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By E-mail

Rosalynn Hughey, Director
Thai-Chau Le, Environmental Project Manager
Department of Planning, Building and Code Enforcement
City of San Jose
200 East Santa Clara Street, 3rd Floor Tower
San Jose, CA 95113
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Re: Comment on the Draft Environmental Impact Report for the Avalon Expansion Project (File Nos. PDC17-056, PD17-027, PT18-049).

Dear Ms. Hughey and Ms. Le:

I am writing on behalf of Laborers International Union of North America Local Union 270 (“LIUNA”) concerning the Draft Environmental Impact Report (“DEIR”) for the Avalon Expansion Project (File Nos. PDC17-056, PD17-027, PT18-049) (the “Project”) in San Jose. After reviewing the DEIR, we conclude that the DEIR fails to analyze all environmental impacts and to implement all necessary mitigation measures. We request that the City of San Jose (“the City”) prepare a recirculated DEIR (“RDEIR”) in order to incorporate our concerns discussed below.

This comment has been prepared with the assistance of Shawn Smallwood, Ph.D., an expert wildlife biologist who has expertise in the areas relevant to the DEIR. Dr. Smallwood’s comment and curriculum vitae are attached as Exhibit A hereto and are incorporated herein by reference in their entirety.

I. PROJECT DESCRIPTION

The site for the Project is 18.9-acres comprised of six parcels (APNs 299-37-024, -026, -030, -031, -032, and -033) located east of Saratoga Avenue, between Blackford Avenue and Manzanita Drive. Currently, the site has 873 residential apartment units within 25 buildings, three parking garages, and several surface parking spaces. The Project would redevelop approximately 7.46 acres of the 18.9-acre site. The Project would demolish two of the existing parking garages and the leasing/amenity buildings.

The Project would construct up to 307 new residential units, 17,800 square feet of retail/commercial space, residential amenities including two pools, and a total of 1,148 new parking spaces. The construction would involve two new buildings (Avalon Building and Manzanita Building) and one parking garage. The Avalon Building would be a 252-unit, six- to seven-story mixed-use building (approximately 85 feet tall) with up to 17,800 square feet of retail space, located above a three-level parking structure (two levels below-grade and one level above-grade). The Manzanita Building would be a three-story residential building (approximately 45 feet tall) with 55 units. The parking garage would be three levels above-grade and one level below-grade (approximately 35 feet tall) with up to 742 parking stalls.

II. LEGAL STANDARD

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). *See, e.g.*, Pub. Res. Code § 21100. The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) “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. Res. Agency* (2002) 103 Cal. App. 4th 98, 109.)

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1).) “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.’” (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) 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.” (*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. (CEQA Guidelines § 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) 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.” (CEQA Guidelines § 15002(a)(2).) 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.” (Pub.Res.Code (“PRC”) § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).)

The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) CEQA requires that a lead agency analyze all potentially significant environmental

impacts of its proposed actions in an EIR. (PRC § 21100(b)(1); CEQA Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354.) The EIR must not only identify the impacts, but must also provide “information about how adverse the impacts will be.” (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings Cnty. Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.)

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.’” (*Berkeley Jets, supra*, 91 Cal. App. 4th at 1355 [quoting, *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391 409, fn. 12.]) 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.” (*San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado Cnty. Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

III. DISCUSSION

A. The DEIR Fails to Adequately Analyze and Mitigate the Potential Adverse Impacts of the Project on Wildlife.

The comment of Dr. Shawn Smallwood is attached as Exhibit A. Dr. Smallwood has identified several issues with the DEIR for the Project. His concerns are summarized below.

1. The DEIR underestimates the number of special-status species that may be impacted by the Project

The DEIR states, “Most special status animal species occurring in the Bay Area use habitats that are not present on the project site.” (DEIR, p. 47.) However, as Dr. Smallwood points out, “Multiple species of wildlife find ways to adapt to urban environments, including for foraging, nesting, cover, and as stop-over refuge during dispersal or migration.” (Ex. A, p. 2.) By looking at occurrence records and geographic range maps, Dr. Smallwood identified 26 special-status species, including six species which are particularly prone to colliding with windows, that are expected to fly through the Project site. (Ex. A, pp. 2-3.) The potential occurrence of these species at or near the Project site warrants discussion in a RDEIR.

Every CEQA document must start from a “baseline” assumption. The CEQA “baseline” is the set of environmental conditions against which to compare a project’s anticipated impacts. *Communities for a Better Env't. v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321. Section 15125(a) of the CEQA Guidelines (14 C.C.R., § 15125(a)) states in pertinent part that a lead agency’s environmental review under CEQA:

“...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.”

(See, *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 (“*Save Our Peninsula*.”) By failing to assess the presence of wildlife at or flying through the site, the DEIR fails to provide any baseline from which to analyze the Project’s impacts on birds.

2. The DEIR fails to address the potential adverse impact on bird species from window collisions.

The DEIR makes no mention of the potential impacts to birds caused from collisions with the glass windows of the Project. Analyzing the potential impact on wildlife of window collisions is especially important because “[w]indow collisions are often characterized as either the second or third largest source of human-caused bird mortality.” (Ex. A, p. 4.) As a preliminary matter, a RDEIR should include “specific details of window placements, window extent, types of glass, and anticipated interior and exterior landscaping and lighting.” (Ex. A, p. 4.)

Dr. Smallwood reviewed a number of studies in order to calculate the number of bird collisions per m² of glass windows per year. (Ex. A, p. 8.) According to his calculations, each m² of glass would result in 0.077 bird deaths per year. (*Id.*) Dr. Smallwood then looked at the building design for the Project and estimated that the Project would include approximately 3,400 m² of glass windows. (*Id.*) Based on the estimated 3,400 m² of glass windows and the 0.077 bird deaths per m² of glass windows, Dr. Smallwood estimates that the project could result in 262 bird deaths per year. (*Id.*) Because this impact was not addressed in the DEIR, the City must prepare a RDEIR to analyze the impact of window collision on bird species.

In order to mitigate the impact of the window collisions on bird species, Dr. Smallwood has suggested several possible mitigation measures. For mitigation measures involving retrofitting the existing project, Dr. Smallwood suggests: (1) marking the windows (e.g. decals, film, fritted glass); (2) managing outdoor landscape to reduce reflection of vegetation; (3) managing indoor landscape; and (4) managing nocturnal lighting. (Ex. A, p. 12.) For mitigation measures involving the siting and design of the Project, Dr. Smallwood suggests: (1) deciding on the location of structures; (2) deciding on the façade and orientation of structures; (3) selecting types and sizes of windows; (4) minimizing transparency through two parallel façades; (5) minimizing views of interior plants; and (6) landscaping so as to increase distance between windows and vegetation. (*Id.*) Dr. Smallwood also suggests that the City also look to the guidelines developed by the American Bird Conservancy and the City of San Francisco to minimize injuries and fatalities to bird species. (*Id.* at p. 13.) Even with these mitigations, however, it is not likely that the Project cannot fully mitigate this potentially significant impact. However, only a robust discussion in the draft EIR subjected to public review and comment would indicate the extent of the impact and the necessary mitigation measures.

3. The DEIR fails to address the potential adverse impact on wildlife from vehicle collisions due to increased traffic from the Project.

According to the DEIR, the Project would generate 1,896 net new daily vehicle trips. (DEIR, p. 154.) The increase in vehicle trips are likely to result in increased wildlife fatalities because vehicle collisions “crush and kill wildlife” and “the impacts have often been found to be significant at the population level.” (Ex. A, p. 13.) In terms of avian mortality, it is estimated that vehicle collisions result in the death of 89 million to 340 million birds per year. (Ex. A, p. 14.) Because the impact of vehicle collisions on wildlife was not addressed in the DEIR, the City must analyze such impacts in a RDEIR, especially the Project’s cumulative impacts.

Factors that affect the rate of vehicle collision with wildlife include: the type of roadway, human population density, temperature, extent of vegetation cover, and intersections with streams and riparian vegetation. (Ex. A, p. 14.) The City should formulate mitigation measures based on those factors.

4. The DEIR fails to address the potential adverse impact on bird species from artificial lighting from the Project.

Artificial lighting can cause substantial impacts on wildlife including displacement or altered activity patterns. (Ex. A, p. 14.) Because this impact was not addressed in the DEIR, the City must prepare a RDEIR to analyze the impact of artificial lighting on bird species.

5. The DEIR fails to address the potential adverse impact on wildlife movement due to the Project.

Even though the Project is located in an urban setting, the City should have analyzed the impact of the project on wildlife movement. Wildlife uses open spaces and trees as stop-over habitat during migrations or dispersal from natal territories. (Ex. A, p. 15.) Any mature trees on the Project site likely provide stop-over and staging habitat for wildlife moving across the South Bay. (*Id.*) Urban and commercial sprawl has already eliminated natural surfaces from much of the landscape and the project would only further cut off wildlife from their movement patterns. (*Id.*) The City must prepare a RDEIR which analyzes the impact of the Project on wildlife movement and incorporates mitigation measures as needed.

6. The Project should include additional mitigation measures to lessen the potential adverse impacts of the Project on wildlife.

The sole mitigation measure proposed in the DEIR is preconstruction bird nest surveys (MM BIO-1.1). (DEIR, p. 51.) However, as Dr. Smallwood points out, preconstruction surveys on their own are not sufficient to mitigate the impact of the Project on wildlife. “Preconstruction surveys cannot prevent, minimize, or reduce the effect of habitat loss. Their sole purpose is to detect the readily detectable individuals for temporary buffering from construction or for salvage relocation just prior to destruction by the tractor blade.” (Ex. A, p. 16.)

Preconstruction surveys should be used in conjunction with other mitigation measures to ensure that the impacts on the Project on wildlife are less than significant. In addition to preconstruction surveys Dr. Smallwood recommends performing detection surveys, which “have been developed for most special-status species of wildlife.” (Ex. A, p. 16.) Such detection surveys are necessary to support any conclusion that wildlife is absent from the Project site. (*Id.*) The City should also adopt compensatory mitigation measures to offset the impact of the project on wildlife movement because “[t]he proposed project site supports mature trees needed by bats and birds as stop-over habitat during long-distance dispersal or migration.” (*Id.*) The impact on wildlife could be further reduced by requiring minimizing nighttime light pollution. (Ex. A, p. 17.) As mentioned above, drawing from the guidelines of the American Bird Conservancy and the City of San Francisco would help to mitigate the impact of window collision on avian wildlife. (*Id.*) Lastly, compensatory mitigation measures such as funding contributions to wildlife rehabilitation facilities would further reduce the impacts of the project on wildlife. The City must prepare and circulate a RDEIR incorporating the above concerns and suggested mitigation measures.

B. The DEIR Fails to Adequately Analyze and Mitigate the Potential Adverse Impacts of the Project on Indoor Air Quality.

Formaldehyde is a known human carcinogen. Many composite wood products typically used in residential and office building construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential and office building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims. Given the prominence of materials with formaldehyde-based resins that will be used in constructing the Project and the residential buildings, there is a significant likelihood that the Project’s emissions of formaldehyde to air will result in very significant cancer risks to future residents and workers in the buildings. Even if the materials used within the buildings comply with the Airborne Toxic Control Measures (ATCM) of the California Air Resources Board (CARB), significant emissions of formaldehyde may still occur.

The residential buildings will have significant impacts on air quality and health risks by emitting cancer-causing levels of formaldehyde into the air that will expose workers and residents to cancer risks well in excess of BAAQMD’s threshold of significance. A 2018 study by Chan et al. (attached as Exhibit B) measured formaldehyde levels in new structures constructed after the 2009 CARB rules went into effect. Even though new buildings conforming to CARB’s ATCM had a 30% lower median indoor formaldehyde concentration and cancer risk than buildings built prior to the enactment of the ATCM, the levels of formaldehyde will still pose cancer risks greater than 100 in a million, well above the 10 in one million significance threshold established by the BAAQMD.

Based on expert comments submitted on other similar projects and assuming all the Project’s and the residential building materials are compliant with the California Air Resources

Board's formaldehyde airborne toxics control measure, future residents and employees using the Project will be exposed to a cancer risk from formaldehyde greater than the BAAQMD's CEQA significance threshold for airborne cancer risk of 10 per million. Currently, the City does not have any idea what risk will be posed by formaldehyde emissions from the Project or the residences.

The City has a duty to investigate issues relating to a project's potential environmental impacts. (*See County Sanitation Dist. No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98. [“[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts.”].) “If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) Given the lack of study conducted by the City on the health risks posed by emissions of formaldehyde from new residential projects, a fair argument exists that such emissions from the Project may pose significant health risks. As a result, the City must prepare a RDEIR which calculates the health risks that the formaldehyde emissions may have on future residents and workers and identifies appropriate mitigation measures.

IV. CONCLUSION

For the foregoing reasons, LIUNA Local Union 270 and its members living in the City of San Jose and the surrounding areas, urge the City to complete a RDEIR addressing the Project's significant impacts and mitigation measures.

Thank you for your attention to these comments. Please include this letter and all attachments hereto in the record of proceedings for this project.

Sincerely,



Brian Flynn
Lozeau | Drury LLP