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By E-mail

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Re: Comment on the Initial Study/Addendum for the 27 South First Street Mixed-Use Project (File No. SP18-016) (Planning Director Hearing Agenda Item No. 3.c).

Dear Director Hughey, Deputy Director Manford, and Ms. Mahomood:

I am writing on behalf of Laborers International Union of North America Local Union 270 (“LIUNA”) concerning the Initial Study/Addendum (“IS/Add”) for 27 South First Street Mixed-Use Project (File No. SP18-016) (the “Project”) in San Jose. After reviewing the IS/Add, we conclude that it fails to analyze all environmental impacts and to implement all necessary mitigation measures. The Project is currently being considered by the Planning Director as a consent item at the February 27, 2019 Planning Director Hearing. LIUNA respectfully requests that the Deputy Director remove this item from the consent calendar. LIUNA further requests that the City of San Jose (“the City”) prepare an EIR 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 IS/Add. Dr. Smallwood’s comment and curriculum vitae are attached as Exhibit A hereto and are incorporated herein by reference in their entirety. This comment has also been prepared with the assistance of SWAPE, an environmental consulting firm. SWAPE’s comment is attached as Exhibit B hereto and is incorporated herein by reference in its entirety.

I. PROJECT DESCRIPTION

The Project site is an approximately 0.6-acre site (APN 259-40-043) currently developed with a one-story, 24,696 square foot commercial building. The Project would demolish the existing commercial building and construct a 22-story residential tower with a maximum height

of 242 feet with up to 374 units and ground floor retail. Floors one and two of the building would house approximately 35,712 square feet of retail. The Project would also contain amenities for residents including a game room, a cinema room, a library, fitness space and yoga studio. Floors three to twenty-two would house the residential units. A pool and spa are proposed on level three of the building. The Project proposes three levels of below-grade parking for a total of 262 parking spaces.

The Project falls within the area covered by San Jose's Downtown Strategy 2040. The Downtown Strategy 2040 has a development capacity of 14,360 dwelling units, 14.2 million square feet of office uses, 1.4 million square feet of retail uses, and 3,600 hotel rooms. The City Council certified the Downtown Strategy 2040 Final Environmental Impact Report (FEIR) on December 18, 2018. The Downtown Strategy 2040 FEIR provided project-level clearance for impacts related to vehicle miles traveled (VMT), traffic noise, and operational emissions of criteria pollutants associated with Downtown development. The Downtown Strategy 2040 FEIR analysis assumed that project-level, site-specific environmental issues for a given parcel proposed for redevelopment would require additional review. The IS/Add is intended to provide the subsequent project-level environmental review for the Project.

II. LEGAL STANDARD

The City is tiering its environmental review for the Project from the 2018 EIR prepared for the Downtown Strategy 2040 as well as the General Plan EIR. (IS/Add, p. 2.) CEQA's many provisions addressing zoning designations and specific plans as separate project, albeit related projects, to subsequent specific development projects, underscore that the Project's construction and operation is a separate and distinct project from the Downtown Strategy. "Agencies are encouraged to tier the environmental analyses which they prepare for *separate* but related projects including general plans, zoning changes, and development projects." (14 Cal. Admin. Code § 15152(b).) Just because tiering is appropriate does not mean that a specific development project is deemed to be the same project as the prior approved area plan or general plan:

Where an EIR has been prepared and certified for a program, plan, policy, or ordinance consistent with the requirements of this section, any lead agency for *a later project pursuant to or consistent with* the program, plan, policy, or ordinance should limit the EIR or negative declaration on the *later project* to effects which:

- (1) Were not examined as significant effects on the environment in the prior EIR; or
- (2) Are susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition of conditions, or other means.

(14 Cal. Admin. Code § § 15152(d) (emphasis added).) Thus, the tiering provision expressly treats a later site specific development project as a separate project from the planning level decisions. The IS/Add's expansion of the project actually considered by the 2018 EIR renders

the tiering provisions of CEQA meaningless. Thus, the IS/Add cannot and does not try to explain how the City could make the finding required by 14 CCR § 15168(e):

Notice With Later Activities. When a law other than CEQA requires public notice when the agency later proposes to carry out or approve an activity within the program and to rely on the program EIR for CEQA compliance, the notice for the activity shall include a statement that:

- (1) This activity is within the scope of the program approved earlier, and
- (2) The ***program EIR adequately describes the activity for the purposes of CEQA.***

(14 CCR § 15168(e) (emphasis added).) As described above, the proposed mixed-use, residential tower is not within the scope of the program evaluated in the 2018 EIR and no reasonable person could claim that the 2018 EIR describes the proposed residential tower project for purposes of CEQA.

The IS/Add also fails to acknowledge that specific development projects which tier from a programmatic plan-level EIR are treated as separate projects by the tiering regulations. (14 Cal. Admin. Code § 15152(b); 14 Cal. Admin. Code § § 15152(d).) Lastly, the IS/Add ignores that, when tiering from a programmatic EIR, the City must employ the fair argument standard. (14 Cal. Admin. Code §§ 15152(f), 15070.)

The 2018 FEIR addressed the impacts related to vehicle miles traveled (VMT), traffic noise, and operational emissions of criteria pollutants associated with Downtown development. Accordingly, it is appropriate for the City to tier those aspects of the Project's environmental impacts from that prior programmatic analysis. However, for this Project which is not described in the prior programmatic EIR nor its specific impacts addressed, the City must analyze those now in the first instance applying the fair argument standard. If there is substantial evidence of a fair argument that the Project will have significant environmental impacts, the City must prepare a specific EIR for the Project.

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 Mgmt. 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. Res. 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 (*Bakersfield Citizens*); *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, supra*, 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 Univ. of Cal.* (1988) 47 Cal.3d 376, 392.) The EIR process “protects not only the environment but also informed self-government.” (*Pocket Protectors, supra*, 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, supra*, 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 Res. 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, supra*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; *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, supra*, 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*, *supra*, 124 Cal.App.4th at 928.)

III. DISCUSSION

A. The IS/Add 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 IS/Add 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 IS/Add states, “Most special status animal species occurring in the Bay Area use habitats that are not present on the project site.” (IS/Add, p. 47.) However, as Dr. Smallwood points out, “Birds, including special-status species of birds, migrate and disperse as critically important steps in their life-histories, and they often complete these steps by traversing the urban landscape. Birds passing over the urban landscape sometimes stop-over to find cover and rest.” (Ex. A, p. 2.) By looking at occurrence records and geographic range maps, Dr. Smallwood identified 22 special-status species seen on San Jose’s urban landscape at or near the project site and 5 special-status species of bat. (*Id.* at pp. 2-3.) The potential occurrence of these species at or near the Project site warrants discussion in an EIR.

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 IS/Add fails to provide any baseline from which to analyze the Project’s impacts on birds. The City must prepare an EIR for the Project which starts with an appropriate baseline from which to determine the impacts of the Project on wildlife.

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

The IS/Add 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. 6.) As a preliminary matter, an EIR for the Project should include “specific details of window placements, window extent, types of glass, and anticipated interior and exterior landscaping and lighting.” (*Id.* at p. 5.)

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, pp. 9-10.) According to his calculations, each m² of glass would result in 0.076 bird deaths per year. (*Id.* at p. 10.) Dr. Smallwood then looked at the building design for the Project and estimated that the Project would include approximately 4,398 m² of glass windows. (*Id.*) Based on the estimated 4,398 m² of glass windows and the 0.076 bird deaths per m² of glass windows, Dr. Smallwood estimates that the project could result in 334 bird deaths per year. (*Id.*) Because this impact was not addressed in the IS/Add, the City must prepare an EIR 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. 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. 14.) 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. 15.)

Even with Dr. Smallwood’s proposed mitigations, however, it is not likely that the Project can fully mitigate this potentially significant impact. Furthermore, Dr. Smallwood has

pointed out that many of the collision factors that he raises in his comment letter are not addressed by San Jose's bird-safe building design guidelines. (*Id.* at p. 16-17.) Thus, those guidelines do not fully mitigate the impact of the Project on wildlife to a less than significant level. Only a robust discussion in a 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 IS/Add, the Project would generate 2,257 net new daily vehicle trips. (DEIR, p. 165.) 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. 4.) In terms of avian mortality, it is estimated that vehicle collisions result in the death of 89 million to 340 million birds per year. (*Id.*) Because the impact of vehicle collisions on wildlife was not addressed in the IS/Add, the City must analyze such impacts in an EIR, especially the Project's cumulative impacts with the traffic generated by existing developments near the Project site.

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, pp. 4-5.) The City should formulate mitigation measures based on those factors.

B. The IS/Add Inadequately Evaluates the Health Risk from Diesel Particulate Matter.

The IS/Add fails to evaluate the health risk posed to the existing, off-site sensitive receptors as a result of Project operation. The IS/Addendum asserts that it analyzes operational health risk based on an analysis of off-site roadway and stationary source emissions to new, on-site receptors (IS/Add, p. 41.) However, the IS/Add's health risk analysis relies entirely on Bay Area Air Quality Management District's (BAAQMD) *Roadway Screening Analysis Calculator* and *Stationary Source Risk & Hazard Analysis Tool*, which identify and analyze health risk from exposure to nearby off-site highway emissions and stationary sources but do not assess emissions from future development projects. (Ex. B, p. 2.) As such, the IS/Add fails to assess the risk posed to existing sensitive receptors as a result of DPM emissions that will be emitted during Project operation. (*Id.*)

The analysis in the IS/Add is inconsistent with the approach recommended by the California Office of Environmental Health Hazard Assessment ("OEHHA") and the California Air Pollution Control Officers Association ("CAPCOA"). (Ex. B, pp. 2-3.) OEHHA guidance makes clear that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors. (Ex. B, p. 3.) OEHHA also recommends a health risk assessment of a project's operational emissions for projects that will be in place for more than 6 months. (*Id.*) Projects lasting more than 6 months should be evaluated for the duration of the project, and an exposure duration of 30 years be used to estimate individual cancer risk for the maximally

exposed individual resident. (*Id.*) The Project would last at least 30 years and certainly much longer than six months.

In order for the IS/Add to be reasonable under CEQA, the cavalier assertions regarding the Project's health impacts on nearby residences must be substantiated with a thorough health risk assessment. Based on all of the guidance available from the expert agencies, an operational health risk assessment should have been prepared for the Project. The IS/MND's conclusory assertions fail to rebut the expert guidance.

SWAPE prepared a screening-level HRA to evaluate potential impacts from the Project. SWAPE used AERSCREEN, the leading screening-level air quality dispersion model. (Ex. B, p. 3.) SWAPE used a sensitive receptor distance of 250 feet and analyzed impacts to individuals at different stages of life based on OEHHA and SCAQMD guidance. (Ex. B, pp. 3-5.)

SWAPE found that the excess cancer risk for adults, children, and infants at a sensitive receptor located approximately 75 meters away, over the course of Project construction and operation, are approximately 15, 98, and 3.6 in one million, respectively. (Ex. B, p. 5.) Moreover, the excess cancer risk over the course of a residential lifetime is approximately 120 in one million. (*Id.*) The risks to adults, children and lifetime residents appreciably exceed the BAAQMD's threshold of 10 in one million by over ten times. This is a potentially significant impact not addressed in the IS/Add. An EIR with a more refined HRA that is representative of site conditions must be prepared in order to evaluate the Project's health risk impact and to include suitable mitigation measures.

C. The IS/Add 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 units, 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 C) 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, hence lower 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 an EIR 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 and circulate an EIR 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 B. Flynn
Lozeau | Drury LLP