will have no significant health risks to nearby sensitive receptors. *Id.* As noted by SWAPE, “review of the construction HRA demonstrates that the analysis is based on diesel particulate matter (DPM) emission estimates from a CalEEMod file that the Project Applicant fails to provide.” SWAPE Comment, p. 3. Hence, nothing in the documents made available to the public during the comment period provide substantial evidence supporting the City’s health risk assessment for the Project’s construction.

As for the Project’s operational emissions, the IS/MND concludes that there will be no significant health risks but does not rely on any health risk assessment prepared for the Project. IS/MND, p. 41. As SWAPE emphasizes, “the IS/MND fails to evaluate, whatsoever, the health risk impacts posed to nearby residences as a result of exposure to TAC emissions generated by operation of the Project.” SWAPE Comments, pp. 3-4. In order to fully disclose the potential health risks associated with the Project, an accurate health risk assessment encompassing the Project’s operational phase and consistent with guidelines published by the Office of Environmental Health Hazard Assessment must be prepared. Currently, the IS/MND’s conclusion that the Project will not result in any significant health risks is not supported by substantial evidence and a fair argument exists that the Project may have significant health risk impacts.

The arbitrariness of the IS/MND’s health risk discussion is further established by SWAPE’s preparation of a Level 2 health risk screening assessment (“HRSA”). BAAQMD recommends a significance threshold of 10 in one million cancer risk for infants, children and lifetime residency. Applying the U.S. Environmental Protection Agency’s AERSCREEN model, as recommended by OEHHA and CAPCOA, SWAPE calculates that construction and operation of the Project will result in cancer risks to

infants, children, adults, and nearby residents over the course of a 30-year residential lifetime of, respectively, 69 in one million, 46 in one million, 7 in one million, and 120 in one million, well in excess of BAAQMD's threshold. SWAPE Comment, pp. 5-7. Based on this substantial screening evidence, a fair argument is present that the Project may have significant health risk impacts on infants, children and nearby residents. A complete health risk assessment must be prepared for the Project in order to provide a substantial basis for any conclusions regarding the Project's health risks to current residents.

In addition, the IS/MND fails to meaningfully apply the directives issued by the Supreme Court in its 2015 decision in *California Building Industry Ass'n v. BAAQMD* (2015) 62 Cal.4th 369. As acknowledged by the IS/MND, in *BIA v. BAAQMD* the Supreme Court held that a CEQA document must analyze "a project's potentially significant *exacerbating* effects on existing environmental hazards – effects that arise because the project brings 'development and people into the area affected.'" 62 Cal.4<sup>th</sup> at 388. "Because this type of inquiry still focuses on the *project's impacts on the environment*—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project's future users or residents is entirely consistent with this focus and with CEQA as a whole." *Id.* at 389. Rather than evaluate whether the Project's additional traffic and vehicle emissions exacerbate the existing TAC emissions spewing onto the Project site from the highway by adding additional vehicles to that serious TAC source, the IS/MND ignores the Project's additional TAC emissions from additional vehicles associated with the Project using the adjacent highway and contributing to its TAC emissions onto the Project site.

Likewise, contrary to CEQA, by adding TAC emissions to the immediate area, the Project cannot avoid evaluating the cumulative impacts of the Project including the adjacent highway's existing TAC emissions on nearby sensitive receptors. The estimated increased cancer risks to infants of 92.7 in a million from the Project's TAC emissions is only slightly below the BAAQMDF significance threshold of 100 in a million cancer risk. Those TAC emissions are thus considerable, albeit just below the threshold. There is no evidence of what the operational TAC emissions are from the back-up generators and hundreds of vehicles per day accessing the project site, presumably including diesel trucks. Given that the IS/MND estimates a health risk of 21.2 per million cancer risk from the highway alone already grossly exceeds the BAAQMD significance threshold of 10 in a million, the addition of TACs from the Project's construction or operation is considerable and may significantly contribute to the Project's cumulative adverse health risk impact. Hence, the IS/MND's conclusion that the Project will not have cumulative health risk impacts is not supported by substantial evidence and a fair argument exists that the Project will result in cumulative health risks. Nor is there any assessment of how the proposed TAC mitigations, including air filters, may reduce these cumulative impacts. The resulting indoor air levels are not analyzed. Given the extensive landscaping proposed for the Project, the residents will not be in their rooms at all times and will be exposed to significant levels

of TACs whenever they venture outside the buildings.

**C. A fair argument exists that the project may have significant GHG emissions because the Project fails to explain how it complies with requirements of the City's GHG Reduction Strategy and does not include solar panels or other strategies supposedly encouraged by the Strategy.**

The IS/MND claims that because the Project is not inconsistent with the mandatory requirements of the City's GHG Reduction Strategy ("GHGRS"), it will not have any significant impacts from its GHG emissions. IS/MND, pp. 82-85. The Project is proposing entirely new uses, new traffic and new operational effects than currently exist at the site. A review of the GHG emission discussion confirms that the Project's actual measures are not identified and not all of the mandatory requirements of the GHG strategy are being implemented. Nor does the discussion show that any of the relevant measures to be encouraged by the City are being implemented at the site. Most of the measures adopted for the Project will have little relevance to GHG reductions, such as for example, "enhanc[ing] the pedestrian environment with new sidewalks." IS/MND, p. 82. The Project is isolated from other neighborhoods and amenities and abuts a freeway and will focus on assisting convalescent patients. How improving sidewalks would significantly enhance a pedestrian environment in such a way as to reduce any GHG emissions at such a facility is unknown and without any evidentiary support. No estimate or prediction of any people walking to the facility is suggested in the IS/MND. No connections or amenities that would draw pedestrians from nearby residential areas are proposed. Convalescing patients will not be strolling uphill from the site or onto the adjacent highway.

Going through the relevant GHG reduction strategies included in the City's plan, there is no evidence that the Project will comply with all of the GHG Reduction Strategy's mandatory requirements. Moreover, there is an almost complete failure to implement any strategy being encouraged by the City. In addition, a number of the mandatory strategies, as applied to the Project, would not have any positive reduction effect on GHG emissions and would appear to do the opposite.

For example, without explanation, the IS/MND claims that if the Project is consistent with the General Plan's Public/Quasi-Public land use designation for the site, that fact somehow will control GHG emissions. IS/MND, pp. 82-83 (Table 4.7-1). This may be true for portions of the General Plan that concentrate development near transit and San Jose's downtown area. It cannot be true for an isolated Public/Quasi-Public designation that is interpreted to allow a large convalescent facility to be built in an isolated open space area surrounded by unrelated residential development. No rationale is provided of how this particular land use designation serves to reduce any GHG emissions.

Although LIUNA agrees with the Project's inclusion of bicycle and pedestrian facilities, as noted above, there is no discussion or effort to quantify how these facilities will meaningfully reduce GHG emissions at such an isolated facility with no use relevant to the surrounding neighborhoods. IS/MND, p. 83.

The IS/MND claims that the Project will comply with certain components of the GHG Reduction Strategy, including "Implementation of Green Building Measures related to: • Solar Site Orientation • Site Design • Architectural Design • Construction Techniques • Consistency with City Green Building Ordinance and Policies • Consistency with GHGRS Policies: MS-2.3, MS-2.11, and MS-14.4." IS/MND, p. 83. The referenced GHGRS policies represent a laundry list of possible design and construction measures a project may utilize. The measures however do not say which ones will be used for this Project or how they would be implemented for this Project. Thus, GHGRS Policy MS-2.3 states that the City shall "encourage consideration of solar orientation, including building placement, landscaping, design and construction techniques for new construction to minimize energy consumption." GHGRS, Attachment B, p. 33. Merely encouraging and considering such measures does not indicate that they will be implemented at this Project. Policy MS-2.11 appears somewhat more proactive, stating that the City will "[r]equire new development to incorporate green building practices, including those required by the Green Building Ordinance." *Id.* Policy MS-2.11 also provides a few examples: "[s]pecifically, target reduced energy use through construction techniques (e.g., design of building envelopes and systems to maximize energy performance), through architectural design (e.g. design to maximize cross ventilation and interior daylight) and through site design techniques (e.g. orienting buildings on sites to maximize the effectiveness of passive solar design)." *Id.* Policy MS-14.4 is similar, stating that the City will "[i]mplement the City's Green Building Policies (see Green Building Section) so that new construction and rehabilitation of existing buildings fully implements industry best practices, including the use of optimized energy systems, selection of materials and resources, water efficiency, sustainable site selection, passive solar building design, and planting of trees and other landscape materials to reduce energy consumption." *Id.*

None of these general admonitions to employ green building components in designing a project indicates or explains how the Project will employ such techniques or whether the existing design includes any such components. For example, nothing in the IS/MND indicates if or how the Project's orientation would "maximize the effectiveness of passive solar design." See SWAPE Comments, p. 10.

There is no indication as to how water efficiency is promoted by the landscaping proposed for the Project. Indeed, the Project proposes to use 931,258 gallons of water per day. IS/MND, p. 140. Only 28,365 gallons of that would be for the Project's indoor use. (*Id.*) Compared to the current estimated water use of the site at approximately 1,213 gallons of water per day, there is certainly nothing in the IS/MND to suggest some effective water conservation strategy, drought resistant landscaping or any other measure that would actually reduce GHGs. See SWAPE Comment, p. 10. The IS/MND

ignores GHGRS Policy MS-21.3 which calls on the City to “[e]nsure that San José’s Community Forest is comprised of species that have low water requirements and are well adapted to its Mediterranean climate.” GHGRS, Att. B, p. 34. See SWAPE Comment, p. 10.

The site selection for the Project has nothing to do with promoting GHG reductions or energy efficiency, amounting to an almost random opportunity to replace a somewhat degraded site with a type of project generally deemed beneficial and in demand. No other details about materials, design or any other aspect of the Project indicate how it will further the referenced green building examples or achieve any particular LEED rating.

The various references to the City’s Private Sector Green Building Policy and Green Building Ordinance boil down to a requirement that certain categories of projects within San Jose achieve certain levels of LEED certification. San Jose Municipal Code, Chapter 17.84. LEED certification is not transparent to a reader of the IS/MND. The various LEED certification levels are based on a point system. The IS/MND does not explain the LEED point system. Nothing in the IS/MND explains what features the Project would claim to justify whatever points may be available to the Project in the LEED system. In other words, it is completely opaque for the IS/MND to invoke the City’s Private Sector Green Building Policy and Green Building Ordinance, which in turn invoke a LEED point system that is inaccessible to the reviewing public, as a logical explanation of how the Project’s specific design elements and facilities will reduce GHG emissions.

In addition, the IS/MND does not accurately describe even the City’s Green Building requirements. The IS/MND states that pursuant to the City’s Private Sector Green Building Policy, “the proposed project would be required to be LEED Certified.” IS/MND, p. 84. However, the Private Sector Green Building Policy actually requires this Project to be certified LEED Silver. <http://www.sanjoseca.gov/index.aspx?NID=3284> (“Commercial/Industrial Tier 2 - ≥ 25,000 square feet = LEED Silver”). Residential projects may rely on a mere LEED certification. This is not a residential or assisted living facility but a private, for-profit, convalescent hospital, a commercial enterprise. San Jose Municipal Code § 17.84.104 (“‘Commercial / industrial building’ means all non-residential construction including construction of retail space, office space, and other commercial uses, regardless of the zoning scheme at the project’s location”). See *also* § 17.84.112 (“‘Large commercial building’ means a non-residential building having a gross floor area of twenty-five thousand (25,000) square feet or more and is not a high-rise building”). Large commercial buildings are deemed Tier two projects under the Code. § 17.84.121 (“Tier two project” means a large commercial industrial building...”). “All tier two commercial industrial projects for which this chapter is applicable must receive the minimum green building certification of LEED Silver.” § 17.84.220.

Even with that heightened LEED certification level, the City's ordinance does not guarantee that even a large commercial project such as the proposed Project will necessarily achieve LEED Silver because it provides for Project specific exemptions at the discretion of the Director of Planning. § 17.84.210. As a result, no one can be sure what compliance with the City's Green Building Ordinance may look like for this Project.

In addition to the lack of relevance of many of the table entries, and the lack of any effort to explain how the project's designs would meet the City's policy and achieve a LEED Silver rating, the IS/MND table is most notable for emphasizing the GHG reductions the Project refuses to do, despite the City claiming to have encouraged their implementation. Hence, the Project refuses to install solar panels to make the Facility energy independent. IS/MND, p. 84. Despite its seemingly excessive proposed water use, no water recycling is proposed to meet that excessive demand. *Id.* Rather than reduce traffic by reducing parking, the Project proposes to increase parking above the City's minimum requirements. *Id.* In short, the IS/MND's GHG emissions discussion fails to provide any substantive discussion of the Project's GHG emission impacts or what, if any, mitigations would be applied to the Project. This aspect of the IS/MND is entirely without evidentiary support and a fair argument exists that the Project may have significant GHG emission impacts.

**D. The IS/MND fails to address all of the Project's potential impacts to biological resources at and near the Project site.**

Wildlife biologist Dr. Shawn Smallwood, Ph.D., concludes that the Project may have significant impacts on several special status species. An EIR is required to analyze and mitigate these impacts. Dr. Smallwood's expert comments and resume are attached hereto as Exhibit B.

**a. The wildlife baseline relied upon by the IS/MND is woefully inadequate.**

Wildlife biologist Dr. Shawn Smallwood, Ph.D., concludes that the Project may have significant impacts on several special status species. An EIR is required to analyze and mitigate these impacts.

The IS/MND's baseline for biological impacts is incomplete, outdated, and understates the biological values at the Project site. According to the IS/MND, a reconnaissance-level wildlife survey was conducted on 12 September 2008 and a reconnaissance level plant survey was done on 21 September 2008. IS/MND, App. B, p. 1; Smallwood Comments, p. 2. A follow-up survey occurred on February 9, 2009. IS/MND, App. B, p. 1. A reconnaissance-level site survey and a focused survey for adult Bay checkerspot butterflies (*Euphydryas editha bayensis*) was conducted on 31 March 2015. IS/MND, App. B, p. 2. "No details were reported about these surveys, such as when they began, how long they lasted, and what methods were used." Smallwood

Comments, p. 2. Hence, whether the biotic assessment is substantial evidence is not apparent from the face of the document or the IS/MND.

The surveys conducted for the Project do not provide substantial evidence of the presence or absence of species of concern that are known to be present in the vicinity. For example, the Biotic Assessment states that “No evidence of burrowing owls was observed on the site during reconnaissance-level surveys conducted for the project...” Biotic Assessment, p. 14. Based on this assertion, the Assessment goes on to conclude that “[t]here is a low probability of occurrence of the burrowing owl, a California species of special concern, on the site due to the paucity of California ground squirrel burrows, and if this owl occurs on the site, it would not do so within the developed portion of the site where direct impacts will occur.” *Id.* Dr. Smallwood notes that the lack of evidence of burrowing owls was not necessarily because they weren’t there, but because the surveys were not conducted during the breeding season when the owls may be present and did not adhere to the survey protocols for burrowing owls prepared by the Department of Fish & Wildlife. As Dr. Smallwood writes:

none of these surveys occurred during the burrowing owl breeding season, and none were consistent with the surveys recommended in the available survey guidelines of the time (CDFW 1995) or since (CDFW 2012). Therefore, H.T. Harvey & Associates’ (2015:14) statement, “*No evidence of burrowing owls was observed on the site during reconnaissance-level surveys conducted for the project...*” was misleading because such a survey cannot provide the evidence needed to determine absence. The City of San Jose’s (2018:47) determination was even more misleading by claiming that the site lacks burrows of California ground squirrel, a claim that is contrary to the reporting of H.T. Harvey & Associates (2015). Detection surveys are needed for burrowing owls on and near the project site, consistent with the recommendations of CDFW (2012). An EIR should be prepared along with a report of appropriate detection surveys.

Smallwood Comments, p. 2. Given the paucity of owls present in Santa Clara and the importance of that county to the breeding success of the species, the Project’s baseline must be informed by protocol level surveys that can determine the presence or absence of burrowing owls at the site. *Id.* Only with an accurate baseline could the IS/MND purport to assess the impacts on that species of concern.

The same baseline problem afflicts the IS/MND’s discussion of bat species on the site. No attempt was made at identifying the baseline for these species. No surveys were performed that could detect bats. According to Dr. Smallwood, “[a]coustic monitoring could have been done, or thermal-imaging surveys.” Smallwood Comments, p. 3. Given bats ability to roost in a variety of locations, Dr. Smallwood concludes that “[t]he potential for bat occurrences is likely higher than reported” in the Assessment. *Id.*

Without having looked for bats, the IS/MND cannot have disclosed their presence or the extent of any impact to that species.

The surveys conducted almost a decade ago are similarly flawed for white-tailed kite and dusky woodrats, two species of special concern. From his experience and expertise, DR. Smallwood notes that “White-tailed kites require substantial survey effort to locate nest sites (Erichsen et al. 1995), and these are unlikely to be found in February when the species is still roosting within groups of conspecifics.” Smallwood Comments, p. 3. The same is true for detecting woodrats: “Likewise, I know from experience that woodrats can be difficult to detect without the aid of live-trapping. H.T. Harvey & Associates (2015) reported no use of live-trapping for small mammals.” *Id.*

In addition to these inadequate surveying methods and unidentified baseline, the IS/MND and its biotic assessment understate the range of animal species that likely are present on the site. Reviewing various on-line databases, Dr. Smallwood identifies no less than 30 special status species one can expect use the site:

A white-tailed kite was seen on the edge of the neighborhood immediately east of the project site. A California tiger salamander was found only 1,200 meters east of the project site only 3 months ago. Thirty special-status species occur in the area (Table 1), two of them were seen on site, and multiple others have added potential to occur on site due to the occurrence of the keystone species, California ground squirrel (*Otospermophilus beecheyi*) (H.T. Harvey & Associates 2015:6).

Smallwood Comments, pp. 1, 4-5 (Table 1).

In regard to loggerhead shrikes and white-tailed kites, the biotic assessment acknowledges these species may be present. The Assessment then states that “the loss of one pair of each species [white-tailed kite and loggerhead shrike] would not be considered a significant impact under CEQA given the extremely low proportion of the regional population that would be represented by a single pair.” Biotic Assessment, p. 13. Dr. Smallwood notes that “losing individuals of species such as white-tailed kite and loggerhead shrike is not akin to losing individuals of common, r-selected species such as California vole or deer mouse. Species such as white-tailed kite and loggerhead shrike are assigned special status due to the effects of cumulative impacts – due to the past and ongoing losses of breeding colonies and of many single pairs or individuals causing noticeable declines in the species.” Smallwood Comments, p. 3. Dr. Smallwood further notes that this conclusion is without any substantial evidence, the assessment including “no information on local populations of loggerhead shrike or white-tailed kite – no spatial boundaries, no population size estimates, nothing at all about populations or even local demography.” *Id.*, p. 6. In addition, the IS/MND and Assessment do not address the Project’s impacts on foraging habitat for loggerhead shrikes and white-tailed kites, assuming only nesting sites matter to the species. As Dr. Smallwood points out, “[f]oraging habitat is just as critical to species as is nesting habitat, and really there

is no distinction between foraging and nesting habitat when it comes to nesting success.” As a result, the conclusion that the Project will not significantly impact shrikes and kites relied upon by the IS/MND is not supported by substantial evidence and a fair argument exists that the Project may have significant impacts on the species of special concern.

The IS/MND also fails to address the Project’s possible impacts on the non-breeding habitat of California tiger salamander and California red-legged frog. As Dr. Smallwood explains:

the [IS/MND] draws a false distinction between breeding and non-breeding habitat of California tiger salamander and California red-legged frog, concluding no significant impacts due to lack of breeding habitat on the project site. Having performed extensive surveys for both of these species, I can attest to the importance of ground squirrel burrows as non-breeding season refugia for these species. For example, in two years of surveys for California red-legged frogs in the Almaden, Los Gatos, and Calero watersheds just west-southwest of the project site, I found the species in only one location, and that happened to be the only location along many miles of surveyed streams where ground squirrels remained abundant in the surrounding uplands (US Fish and Wildlife Service unpublished data). Similarly, at a large study area to the north of the project site, I found California tiger salamander larvae and California red-legged frog adults in ponds surrounded by uplands occupied by ground squirrels or pocket gophers (Smallwood and Morrison 2007). Orloff (2011) reported California tiger salamanders dispersing to upland refugia up to 2.2 km from breeding ponds, or well beyond the 1,200 m distance between the project site and the recently observed California tiger salamander posted on iNaturalist. The grasslands of the project site could very well be important refuge and crossover habitat used by California tiger salamander and California red-legged frog.

Smallwood Comments, pp. 6-7. Given the close proximity of these species to the Project site, the IS/MND fails as a matter of law to analyze the impacts to these species’s non-breeding habitat.

**b. The IS/MND fails to address the Project’s potential significant impacts on wildlife movement.**

The IS/MND and biotic assessment fail to address impacts on wildlife movement, instead looking for impacts to a “designated migratory wildlife corridor.” As Dr. Smallwood states, the CEQA significance threshold is whether a project will “[i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors...” See Smallwood Comments, p. 7. Impacts to wildlife movement may occur with or without the

presence of a migratory wildlife corridor, never mind a *designated* migratory wildlife corridor, whatever that phrase may signify. *Id.*

Dr. Smallwood notes that “[w]ildlife movement in the region is often diffuse rather than channeled (Runge et al. 2014, Taylor et al. 2011), and includes stop-over habitat used by birds and bats (Taylor et al. 2011), staging habitat (Warnock 2010), and crossover habitat used by nonvolant wildlife during dispersal, migration or home range patrol.” The IS/MND and biotic assessment cite no source for the “designation” of a wildlife corridor. No analysis of any impacts to wildlife movement, including birds’ stop-over habitat, is included in the IS/MND and its appendix.

**c. The Project may have significant effects on wildlife resulting from collisions with vehicles associated with the Project.**

Dr. Smallwood identifies the serious impacts that increased traffic has on wildlife. Smallwood Comment, pp. 7-8. Indeed, as he points out, the Project is proposed to be located in the midst of a major hotspot of wildlife mortality. *Id.*, p. 8. The additional 759 vehicle trips expected from the Project will result in collisions with wildlife. *Id.* Wildlife that will be run over by the Project’s additional traffic may include special-status species of wildlife such as Alameda whipsnake (*Masticophis lateralis euryxanthus*), California red-legged frog (*Rana draytonii*), California tiger salamander (*Ambystoma californiense*), and American badgers (*Taxidea taxus*). Although these species do not appear on the Project site, they do cross roads over which traffic from the Project will travel. As Dr. Smallwood explains:

Vehicle collisions have accounted for the deaths of many thousands of reptile, amphibian, mammal, bird, and arthropod fauna, and the impacts have often been found to be significant at the population level (Forman et al. 2003). Increased use of existing roads will increase wildlife fatalities (see Figure 7 in Kobylarz 2001). It is possible that project-related traffic impacts will far exceed the impacts of land conversion to residential use. But not one word of traffic-related impacts appears in the IS/MND – a gross shortfall of the CEQA review.

Smallwood Comment, p. 7. The IS/MND fails to recognize at all this potential significant impact of the project. Because a fair argument exists that the Project may have a significant impact on wildlife in the vicinity, an EIR must be prepared to assess this impact and identify appropriate mitigation.

**d. The IS/MND fails to address the Project’s potential cumulative impacts on habitat fragmentation.**

The IS/MND does not assess the likelihood of cumulative impacts to wildlife, especially from habitat fragmentation in the vicinity. Smallwood Comment, p. 8. Because a fair argument exists that developing currently undeveloped and vegetated

sites on the southern edge of San Jose will further fragment wildlife habitat in this area, there is a fair argument that the project may contribute to habitat fragmentation.

- e. The pre-construction surveys identified in the IS/MND are not sufficient to address potential impacts to bats and birds that may be present at the site.**

Dr. Smallwood has reviewed the proposed wildlife impact mitigations identified in the IS/MND. Smallwood Comment, p. 8. Although he agrees with the need for preconstruction surveys for bats and birds at the site, he notes that preconstruction surveys will come too late either to disclose the Project's anticipated impacts or to fully mitigate impacts to birds and bats. *Id.* Dr. Smallwood states that detection surveys need to be performed to professional standards and that information used to disclose potential impacts and to inform the pre-construction surveys. As Dr. Smallwood explains, "Detection surveys are needed, because detection surveys provide the bases for impacts assessments and formulation of mitigation measures. They also inform preconstruction surveys, which are otherwise performed in a rushed manner just ahead of the tractor blade." *Id.* By failing to determine the actual baseline of bird's and bat's reliance on the site for roosting, nesting and foraging and instead waiting until the eve of construction to determine what roosts, nests, birds, and bats may suffer impacts from the Project, the IS/MND fails to evaluate and mitigate the Project's potential significant impacts to birds and bats.

## **E. CONCLUSION**

For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,



Michael R. Lozeau  
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