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March 6, 2018

Via Email and Hand Delivery

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Re: Comments on Zeiss Innovation Center Supplemental Mitigated Negative Declaration/Initial Study, PLPA-2017-00025

Dear Mayor and Honorable Members of the City Council:

This letter is submitted on behalf of Dublin resident Jack Lee Duffy and **Laborers International Union of North America, Local Union 304**, and its members living in and near the City of Dublin (collectively "LIUNA") regarding the Supplemental Mitigated Negative Declaration/Initial Study ("SMND") prepared for the Zeiss Innovation Center (the "Project") (PLPA-2017-00025).

After reviewing the SMND together with our team of expert consultants, it is evident that the Project meets all of the criteria requiring the preparation of an Environmental Impact Report ("EIR") rather than a Supplemental MND. The SMND relies almost entirely on a prior mitigated negative declaration prepared 17 years ago for a completely different project in 2001, the Cisco Systems Mitigated Negative Declaration ("Cisco MND"), and an EIR that was prepared 25 years ago for the Eastern Dublin Specific Plan in 1994 ("Eastern Dublin EIR"). The fundamental problem with the City's reliance on these prior documents is that they were prepared so long ago that circumstances have changed, and new information has come to light that demonstrate that the Project will, in fact, have significant new or more severe environmental impacts than what was previously analyzed. As a result, the City is required to prepare an EIR, rather than a Supplemental MND.

LIUNA submits the supplemental expert comments of wildlife biologist Shawn Smallwood, Ph.D. Dr. Smallwood's expert comments and resume are attached hereto as Exhibit A. LIUNA submits herewith supplemental comments from air quality expert James Clark, Ph.D. Dr. Clark's comments and resume are attached hereto as Exhibit B. LIUNA also submits supplemental comments from expert transportation analyst Daniel Smith, Jr., P.E., a registered civil and traffic engineer. Mr. Smith's expert comments and resume are attached hereto as Exhibit C. Each of these letters supplement these experts initial comments, submitted with our previous comments to the Planning Commission on February 13, 2018. In addition, the February 13, 2018 comments of toxics expert Heidi Bauer are attached hereto as Exhibit D.

These experts and our own independent review demonstrate that the SMND is inadequate under CEQA. Accordingly, LIUNA requests that the City address the significant environmental impacts described below in an EIR prior to considering approval of the Project.

I. PROJECT DESCRIPTION

Carl Zeiss, Inc. proposes to develop the Zeiss Innovation Center in east Dublin, on the northeast corner of Dublin Boulevard and Arnold Road on 11.36 net acres of land. SMND, p. 1. The Project site is currently vacant. *Id.* Seasonal wetlands make up 1.03 acres of the project site. *Id.* The Project would be developed in two phases. Phase 1 would consist of a three-story, 208,650 gross square feet research and development ("R&D") building and 663 surface parking spaces. SMND, p. 4. Phase 2 would include an additional five-story, 224,440 gross square food R&D building, and a five-story parking garage with 1,229 spaces. *Id.* At build out, the Project would include two low-to-mid-rise research and development ("R&D") buildings, one three stories and one five stories, totaling 433,090 gross, and 1,396 parking spaces. SMND, p. 4. The buildings will be used for research, development and testing, light assembly and dry laboratories, and supporting office spaces. *Id.* The Project will accommodate approximately 1,500 employees upon completion. *Id.*

II. PRIOR CEQA PROJECTS AND DOCUMENTS

A. 1993 East Dublin EIR

Twenty-five years ago, in May of 1993, the Dublin City Council certified an Environmental Impact Report for the Eastern Dublin General Plan Amendment and Specific Plan ("Eastern Dublin EIR"). SMND, p. 2. The Project is located at the extreme western edge of the Eastern Dublin Specific Plan area, the western limit of which is Arnold Road, the Project's western boundary. The EIR as certified included an Addendum to the East Dublin EIR that assessed a reduced development project alternative. *Id.* The City Council approved the General Permit Amendment and Specific Plan for the reduced area alternative. *Id.* According to the SMND, the East Dublin EIR evaluated the potential environmental effects of urbanizing Eastern Dublin over a 20 to 30 year period. *Id.* As part of the certification of the Eastern Dublin EIR, the Dublin City Council adopted a statement of overriding considerations for the following

impacts: cumulative traffic, extension of community facilities, regional air quality, noise, and visual. The East Dublin contains mitigation measures that are to be applied to any development within the project area, which includes the Project.

B. Cisco Systems MND

Fifteen years ago, in 2003, the Dublin City Council certified a Mitigated Negative Declaration for a proposed Cisco Systems project. *Id.* Prior to entitlement, Cisco withdrew their application. *Id.* However, the property owner moved forward with the General Plan and Eastern Dublin Specific Plan amendments for the project site. *Id.* As a result, in 2003, the City Council amended the General Plan and the East Dublin Specific Plan from High Density Residential to Campus Office and adopted the Cisco IS/MND (“Cisco MND”). *Id.* The Cisco MND assumed 430,090 square feet of office and Research and Development space to accommodate 3,000 employees. *Id.*

C. Boulevard – Dublin Crossing Specific Plan¹

In 2013, the Dublin Crossing Specific Plan (now known as “Boulevard”) was approved by the City of Dublin. The Boulevard project calls for the development of approximately 189 acres in Dublin. It is located on a portion of the 2,485-acre Camp Parks Reserve Training Area. The boundary of the Boulevard project is located immediately west of the Project. The location of the two projects can be seen in Figure 1 below. The Boulevard project calls for the construction of 1,995 residential units 200,000 square feet of commercial uses, 30 net-acres of community park, 5-acres of neighborhood parks, and space for a 12-acre elementary school site.

¹ Available at <http://www.dublinca.gov/DocumentCenter/View/5847> (last accessed March 6, 2018). The Dublin Crossing Specific Plan EIR is available at: https://dublinca-my.sharepoint.com/:f/g/personal/danielle_diaz_dublin_ca_gov/Evun47ysMYtlvzTFdZr5Q5wBHyT9Bp-Url2KO_d82R4dxQ?e=U0Md1M



Figure 1: Location of Boulevard (left) and Proposed Zeiss Innovation Center (right)

III. LEGAL STANDARD

Under CEQA, lead agencies normally conduct initial studies to determine if a proposed project may have a significant effect on the environment. 14 CCR § 15063(a). If there is substantial evidence that the project may have a significant effect on the environment, then the agency must prepare and certify an EIR before approving the project. If there is no substantial evidence that a project may cause a significant effect on the environment, then the agency may prepare a negative declaration. 14 CCR § 15371. If the initial study shows that a project may have significant environmental effects, but mitigation measures can be imposed so that no significant effect on the environment would occur, the agency may prepare a mitigated negative declaration. Pub. Res. Code § 21064.5.

Normally, this is the end of the CEQA process. But when changes to a project occur, CEQA comes back into play. When an agency proposes changes to a previously approved project, the agency's environmental review obligation depends on the effect of the proposed changes on the decisionmaking process. *Friends of San Mateo Gardens v. San Mateo* (2017) 1 Cal.5th 937, 944. "An agency that proposes project changes [] must determine whether the previous environmental document retains any relevance in light of the proposed changes and if so, whether major revisions to the previous environmental document are nevertheless required due to the involvement of new, previously unstudied significant environmental impact." *Friends of San Mateo Gardens v. San Mateo* (2017) 1 Cal.5th 937, 944. If the proposed changes render the prior CEQA document completely irrelevant to the decisionmaking process, then the agency must start from the beginning under Public Resources Code section 21151, and conduct an initial

study to determine if the project may have a significant effect on the environment.

If a previous EIR, negative declaration, or mitigated negative declaration retain some relevance to a changed project, a supplemental or subsequent EIR, negative declaration, or mitigated negative declaration are required only if one of the following occurs:

- Substantial changes are proposed in the project that will require major revisions to the prior CEQA document;
- Substantial changes occur in circumstances under which the project is being undertaken that will require major revisions to the previous CEQA document due to the involvement of new significant effects or a substantial increase in the severity of previously identified significant effects; or
- New information of substantial importance to the project that was not known and could not have been known when the prior CEQA document was approved becomes available that shows any of the following:
 - The project will have a significant effect not discussed in the previous EIR or negative declaration;
 - Significant effects previously examined will be substantially more severe than show in the previous EIR;
 - Mitigation measures previously found not to be feasible would in fact be feasible; or
 - Mitigation measures that are considerably different from those analyzed in the prior EIR would substantially reduce one or more significant effect on the environment.

14 CCR § 15162; Pub. Res. Code § 21166.

An agency must prepare an supplemental EIR – and not a supplemental negative declaration or mitigated negative declaration - when there is substantial evidence that changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved. *Friends of San Mateo Gardens*, 1 Cal.5th 937, 959.

If, because of new information or changed circumstances a new or more substantial impact was not previously studied, then a further EIR is required if the change “may produce a significant environmental effect.” *Friends of the College of San Mateo Gardens*, 1 Cal.5th at 958. This is determined under the “fair argument” standard, meaning that an EIR is required if there is any substantial evidence that changes in circumstances or new information not previously available demonstrates that the project may have a significant environmental impact.

IV. ANALYSIS

A. Substantial Changes Occurred in the Circumstances Under Which the Project is Being Undertaken that Require Major Revisions to the Eastern Dublin EIR and Cisco MND due to the Involvement of New Significant Effects on Biological Resources.

A project will have a significant impact if it will “[h]ave a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by the CDFW or USFWS.” CEQA Guidelines, Appendix G.

Neither the Eastern Dublin EIR, nor the Cisco MND identified any protected-status species on the Project site, and therefore, the CEQA analyses both found that the previous projects would not have significant biological impacts. SMND, p. 4. As the SMND discloses, circumstances have changed. Since many special-status species and wetlands have now been detected at the Project site, or are likely to occur at the Project site, the biological impact assessments from the Eastern Dublin EIR and the Cisco MND are no longer relevant. As detailed below, the expert comments of Dr. Shawn Smallwood and Scott Cashen constitute substantial evidence that the Project may have significant impacts on biological resources that have not been fully mitigated. As a result, an EIR is required to fully analyze and mitigate these impacts.

Because the changes in circumstances render the prior CEQA documents’ biological impacts analyses completely irrelevant to the decisionmaking process, the City must start from the beginning of the CEQA process under Public Resources Code section 21151, and conduct an Initial Study to determine if the Project may have a significant effect on the environment. Even if the City were to proceed under section 21166, a Supplemental EIR is needed because there is substantial evidence that the Project will have significant and unmitigated biological impacts stemming from changed circumstances. *Mira Monte Homeowners Assn. v. Cty. of Ventura* (1985)165 Cal. App. 3d 357, 359.

Wildlife biologist Dr. Shawn Smallwood, Ph.D., concludes that the Project may have a significant impact on even more species than those identified in the SMND, and that the mitigation measures proposed in the SMND are not sufficient to fully mitigate the Project’s impacts on biological resources. In addition, Dr. Smallwood concludes that the Project may have a significant impact on wildlife movement, and may have significant cumulative impacts. An EIR is required because Dr. Smallwood’s expert comments constitute substantial evidence that the Project may have significant and unmitigated impacts on biological resources.

1. The Project May Have a Significant Impact on Red-Tailed Hawks.

Red-tailed hawks are protected under California Department of Fish and Wildlife Code § 3503.5 (birds of prey). Neither the SMND nor the Biological Resources Assessment mention red-tailed hawks. Yet our expert, Dr. Shawn Smallwood, observed red-tailed hawks at the Project site on each of his two site visits. Smallwood (March 5, 2018), p. 1; Smallwood (Feb. 9, 2018), p. 2. On his March 2, 2018 visit to the Project site, Dr. Smallwood saw three red-tailed hawks, which foraged on the site, and interacted in manners typical of nesting. Dr. Smallwood captured Pictures of two of the red-tailed hawks he observed that day, seen below as Pictures 1 and 2.

The Project would have a significant impact on these red-tailed hawks by, at a minimum, modifying their habitat. This potentially significant impact is completely absent from the SMND. An EIR is required to analyze and mitigate this potentially significant impact.



Picture 1. *A red- tailed hawk dives on a prey item on the proposed project site, 2 March 2018. Three red-tailed hawks hunted the site intensely. This particular attack was unsuccessful.*

Picture 2. *An American crow defends its nesting territory against the female member of a nesting pair of red-tailed hawks flying over the proposed project site, 2 March 2018.*



2. The Project May Have a Significant Impact on White-Tailed Kites.

The white-tailed kite is a Fully Protected Species under the California Endangered Species Act. Cal. Fish & Game Code § 3511. The California Endangered Species Act provides that, except as specifically provided, “a fully protected bird may not be taken or possessed at any time.” Cal. Fish & Game Code § 3511.

The SMND and its Biological Resources Assessment concludes that the white-tailed kite’s occurrence at the Project site is “unlikely” because the “Project Area is located in a predominantly developed area, and typical open grassland habitat used for foraging is not present.” Dr. Smallwood’s initial comments from February 9, 2018 noted that, “[t]his assessment is absurd. White-tailed kites are well known for foraging on sites just like this one.” *Id.* Dr. Smallwood’s opinion was substantiated when he visited the Project site for a second time on March 2, 2018. Smallwood (March 5, 2018), p. 1. Dr. Smallwood observed a white-tailed kite fly by the west side of the Project site. *Id.* Because “white-tailed kites are California Fully Protected species, [] their occurrence in the project area warrants the determination of significant project impacts on biological resources.” *Id.* As EIR is required to analyze and mitigate the Project’s potential impact on the Fully Protected white-tailed kite.

3. The Project May Have Significant Impacts on Other Special Status Species.

Dr. Smallwood concludes that the biological analysis conducted as part of the SMND is woefully incomplete and inadequate. According to Dr. Smallwood, the SMND mischaracterizes the species' habitat requirements for numerous species in order to come to determinations of unlikely occurrence or no potential for occurrence of any species other than western burrowing owl and loggerhead shrike. Smallwood, p. 5.

Burrowing Owl. According to the SMND, "the project area is not currently inhabited by Western burrowing owls." SMND, p. 26. As Dr. Smallwood points out, however, "A single site visit can determine presence of burrowing owls, but it cannot be used to determine absence." Smallwood, p. 5. In order to assess the Project's potential impacts to burrowing owls, detection surveys should have been conducted in accordance with California Department of Fish & Wildlife's Burrowing Owl Guidance Document (2012). *Id.* All but five of CDFW's 39 standards for detection were not followed. *Id.* Looking on eBird.org, Dr. Smallwood noted that a burrowing owl was reported as being spotted on the Project site. Smallwood, p. 10, Table 3. In addition, Dr. Smallwood's observation of California ground squirrels on the site means it is possible that burrowing owls find winter refuge there or nest on site. Smallwood (March 5, 2018), p. 2.

Ferruginous hawk. According to the SMND, ferruginous hawk occurrence is "unlikely" because "[t]he Project Area is within a developed area, and lacks the open habitat required by this species for foraging and nesting. The lack of foraging habitat or nesting structures as well as a lack of connectivity with other open grasslands makes the Project Area unlikely to support this species." Dr. Smallwood disagrees. Smallwood, p. 10. According to Dr. Smallwood, Ferruginous hawks will forage where they can. *Id.* "As more of their habitat has been converted to human uses, ferruginous hawks have had to make use of smaller and more isolated patches of habitat." *Id.* at 10-11. He concludes that there is no reason to rule out use of the Project site by ferruginous hawks. *Id.* at 11.

Northern harrier. The SMND concludes that Northern harrier occurrence is "unlikely" because "[m]arsh and grassland habitat suitable for this species is not present within the Project Area." As Dr. Smallwood points out, the site is composed entirely of grassland suitable for the species. *Id.* at 11. Dr. Smallwood "would characterize the site as classic northern harrier habitat." *Id.*

White-tailed kite. The SMND concludes that white-tailed kites occurrence is "unlikely" because the "Project Area is located in a predominantly developed area, and typical open grassland habitat used for foraging is not present." According to Dr. Smallwood, "[t]his assessment is absurd. White-tailed kites are well known for foraging on sites just like this one." *Id.*

California horned lark. The SMND concludes that California horned lark occurrence is “unlikely. According to Dr. Smallwood, the Project site is covered by grassland cover typical of where he has documented horned larks many times. *Id.*

Tricolored blackbird. The SMND concludes that tricolored blackbird occurrence has “no potential” because the “Project Area does not have any suitable habitat such as: marsh or thickets of willow, to support nesting or foraging of this species.” According to Dr. Smallwood, tricolored blackbirds forage on grasslands, such as the Project site. *Id.* at 12.

Bald Eagle. The SMND concludes that Bald eagle occurrence has “no potential” because “There are no rivers, streams, lakes or other waterbodies to provide foraging habitat for this species within the Project Area.” Dr. Smallwood has “many times watched bald eagles foraging over grasslands far from any water body in the Altamont Pass over the last several decades,” and “visits [to the Project site] by juvenile bald eagles would not surprise” Dr. Smallwood. *Id.*

Bell’s Sparrow. The SMND concludes that Bell’s Sparrow occurrence has “no potential” because “[t]he Project Area consists of mainly nonnative grasses. No breeding or foraging habitat exists within the Project Area to support this species.” Dr. Smallwood disagrees that Bell’s Sparrow, or any other species of wildlife in California is incapable of foraging in anything other than native grasslands. Smallwood, p. 13.

Peregrine falcon. The SMND concludes that the Peregrine falcon occurrence has “no potential” because the “Project Area and immediate vicinity do not consist of any wetland, lake, river or other water body necessary to support this species.” According to Dr. Smallwood, this is an overly narrow habitat description. *Id.* “Peregrine falcons also nest on buildings and they forage over grasslands. They have been reported multiple times in the local area on eBird.” *Id.*

Yellow-billed magpie. According to the SMND, yellow-billed magpie occurrence has “no potential” because the “Project Area is located in a predominantly developed area, and typical open grassland habitat used for foraging is not present. The lack of trees this species uses for cover is also absent.” According to Dr. Smallwood, “there is absolutely no reason to reject the notion that the species would make use of the proposed project site. eBird also includes reports of yellow-billed magpie near the project site. WRA’s conclusion is wrong and misleading.” *Id.* at 13.

Dr. Smallwood’s expert opinion constitutes substantial evidence that the Project may have a significant impact on each of the species discussed above. An EIR must be prepared to analyze and mitigate these potentially significant impacts.

4. The Project May Have Significant Impacts to Wildlife Movement.

A project will have a significant biological impact if it would “[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, or impede the use of native wildlife nursery sites.” CEQA Guidelines, App. G.

As Dr. Smallwood points out, the “Initial Study applies a false CEQA standard to conclude the project will have no significant impact on wildlife movement in the region.” Smallwood (Feb. 9, 2018), p. 13. Dr. Smallwood explains that the false standards was initiated in the Biological Resources Assessment, which states that “Wildlife movement between suitable habitat areas typically occurs via wildlife movement corridors.” SMND, App. A, p. 30. This implies that the only wildlife movement that matters to a CEQA assessment is that which occurs along movement corridors. The SMND then amplifies this false standard by writing “There are no stream courses on or near the project site that could be used as a wildlife migration corridor.” The SMND gives the impression that the only wildlife movement that matters under CEQA is that which occurs along stream courses. As just stated, the CEQA standard 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, or impede the use of native wildlife nursery sites.” By focusing only on whether the Project will interfere with a migratory wildlife corridor, the SMND’s analysis is incomplete.

5. The Project May Have Significant Impacts on Animals as a Result of Window Collisions.

Window collisions are often characterized as either the second or third largest source of anthropogenic-caused bird mortality, yet the SMND fails to disclose, analyze, or mitigate this potentially significant impact. Dr. Smallwood concludes that the Project will have potential impacts on birds colliding with the Project’s clear glass windows. Smallwood (Feb. 9, 2018), p. 14. “Wildlife will be killed and injured by the windows of the Zeiss Innovation Center.” *Id.* at 27. “If built as proposed, the Zeiss Innovation Center would likely kill hundreds of birds per year for as many years as the buildings stand.” Smallwood (March 5, 2018), p. 4. “Wetlands and trees are depicted just far enough from the glass façades to enable birds alighting from them to gain sufficient speed upon arrival at the windows that they will not survive the ensuing collisions. The building as planned would contribute to an ongoing national catastrophe in bird collision deaths caused by poorly planned incorporation of windows into building designs.” Smallwood (Feb. 9, 2018), p. 14. An EIR is required to fully analyze and mitigate this impact.

This impact is far greater for the Zeiss Project than for the Cisco Project since the Zeiss building, unlike the Cisco building, is constructed with massive transparent glass walls across nearly the entirety of the facade. Compared to the Cisco Project, the proposed Project would introduce substantially more extensive transparent glass siding. Thus, the project has been modified in ways that will vastly increase the severity of the bird-collision impact, rendering the prior analysis inadequate.

In order to mitigate these potential impacts to birds, Dr. Smallwood recommends the following mitigation measures:

- Marking windows

- Managing outdoor landscape vegetation
- Managing indoor landscape vegetation
- Managing nocturnal lighting
- Designing to minimize transparency through two parallel facades
- Designing to minimize views of interior plants
- Landscaping to increase distances between windows and trees and shrubs

Smallwood, p. 21.

Dr. Smallwood also suggests adherence to available guidelines on building design intended to minimize collisions hazards to birds, such as those by the American Bird Conservancy (“ABC”). Smallwood, p. 22. ABC recommends: (1) minimizing use of glass; (2) placing glass behind some type of screening (grilles, shutters, exterior shades); (3) using glass with inherent properties to reduce collisions, such as patterns, window films, decals or tape; and (4) turning off lights during migration seasons. *Id.*

As additional mitigation, Dr. Smallwood recommends requiring funding to wildlife rehabilitation facilities:

Wildlife will be killed and injured by the windows of the Zeiss Innovation Center. The impacts to injured wildlife can be rectified by helping to pay the costs of wildlife rehabilitation facilities, which operate on volunteer support and inadequate budgets.

Smallwood, p. 27. Dr. Smallwood proposes a number of options the City should consider in determining how to appropriately compensate for the Project’s potential biological impacts. *Id.* at p. 28. These and other feasible mitigation measures must be considered in an EIR.

6. The Project May Have Cumulative Impacts on Biological Resources.

CEQA documents, such as the SMND, must discuss cumulative impacts, and mitigate significant cumulative impacts. 14 CCR § 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if “the possible effects of a project are individually limited but cumulatively considerable. . . . ‘Cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand.

While acknowledging new Project-related biological impacts, the SMND fails to analyze the Project’s potentially significant cumulative biological impacts. Instead, the SMND concludes, without evidence, that:

The implementation of the proposed project, with mitigation, would not result in any new cumulative impacts or increase the severity of a previously identified significant cumulative impact as previously analyzed in the Eastern Dublin EIR and Cisco Systems IS/MND, and no other CEQA standards for supplemental review are met.

SMND, p. 86.

The problem with this analysis, as it applies to biological resources, is that the SMND itself acknowledges that the Project's biological impacts are new, so they could not have possibly been analyzed cumulatively in the East Dublin EIR or the Cisco MND.

The question that CEQA requires the City to address - and that the SMND fails to address - is: will the Project's impacts be significant when combined with other past, current, and probable future projects. By failing to provide this basic information, the SMND's cumulative biological impact analysis is not supported by substantial evidence.

Dr. Smallwood also points out that the SMND's cumulative impact analysis is flawed. According to the SMND, an impact is cumulatively considerable only when it has not been fully mitigated. Dr. Smallwood states:

The Initial Study presents a false standard for determining whether a project's impacts will be cumulatively considerable. It implies that a given project impact is cumulatively considerable only when the project impact has not been fully mitigated. The Initial Study further implies that the impact would be cumulatively considerable only if the same impact caused by one or more other projects failed to fully mitigate the impact. In essence, the Initial Study implies that cumulative impacts are really residual impacts left over by inadequate project mitigation.

Smallwood, p. 22.

Dr. Smallwood describes the importance of the Project site to wildlife, given the lack of habitat surrounding the Project site:

A strip mall occurs to the south, large buildings to the east and north, and to the west the field has been graded flat in preparation for some new development. Many of the animals on the proposed project site will have no refuge to which they can escape once ground is broken for the Center. Black-tailed jackrabbits and desert cottontails will be unable to run for cover to the north, south, east or west; they likely end up as road fatalities. Birds on the site will find increasingly less grassland habitat to move into once they have to leave the proposed project site.

Smallwood, p. 3.

Moreover, circumstances for biological species have changed dramatically since the East

Dublin EIR was prepared in 1994. *Id.* at 23. Many of the special-status species observed by Dr. Smallwood on his site visit, or reported by members of the public on eBird.org lacked special status in 1994 “because cumulative impacts increased since then, changing the status of these species.” *Id.* Dr. Smallwood cites the yellow-billed magpie as an example:

The Eastern Dublin Specific Plan EIR could not have anticipated the widespread damage that West Nile Virus caused to yellow-billed magpie, driving the species’ numbers to the brink of extinction. In 1995 yellow-billed magpies were ubiquitous within their geographic range, including in Dublin, but now each and every project that removes more yellow-billed magpie habitat also generates, in combination with West Nile Virus, a cumulative impact on the species.

Id.

7. The Project May Have a Significant Cumulative Impact on Burrowing Owls That Has Not Been Mitigated.

Dr. Smith and Wildlife biologist Scott Cashen agree that the Project may have a significant cumulative impact on burrowing owls. In his February 12, 2018 expert comments, Mr. Cashen notes that the Camp Parks burrowing owl population is rapidly declining. Between 2008 and 2014, 8 to 10 pairs of burrowing owls nested in the Park Reserve Forces Training Area (“PRFTA”) have been lost. Cashen, p. 15. Surveys conducted in that area in 2016 indicate that only one or two pairs of burrowing owls remain. *Id.* As Mr. Cashen explains:

One or two pairs [of burrowing owls] are incapable of sustaining the population, especially given the decline in recruitment (i.e. reproductive success) of burrowing owls at PRFTA. Because the Project site provides potential habitat for burrowing owls in the Camp Parks population, the loss of habitat from the Project site would further jeopardize the persistence of the Camp Parks population. Furthermore, because the Camp Parks population is one of only two breeding populations remaining in Alameda County, the loss of the Camp Parks population would significantly reduce the range of species in the County (and the San Francisco Bay Area)... Thus, there is substantial evidence that the Project could substantially reduce the habitat of a wildlife species; cause a wildlife population to drop below a self-sustaining level; threaten to eliminate an animal community; or reduce the number or restrict the range of a rare or endangered animal.

Cashen, p. 15.

Similarly, Dr. Smallwood’s analysis indicated that 82% of habitat in the area surrounding the Project has already been converted to houses, commercial buildings and roadways. Smallwood (March 5, 2018), p. 7. As a result, he concludes that the Project’s impacts on burrowing owl populations may be significant:

The project site is one of only three or four patches of habitat within a mile that are large

enough to support breeding colony of burrowing owls. Losing it would nearly eliminate the breeding capacity of burrowing owls in the area, thereby qualifying the project's cumulative effects as considerable and highly significant.

Id. These significant cumulative impacts to burrowing owls must be analyzed and mitigated in an EIR.

8. The SMND's Mitigation of Biological Impacts is Incomplete and Improper.

i. Mitigation Measure BIO-4 Constitutes Improperly Deferred Mitigation.

CEQA disallows deferring the formulation of mitigation measures to post-approval studies. 14 CCR § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309. An agency may only defer the formulation of mitigation measures when it possesses “‘meaningful information’ reasonably justifying an expectation of compliance.” *Sundstrom* at 308; see also *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only “for kinds of impacts for which mitigation is known to be feasible”). A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available). This approach helps “insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug.” *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

Moreover, “mitigation measure[s] [that do] no more than require a report be prepared and followed” do not provide adequate information for informed decisionmaking under CEQA. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794; Guidelines § 15126.4(a)(1)(B). By deferring the development of specific mitigation measures, the City has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the court in *Communities for a Better Env't v. Richmond* (2010) 184 Cal.App.4th 70, 92:

[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment.

Mitigation Measure BIO-4 (“MM BIO-4”) requires, in part, that the Project applicant “obtain agency approval of a wetland mitigation plan that ensures no-net-loss of wetland and waters habitat.” SMND, p. 30. The wetland mitigation plan is required to include:

measures for avoidance, minimization, and compensation for wetland impacts. Avoidance and minimization measures may include the designation of buffers around wetland features to be avoided, or project design measures. Compensation measures shall include the preservation and/or creation of wetland or waters. The final mitigation ratios (the amount of wetlands and waters created or preserved compared to the amount of impacted) shall be determined by the applicable resource agency(s).

Id. It must also include:

- a) Descriptions of the wetland types, and their expected functions and values;
- b) Performance standards and monitoring protocol to ensure the success of the mitigation wetlands over a period to be determined by the resource agencies;
- c) Engineering plans showing the location, size and configuration of wetlands to be created or restored;
- d) An implementation schedule showing that construction or preservation of mitigation areas shall commence prior to or concurrently with the initiation of construction; and
- e) A description of legal protection measures for the preserved wetlands (i.e., dedication of fee title, conservation easement, and/or an endowment held by an approved conservation organization, government agency or mitigation bank).

Id.

MM BIO-4 constitutes just the type of deferred mitigation CEQA prohibits. Here, the SMND defers the preparation of a wetland mitigation plan until after completion of CEQA review, without imposing any substantive standards, without providing for any public review, and subject only to “applicable resource agency(s)” approval.

In addition, there is no evidence that the MM BIO-4 is feasible because there is no evidence that there are sufficient wetlands in the watershed to preserve or create wetlands within the impacted watershed. This is particularly true given that the amount of wetlands and waters created or preserved will not be determined until after the Project is approved. Moreover, interested parties are precluded from commenting on the adequacy of the wetland mitigation plan, even though CEQA requires that they be permitted to do so.

Deferral of mitigation is also impermissible if it removes the CEQA decision-making body from its decision-making role. The City may not delegate the formulation and approval of mitigation measures to address environmental impacts because an agency’s legislative body must ultimately review and vouch for all environmental analysis mandated by CEQA. *Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d 296, 306-308. Thus, the SMND may not rely on programs to be developed and implemented later without approval by the City. Yet that is

precisely what MM BIO-4 does.

Here, the lead agency has improperly delegated its legal responsibility of determining what constitutes adequate mitigation to unnamed “resource agency(s).” MM BIO-4 calls for a wetland mitigation plan that is prepared by the Project Applicant, and approved by “applicable resource agency(s).” The “resource agency(s)” will determine the final mitigation ratios (the amount of wetlands and water created or preserved compared to the amount impacted). *Id.* It is also up to the resource agency as to whether the wetland mitigation plan is sufficient to mitigate the Project’s impacts.

The SMND may not rely on the wetland mitigation plan to be developed, approved, and implemented later without any approval by the City, at some future time after the Project has been approved. Without valid mitigation, the Project’s significant impact on wetlands remains significant.

ii. The Project’s Burrowing Owl Impacts Have Not Been Properly Analyzed or Fully Mitigated.

MM BIO-1 is entitled “Burrowing Owl Survey and Impact Assessment.” SMND, p. 26. The first step of this mitigation measure requires that, prior to obtaining the first site grading, building, or other permit for development activities involving ground disturbances, the Project Applicant shall “Conduct a Burrowing Owl Survey and Impact Assessment.” *Id.* The time for burrowing owl surveys and impact assessments is now, during the CEQA process. This is not mitigation, but rather a deferment of the determination of the Project’s impacts.

MM BIO-1 next requires the implementation of burrowing owl avoidance measures “[i]f direct impacts to owls can be avoided.” SMND, p. 27. No standards are provided for how to determine whether it is possible or not to avoid direct impacts. If it is too expensive, does it mean direct impacts cannot be avoided? If it interferes with the construction schedule, does that mean direct impacts cannot be avoided?

Finally, MM BIO-1 provides that:

If avoidance of burrowing owl or their burrows is not possible and project activities may result in impacts to nesting, occupied, and satellite burrows and/or burrowing owl habitat, the project Applicant shall consult with the CDFW and develop a detailed mitigation plan that shall include replacement of impacted habitat, number of burrows, and burrowing owl at a ratio approved by CDFW. The mitigation plan shall be based on the requirements set forth in Appendix A of the CDFW 2012 Staff Report on Burrowing Owl Mitigation and the plan shall be reviewed and accepted by CDFW and the City prior to the first ground-disturbing activities.

SMND, p. 27.

CEQA does not allow this type of deferred mitigation. This mitigation measure defers the determination of the adequate compensatory mitigation, the acceptable mitigation location and the acceptable mitigation method (habitat acquisition, purchase of credits from a mitigation bank, etc.), site protection methods, performance standards, and monitoring requirements until sometime after the CEQA process is complete. In doing so, the SMND limits the public from being able to comment on the adequacy of the mitigation measure, and is prohibited by CEQA.

iii. The SMND Fails to Mitigate Impacts to Nesting Birds.

According to the Biological Resources Assessment, in order to mitigate impact to nesting birds, “[p]roject activities such as vegetation removal, grading, or initial ground-disturbing activities shall be conducted between September and January 31 (outside of the February 1 to August 31 nesting season) to the extent feasible.” SMND, App. A, p. 34. In addition, in order to mitigate impacts to nesting birds, the BRA requires that, “[i]f active nests of protected species are found within the survey area, a work exclusion zone shall be established around each nest by the qualified biologist. Established exclusion zones shall remain in place until all young in the nest have fledged or the nest otherwise becomes inactive (e.g. due to predation).” SMND, App. A, p. 34.

These two aspects of the mitigation measure, which the City’s own expert claims in the BRA is necessary to reduce the Project’s biological impacts, are absent from the mitigation measure proposed as part of the SMND. Without including the additional aspects of the mitigation measure proposed by the City’s own experts, there is no evidence to support a conclusion that the Project’s impacts on nesting birds.

B. New Information and Changes in Circumstances Require Preparation of an EIR to Analyze and Mitigate the Project’s GHG Impacts.

Neither the Eastern Dublin EIR nor the Cisco MND analyze greenhouse gas (“GHG”) impacts. SMND, p. 41. The SMND similarly contains no analysis of the Project’s GHG emissions or impacts. The SMND claims that “Greenhouse gas emissions and climate change is not required to be analyzed under CEQA standards for supplemental or subsequent EIRs unless it constitutes ‘new information of substantial importance, which was not known and could not have been known at the time the previous EIR was certified as complete.’” *Id.* The SMND then claims that, since the impact of greenhouse gases on climate change was known at the time of the certification of the East Dublin EIR and Cisco MND, no supplemental analysis of GHGs is required, even though the impact was never analyzed in the prior CEQA documents. *Id.* The SMND is wrong.

The need to analyze GHGs at all is a changed circumstance. At the time the East Dublin EIR and the Cisco MND were prepared, GHGs were not part of the CEQA analysis. It was not until the Legislature’s 2006 adoption of the California Global Warming Solutions Act of 2006 (Health & Safety Code § 38500, et seq), three years after the Cisco MND was adopted, that the “Legislature [] expressly acknowledged that greenhouse gases have a significant environmental

effect.” It was not until January 2008, that a White Paper was issued by the California Air Pollution Control Officers Association entitled “CEQA and Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act (Jan. 2008)” discussing “different approaches for making a determination whether a project’s greenhouse gas emissions would be significant or less than significant.”

Particularly important, it was not until 2010 that the Bay Area Air Quality Management District (“BAAQMD”) adopted CEQA thresholds of significance for GHG impacts. These air quality thresholds are treated as dispositive in evaluating the significance of a project’s air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD’s “published CEQA quantitative criteria” and “threshold level of cumulative significance”). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 (“A ‘threshold of significance’ for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant

BAAQMD has determined that a project may have significant greenhouse gas (GHG) emissions if it will generate more than 1,100 metric tons of carbon dioxide equivalents per year (1,100 MT of CO₂e/yr). BAAQMD CEQA Guidelines (2010), p. 3-2 (attached hereto as Exhibit E). BAAQMD has published a table of project types and sizes that may generate more than 1,100 MT of GHG per year. *Id.* According to the BAAQMD screening table, a general office building with 53,000 square feet of space is large enough that it may have a significant GHG impact. *Id.* The Project is more than eight times the screening level.

In addition, new information of substantial importance about the impact and rate of climate change has become available since the East Dublin EIR and Cisco MND were approved. Even if greenhouse gases had been raised in 2001 in the Cisco Systems MND, new information of substantial importance about the impact and rate of climate change, which was not known and could not have been known when the prior CEQA document was approved, has become available.² For example, the 10 hottest years on record all occurred since 2006, well after the Cisco MND was approved. See, <http://www.climatecentral.org/gallery/graphics/the-10-hottest-global-years-on-record>. Given this new information, and the previous failure to analyze the

² See, for example: <http://www.climatecentral.org/news/antarctic-modeling-pushes-up-sea-level-rise-projections-21776> (Antarctic modeling pushes up seal-level rise projection); <https://insideclimatenews.org/news/26122017/climate-change-science-2017-year-review-evidence-impact-faster-more-extreme> (Climate change is happening faster than predicted, and it’s more extreme); <https://royalsociety.org/~media/policy/Publications/2017/27-11-2017-Climate-change-updates-report.pdf> (Climate updates - What have we learned since the IPCC 5th Assessment Report?); <https://insideclimatenews.org/news/12122017/arctic-report-card-sea-ice-extent-temperature-record-2017-noaa> (Arctic Report Card: Lowest Sea Ice on Record, 2nd Warmest Year); <http://time.com/4745827/antarctica-water-climate-change/> (New Discovery in Antarctica Suggests Ice Sheets Could Disappear Way Faster Than Previously Thought).

Project's GHG impacts,³ an EIR must be prepared to fully analyze and mitigate the Project's potentially significant GHG impacts.

C. Changed Circumstances Have Occurred and New Information is Available Which Requires Preparation of an EIR as a Result of a New or More Serious Significant Air Quality Impacts.

1. The SMND's Health Risk Analysis is Wrong and Fails to Account for a Number of Sensitive Receptors.

Since the release of the Cisco MND, new sensitive receptors have been identified within the zone of influence for the Project. Clark, p. 6. Sensitive receptors include hospitals, schools, daycare facilities, among others, and are places where occupants are more susceptible to the adverse effect of exposure to toxic chemicals, pesticides, and other pollutants. *Id.* Dr. Clark identified two sensitive receptors that were not identified in the SMND. First, the La Petite Academy is a daycare facility located at 3 Sybase Drive, approximately 1,000 feet east of the Project site. *Id.* Second is the James Dougherty Elementary School located at 5301 Hibernia Dr., approximately 1,600 feet north east of the Project site.

In addition, the SMND discloses that "[p]roperties west of the project site are undergoing development as residential uses (Boulevard)." SMND, p. 2. Boulevard was approved nearly a decade after the Cisco MND was approved, and therefore the Cisco MND did not account for cumulative impacts from Boulevard. Dr. James Clark notes that, "[b]ased on the proposed land use within the development plan for the Boulevard Project it is clear that residential, mixed use, and the elementary school project would all be developed within 1,000 feet of the Zeiss Project." Clark Supplemental Comment, p. 5. The proposed land uses within the Boulevard project, and the location of the Project are shown in Figure 2, below. The conclusion in the SMND that "There are no sensitive receptors (e.g. residential, schools, churches, hospitals) proposed or surrounding the project site. Therefore no impact would occur to sensitive receptors" is false. *Id.*

³ The City's failure to even conduct an analysis of the Project's GHG emissions, let alone mitigate those impacts, is particularly egregious, given the efforts made by the City in recent years to combat greenhouse gases, including with the adoption of a Climate Action Plan and the adoption of the US Mayors' Climate Protection Agreement. *See*, <http://dublinca.gov/1657/Climate-Action-Information> (accessed Feb. 12, 2018)

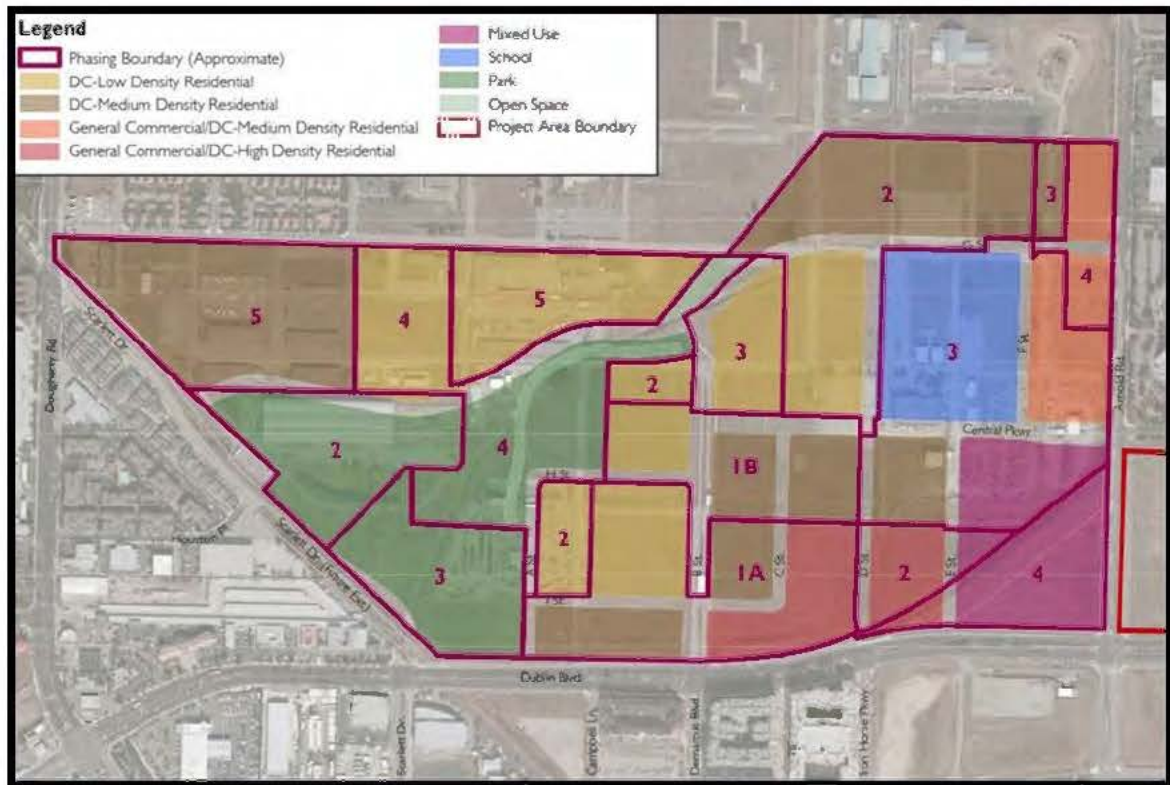


Figure 2: Proposed Land of The Boulevard Project and Location of Zeiss Project

None of these sensitive receptors is mentioned in the SMND or analyzed, but each constitutes a changed circumstance that may result in a significant impact as a result of the Project exposing these sensitive receptors to air pollution. Because these changed circumstances may result in a significant impact, an EIR is required. A Health Risks Assessment must be prepared as part of the EIR to analyze the Project's potential impacts on these nearby sensitive receptors.

An EIR must be prepared to analyze the air quality impacts from the construction and operation of the Project on the residents and school children that will occupy the Boulevard project. In addition, an EIR must look at the cumulative air quality impacts of the Project and the Boulevard project together. Clark Supplemental Comment, p. 5.

2. The Project Will Have Significant NOx emissions.

Air Quality Expert Dr. James Clark concludes that the Project will have a significant construction-related NOx impact during the first phase of the Project. The SMND claims that the "air quality impacts of the proposed project are within the scope of the project impacts covered by the Cisco MND and the Eastern Dublin EIR." SMND, p. 20. This conclusion, however, is not supported by any evidence. No analysis was conducted of the Project's construction or operational emissions. As a result, there is no evidence that the Project's

emissions would be equal to or less than those of the Cisco project. In contrast, Dr. Clark's expert comments constitute substantial evidence that the Project will have a significant construction-related NOx impact. Clark, p. 5-6. Dr. Clark's comments are attached hereto as Exhibit B. An EIR is required to analyze this impact and propose feasible mitigation measures.

D. An EIR is needed because the Cisco MND and EDSP EIR traffic impact analyses do not retain any relevance due to substantial changes in circumstances.

The traffic conditions in the vicinity of the Project have changed substantially in two ways since the Cisco MND and the EDSP EIR were prepared 15 and 25 years ago. First, the traffic on nearby highways is far greater than was previously analyzed. Second, Boulevard, a major new development being built directly across the street from the Project, was adopted long after the prior CEQA documents were approved. These changed circumstances mean that the Cisco MND and the EDSP EIR are no longer relevant to the Project's potential traffic impact.

1. Increased Traffic Conditions on Highway I-580 is a Changed Circumstance that Render's the Prior CEQA Documents' Traffic Analysis Irrelevant.

Traffic on nearby freeways is much heavier now than it was 25 years ago when the East Dublin EIR was prepared. Smith, p. 3. For example, the East Dublin EIR indicates that the then-existing daily traffic volume on the I-580 between Hacienda and Tassajara interchanges was 135,000 vehicles, and projected that it would reach 184,000 vehicles in 2010, and 189,000 vehicles at full buildout. *Id.* (citing East Dublin EIR, Figure 3.3-E). Yet Caltrans data for this same location from 2016 indicates a traffic volume of 213,000 vehicles.⁴ *Id.* The current traffic volume is 12.7 percent greater than the projected build-out volume in the East Dublin EIR. *Id.* at 4. The vehicle count at this location when the Cisco MND was prepared was also much lower, at only 177,000.

Similarly, the East Dublin EIR indicates that between the Hacienda and Dougherty/Hopyard interchanges, I-580 had an existing daily traffic volume of 135,000, would have a 2010 volume of 191,000, and a build-out volume of 194,000 vehicles. *Id.* Yet Caltrans data from 2016 indicates that the traffic volume at this location was actually 233,000 vehicles per day. *Id.* This is 20.1 percent higher than the traffic projected in the East Dublin EIR. The vehicle count at this location when the Cisco MND was prepared was, again, much lower, at 183,000 vehicles. *Id.*

The massive increase in traffic on the I-580 highway is a substantial change in circumstances. As a result of these changes, the East Dublin EIR and Cisco MND have no relevancy to the Project's potential traffic impacts. As a result, a supplemental EIR, or at the very least, a supplemental MND is required to analyze the Project's potential traffic impacts,

⁴ Data available at www.ca.gov/trafficops/census/.

given these changed circumstances. As discussed below, the SMND does not do this.

2. The Dublin Crossing Specific Plan and Boulevard Development are Changed Circumstances that Render the Prior CEQA Documents' Traffic Analyses Irrelevant.

Approved in 2013, the Dublin Crossing Specific Plan ("DCSP") is "a plan for the orderly development of approximately 189 acres in the City of Dublin." DCSP, p. 1-2. The DCSP's eastern boundary is located directly across the street from the Project, on the other side of Arnold Road. The Dublin Crossing Specific Plan "includes a maximum of up to 1,995 residential units, up to 200,000 square feet of commercial uses, a 30 net-acre community park, neighborhood park land, and a school site. *Id.*

According to its EIR, the DCSP, would generate 24,563 gross daily vehicle trips. DCSP EIR, p. 3-224. Even after applying certain trip reductions, the Dublin Crossing Specific Plan would still generate 22,047 net new daily trips. *Id.* at, p. 3-225. Since the DCSP was proposed and adopted nearly a decade after the Cisco MND was approved, neither it nor the Eastern Dublin EIR taken into account any of the traffic the DCSP will produce. Indeed, in 2013 when the Dublin Crossing Specific Plan was being approved, the land was mostly zoned for "Agriculture."

As Mr. Smith notes in his supplemental comments, submitted herewith, "the EDSP traffic analysis that the Supplemental IS/MND relies on as its cumulative analysis has virtually nothing to do with the traffic environment that is the context for the subject Zeiss Project..." Smith Supp. Comment, p. 2. Because of this, Mr. Smith concludes that "[t]he entire analysis must be redone to reflect a reasonable analysis of the current approved conditions of the Project's surroundings and the likely cumulative conditions." *Id.*

A supplemental EIR is needed to analyze the Project's potentially significant traffic impacts because the previous CEQA documents retain no relevance given the substantially changed traffic circumstances that have occurred since the prior CEQA documents were adopted.

3. The Traffic Consistency Analysis is not an Impact Analysis.

The Traffic Consistency Analysis states that its "purpose" is to "indicate the consistency of the proposed Zeiss Innovation Center (Project) with the traffic assumptions and supporting analysis in the previously certified Eastern Dublin Specific Plan Environmental Impact Report (EIR) and the Cisco Systems Initial Study/Mitigated Negative Declaration (IS/MND)." SMND, App. E, p. 1.

The Traffic Consistency Analysis should not be confused with a traffic impact analysis. The Traffic Consistency Analysis essentially compares the number of vehicle trips generated by the Zeiss Project (2,713) to the number analyzed in the Cisco MND (2,802), determines that the Project will generate fewer trips, and therefore concludes there will be no new or more

significant traffic impacts. SMND, App. E, p. 11.

What is missing from the TCA is an actual analysis of the Project's traffic-related impacts, given the circumstances that exist today. For example, the TCA does not discuss how the traffic conditions today differ from those that existed when the Cisco MND or the Eastern Dublin EIR were prepared. For example, the TCA does not even mention the Dublin Crossing/Boulevard Project that is slated to be built directly across the street from the Project, and will generate more than 22,000 vehicle trips every day. DCSP EIR, p. 3-225. Indeed the TCA does not provide any information on what current or future traffic levels are, or are expected to be, and how those levels compare to 1994 and 2001 levels.

4. The SMND Fails to Analyze the Project's Cumulative Traffic Impacts.

The TCA bases its cumulative analysis almost entirely on the EDSP EIR cumulative traffic analysis. SMND, App. E, p. 28. The TCA states:

The EDSP EIR evaluated buildout of the area, including development on this Project site for cumulative conditions and all the study intersections in this study were found to operate at acceptable operating conditions. Trip generation for the site indicates that the Project will generate substantially less traffic compared to the previous analysis in the EDSP and Cisco Systems IS/MND. It is concluded that based on the previous analysis, the potential cumulative impacts from the Project would be equal or less at the study intersections, except for Park Place/ Central Parkway (Intersection #2) and Park Place/ Dublin Boulevard (Intersection #6), which are analyzed below.

SMND, App. E, p. 28. In other words, for four of the intersections studies, the TCA concludes that the Project will not have a cumulative traffic impact based solely on traffic conditions that existed in 1994. This conclusion appears to also be applied to Intersection 4, which "does not exist yet." *Id.*

Intersection 2 and Intersection 6 were apparently not previously analyzed in the prior CEQA documents. The TCA purports to conduct an actual cumulative traffic analysis for these intersections, but neither the TCA nor the SMND disclose what cumulative conditions were considered. The TCA claims that "[t]raffic operations were evaluated at the study intersection under Cumulative Plus Phase 2 Conditions," but the TCA never discloses what those cumulative conditions are. For example, there is no mention of the Boulevard Project in the TCA, yet that project is directly across the street from the Project, and will create more than 22,000 new daily vehicle trips. It appears that this massive project was not taken into account as part of the "Cumulative (2035) Plus Phase 2 Conditions." Without an explanation of what cumulative conditions were or were not included in the analysis, the TCA's conclusion that "All intersections operate at acceptable LOS under Cumulative (2035) Plus Phase 2 Conditions" is not supported by substantial evidence.

Traffic engineer Dan Smith points out in his supplemental comments (attached hereto as Exhibit B), that had the Boulevard project been taken into account, the “analysis would likely prove consequential.” Smith Supp. Comment, p. 2. Mr. Smith uses the intersection of Arnold Road and Dublin Boulevard as an example:

According to the IS/MND Appendix E, Figure 12, the combination of Existing plus Zeiss build-out traffic at this intersection would involve 2475 total vehicle movements in the AM peak hour and 3284 in the PM peak hour. Per comparison of Dublin Crossing EIR Figures 3.12-6a and 3.12-8a, the Boulevard Project would add 356 vehicle movements to this intersection in the AM peak hour and 822 vehicle movements in the PM peak hour. These traffic increments, had they been considered in the Zeiss Project traffic analysis, would likely have resulted in traffic conditions deteriorating into the unacceptable LOS E range.

Id.

An actual traffic impact analysis is needed for the Project as part of an EIR, including a cumulative impact analysis that takes into account the Boulevard project. The Eastern Dublin EIR and Cisco MND simply have no relevance to the instant Project’s traffic impacts, given the substantial changes that have occurred.

E. Changed Circumstances Have Occurred and New Information is Available Which Requires Preparation of an EIR as a Result of a New or More Significant Hazards Impact.

The Cisco MND has no value to the current analysis of the Project site’s toxic contamination. Toxics expert Heidi Bauer concludes that the Project may have a significant impact from soil and groundwater contamination. Ms. Bauer’s expert comments are attached hereto as Exhibit D.

The Project site previously functioned as a US Naval facility (Camp Shoemaker) from the early 1940’s up until about 1949. Of interest to the subject site is two former fuel stations located on the property; one in the northwest portion of the property and one in the southwest of the property. Parcel 15A also contained an inflammable storage building, public works office and shop, transportation shop and barracks, and another unidentified building (Lowney 2000). A former laundry and boiler room was located on the adjacent parcel to the east (Parcel 15B). The Zeiss Innovation Center is being proposed on the former Parcel 15A site. Bauer, p. 1.

Between 1998 and 2000, in response to directives from the Regional Water Quality Control Board and in preparation for the Cisco MND, several soil, soil vapor, and groundwater investigations were conducted. The main areas of concern for the project (Parcel 15A) is the area of the former fuel stations piping and associated leaking underground storage tanks (LUSTs), the upgradient/sidegradient (Parcel 15B) which shows elevated PCE levels likely from the former laundry, the possible contaminated fill from incinerator ash used throughout the property and the presence of an unknown tar-like substance on Parcel 15. Bauer, p. 2.

The SMND contains no new or updated analysis of the contamination below the Project site, instead relying completely on data from prior to 2001. As detailed in the expert comments of toxics expert Heidi Bauer:

The data relied on in the Zeiss IS/MND (Zeiss IS/ MND, 2017) in the Hazards and Hazardous Materials Section is no longer appropriate for use. The latest data collected for this site is 18-20 years old. The site subsurface in the area of the water table is dynamic and contaminant concentrations in the vadose and saturated zones change with the groundwater table fluctuation and also with the direction of groundwater flow.

Bauer, p. 5.

Because the groundwater flow direction is towards the southwest, Contaminant concentrations that were detected above the ESL from the north portion of the site likely migrated southwest and therefore could be found in other portions of the site not previously investigated.” Bauer, p. 5.

“The environmental history of this site, including the unknown impacts from the uninvestigated site soils, combined with the existing elevated concentrations of contaminants above the ESLs in the groundwater can potentially create a significant environmental health threat to worker safety, the public and future employees at the project site.” Bauer, p. 6. Because of the changed circumstances, an EIR is required to analyze and mitigate this potentially significant impact.

F. The Project Requires a Water Supply Assessment.

Under SB 610, projections about water availability must be developed before certain large development projects that will be served by a public water system can be approved. Water Code §§ 10910-10915. The public water system identified as the water provided for a proposed project must prepare a water supply assessment that is then included in an EIR or negative declaration. *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 96. SB 610 applies when a project subject to CEQA meets any of the criteria in Water Code section 10912. These criteria include a business establishment employing more than 1,000 people and a commercial office building employing more than 1,000 people or having more than 250,000 square feet of floor space.

Here, the Project will accommodate 1,500 employees, in buildings totaling 433,090 square feet. SMND, p. 3, 4. The Project will also be served by the Dublin San Ramon Services District, which is a public water system. SMND, p. 80. As a result, a Water Supply Assessment must be prepared and included in the SMND. Water Code §§ 10910-10915; *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 96. This is particularly important in light of the frequent drought conditions that have plagued the area in recent years.

A Water Supply Assessment was not included in the SMND. As a result, LIUNA is concerned that a WSA has not been prepared for the project, as required by SB 610. If there is no WSA for the Project, one must be prepared and circulated with the SMND.

V. CONCLUSION

For the foregoing reasons, LIUNA believes the SMND is deficient and inadequate. LIUNA urges the City to make the above changes, and recirculate the revised SMND or an EIR to the public for review. Thank you for your attention to these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Rebecca L. Davis', with a long horizontal flourish extending to the right.

Rebecca L. Davis
Lozeau | Drury LLP