

BY EMAIL and HAND-DELIVERY

December 13, 2016

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**Re: DRC2015-00797
Santa Anita Warehouse – Oakmont Industrial Group
Initial Study | Mitigated Negative Declaration**

Dear Mr. Perez:

This supplemental comment letter is submitted on behalf of Laborers International Union of North America, Local Union 783, and its members living in San Bernardino County (collectively, "LIUNA" or "Commenters") concerning the City of Rancho Cucamonga's (the "City") Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the project known as DRC2015-00797, also known as the Santa Anita Warehouse, proposed by the Oakmont Industrial Group (the "Project"). These comments supplement the earlier comment letter dated December 8, 2016 also submitted on behalf of LIUNA.

LIUNA wanted to bring to the City's attention a substantial inconsistency between the proposed IS/MND and the 2010 General Plan Final Program Environmental Impact Report ("2010 General Plan EIR") and findings on which the IS/MND relies. The IS/MND's air quality analysis concludes that the Project will have less than substantial air quality impacts because it will implement the mitigation measures identified in the 2010 General Plan EIR. However, the 2010 General Plan EIR and the accompanying determination by the City that implementation of the General Plan would have significant and unavoidable impacts from emissions of numerous air pollutants assumed that all of the mitigations identified in the 2010 General Plan EIR would be implemented. In other words, even if every single project in the City included the air emission mitigations identified in the General Plan EIR, the City already determined that those mitigations would not prevent the anticipated significant and unavoidable air quality impacts. The IS/MND, contrary to the 2010 General Plan EIR and the City's statement of overriding considerations, claims that the General Plan EIR mitigations now will avoid cumulative air quality impacts. The IS/MND goes so far as to cite the 2010 General Plan EIR for this proposition. That prior EIR, in fact, draws the opposite conclusion. Thus, the IS/MND's air quality analysis lacks

any evidence to support the conclusion that the Project's cumulative air quality impacts would not be significant.

Moreover, because the 2010 General Plan EIR already determined that air quality emissions from the Project and other development consistent with the City's General Plan will have unavoidable cumulative air quality impacts and the Project proposes the same mitigations already considered and deemed inadequate to avoid these impacts by the General Plan EIR, the City cannot now rely on an IS/MND applying the same inadequate mitigations. The City's previous analysis and statement of overriding considerations are substantial evidence of a fair argument that the Project may have significant cumulative air quality impacts. Accordingly, the City must prepare an EIR addressing that continuing admitted impact and make a new statement of overriding considerations.

LIUNA also wanted to bring to the City's attention the expert review of the Project and IS/MND by Shawn Smallwood, Ph.D. Dr. Smallwood points out numerous flaws in the biological surveys relied upon by the IS/MND and identifies numerous significant impacts that the Project may have on wildlife, including sensitive and listed species, that have either been identified or likely use the Project site. Dr. Smallwood's comments are attached and incorporated by reference as well as summarized below.

A. Mitigations from the 2010 General Plan EIR Which The City Determined Were Not Sufficient to Avoid Cumulative Air Quality Impacts, Cannot Now Be Sufficient to Avoid Those Impacts For The Project.

The 2010 General Plan EIR concluded that, even after implementation of the air quality mitigation measures, its implementation would nevertheless result in significant and unavoidable long-term emissions of PM10 and PM2.5. The General Plan EIR explains this at several points:

The proposed 2010 General Plan Update includes many goals and policies, described above, that would reduce long-term criteria air pollutant emissions. Also, MM 4.3-1 and MM 4.3-2 describe a range of measures to be applied to future projects, as feasible, to reduce emissions. However, the anticipated reduction in emissions with implementation of such measures is not quantifiable at this time. Therefore, the proposed project would be considered to have a significant and unavoidable direct impact related to emissions of PM10 and PM2.5....

General Plan EIR, p. 4.3-31. Likewise, the General Plan EIR states:

As discussed above, the proposed 2010 General Plan Update would result in a significant and unavoidable direct impact related to emissions of PM10 and PM2.5 with implementation of identified 2010 General Plan Update goals and policies, MM 4.3-1 and MM 4.3-2, as feasible. Therefore, because SCAB is designated non-attainment for particulates, this significant and unavoidable direct impact would also be a significant and unavoidable cumulative impact for PM10 and PM2.5.

Id., p. 4.3-32. Thus, the General Plan EIR identifies Impact 4.3-33:

Impact 4.3c: ... Estimated net emissions of PM2.5 and PM10 would result in a significant and unavoidable direct impact. Therefore, because SCAB is designated nonattainment for particulates, this significant and unavoidable direct impact would also be a significant and unavoidable cumulative impact for PM10 and PM2.5 after implementation of proposed 2010 General Plan Update goals and policies, MM 4.3-1 and MM 4.3-2, as feasible.

Id., p. 4.3-33. MM 4.3-1 and MM 4.3-2 of the General Plan EIR lists out the mitigation measures which the EIR included in its significant impact determination. *Id.*, p. 4.3-34 – 4.3-36. The General Plan EIR is quite explicit, providing a clear determination of the “Level of Significance **After Mitigation**” that the General Plan will result in cumulative impacts that are “Significant and Unavoidable for PM10 and PM2.5.” *Id.*, p. 4.3-36.

The IS/MND’s cumulative air quality impact discussion exclusively relies upon the 2010 General Plan EIR’s analysis and incorporates the FEIR’s air pollutant emission mitigations. However, the IS/MND ignores the fact that the unavoidable air impacts identified in the General Plan FEIR will result even **after** implementation of the mitigations identified in the FEIR and now incorporated into the IS/MND. On the contrary, the IS/MND misstates the FEIR as finding that the PM2.5 and PM10 cumulative impacts would be significant “if they cannot be mitigated on a project level basis to a level less-than-significant.” IS/MND, p. 11. See *id.*, p. 14. No such qualifier is found in the FEIR’s significance determination. Nor would it make sense that the identified cumulative impacts would ever be mitigated by a single project. Where, as here, the mitigations identified in the General Plan EIR are the mitigations now assigned to the Project, there obviously is no change to the cumulative impacts already anticipated by the 2010 General Plan EIR.

Ignoring the actual language of the 2010 General Plan EIR, the IS/MND states that, “with implementation of the following mitigation measures from the City’s 2010 General Plan FPEIR that are designed to minimize long-term, operational air quality impacts, the Project’s contribution to cumulative impacts will be less-than-significant.” IS/MND, p. 14. See *id.*, p. 15 (“With implementation of mitigation measures listed in subsection b) above from the City’s 2010 General Plan FPEIR, which are designed to minimize long-term, operational air quality impacts, cumulative impacts will be less-than-significant”); p. 11 (“With implementation of the following best practices and mitigation measures from the City’s 2010 General Plan FPEIR that are designed to minimize short-term air quality impacts, the project’s contribution to cumulative impacts will be less-than-significant”). This conclusion is fundamentally flawed and is not supported by substantial evidence because, even with the General Plan EIR mitigations, the City already has concluded in that EIR that cumulative impacts from PM10 and PM2.5 would nevertheless continue to occur.

For shorter-term construction emissions, the IS/MND also states:

The General Plan Final Program Environmental Impact Report (FPEIR) analyzed the impacts of Air Quality based on the future build out of the City. Based upon on the Urban Emissions Model (URBEM1S7G) estimates In

Table 4.3-3 of the General Plan (FPEIR), Nitrogen Dioxide (NO₂), Ozone (O₃), and Particulate Matter (PM_{2.5} and PM₁₀) would exceed SCAQMD thresholds for significance; therefore, they would all be cumulatively considerable if they cannot be mitigated on a project basis to a level less-than-significant. This city-wide increase in emissions was identified as a significant unavoidable adverse impact for which a Statement of Overriding Considerations was ultimately adopted by the City Council as noted in the Section 4.3 of the General Plan FPEIR.

IS/MND, p. 11. Again, as noted above, the 2010 General Plan EIR found unavoidable cumulative air pollution impacts after the identified mitigation was applied. Thus, even if a particular project applies the FEIR's mitigations, it does not alter the existing conclusion that a project's emissions of PM_{2.5} and PM₁₀ will still contribute to a significant cumulative particulate matter problem.

In addition to lacking substantial evidence justifying the City's inconsistent conclusions regarding cumulative PM_{2.5} and PM₁₀ emissions, CEQA as a matter of law also forbids the City from using an IS/MND to effectively erase a prior EIR determination of unavoidable significant impacts and statement of overriding considerations from which it is tiering. The IS/MND tiers from the 2010 General Plan EIR. IS/MND, p. 52.

In the case of *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125, the court of appeal held that when a "first tier" EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later tiered projects to ensure that those unmitigated impacts are "mitigated or avoided." *Id.* citing CEQA Guidelines §15152(f). The court reasoned that the unmitigated impacts were not "adequately addressed" in the first tier EIR since they were not "mitigated or avoided." *Id.* Thus, significant effects disclosed in first tier EIRs will trigger second tier EIRs unless such effects have been "adequately addressed," in a way that ensures the effects will be "mitigated or avoided." *Id.* Such a second tier EIR is required, even if the impact still cannot be fully mitigated and a statement of overriding considerations will be required. The court explained, "The requirement of a statement of overriding considerations is central to CEQA's role as a public accountability statute; it requires public officials, in approving environmental detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support." *Id.* at 124-125.

This reasoning applies in particular here where the mitigation for the Project are incorporated from the previous 2010 General Plan EIR. If those mitigations were insufficient to address the significant cumulative particulate matter emissions in the General Plan, they are equally unable to address those impacts when applied to the current Project. The FEIR itself gives rise to a fair argument that the Project's particulate matter emissions may have significant cumulative impacts, requiring the preparation of a new EIR for the Project.

B. Dr. Smallwood's Expert Review is Substantial Evidence of a Fair Argument That the Project May Have Significant Impacts on Biological Resources Requiring the Preparation of an EIR.

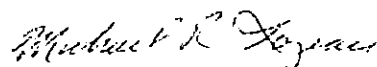
Dr. Smallwood's expert review of the Project and IS/MND has identified a number of deficiencies in the analysis and potential environmental impacts. Dr. Smallwood identifies numerous serious flaws in the surveys conducted for the Project and a general lack of compliance with recognized survey protocols established by the Department of Fish & Wildlife. Smallwood Comment. Dr. Smallwood identifies numerous sensitive animals that his review of relevant databases indicates may occur at the site and which were not assessed by the City or its consultants. *Id.*, pp. 2-4. He focuses his concerns on six species of note - Los Angeles pocket mouse, San Diego black-tailed jackrabbit, San Bernardino kangaroo rat, Silvery legless lizard, coast horned lizard, and burrowing owl - for which the IS/MND and accompanying biological assessments include unsupported conclusions, faulty survey techniques, ineffective mitigations, and lack of understanding of the particular species and its habitat. *Id.*, pp. 5-9. Dr. Smallwood points out the IS/MND's glaring omission of any recognition of the wildlife impacts that will result from traffic associated with the Project, citing the copious studies documenting the devastating toll on wildlife from trucks and other vehicles. *Id.*, p. 9.

As a matter of law, "substantial evidence includes . . . expert opinion." Pub.Res.Code § 21080(e)(1); CEQA Guidelines § 15064(f)(5). CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 935). Dr. Smallwood's comments present a fair argument that the project may have a potential significant impact on wildlife. As a result, the City must prepare an EIR for the Project.

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. We reserve the right to supplement these comments further during the upcoming public hearing on the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, 60 Cal. App. 4th 1109, 1121 (1997). Thank you for considering our comments.

Sincerely,



Michael R. Lozeau
Lozeau Drury LLP