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January 16, 2015

Via Electronic Mail and Overnight Mail

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City of Rancho Mirage
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And Honorable Member of the Rancho Mirage City Council
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Riverside Local Agency Formation Commission
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Re: Comment re: Draft Environmental Impact Statement for the Proposed Section 24 Specific Plan Agua Caliente Band of Cahuilla Indians (SCH No. 2014011035)

Dear Ms. Park, Mayor Smotrich and Riverside Local Agency Formation Commission:

This letter is submitted on behalf of Laborers International Union of North America, Local Union 1184 and its thousands of members in Riverside County(collectively "LIUNA" or "Commenters") regarding the proposed Section 24 Specific Plan project proposed by the Agua Caliente Band of Cahuilla Indians (SCH No. 2014011035). ("Project").

As discussed herein, after reviewing the Draft Environmental Impact Statement ("DEIS") for the Project together with our expert consultants, it is evident that the document fails to comply with the California Environmental Quality Act, Public Resources Code § 21000 et seq. ("CEQA"), and contains numerous errors and omissions that continue to preclude accurate analysis of the Project.

As a result of these inadequacies, the DEIS fails as an informational document, fails to analyze all significant impacts of the Project, fails to identify and impose feasible mitigation measures to reduce the Project's impacts, and fails to properly analyze Project alternatives and cumulative impacts.[1] As a result, the Project will result in significant environmental impacts that have not been adequately addressed or mitigated as required by CEQA. LIUNA Local 1184 therefore requests that the Tribe and the City of Rancho Mirage ("City") or the Riverside Local Agency Formation Commission ("LAFCO") prepare and circulate a Supplemental Draft Environmental Impact Report ("SEIR") to address the issues raised in this and other comments, and to require implementation of feasible mitigations and alternatives required by law.

1

These comments are supported by the expert comments of:

- Certified hydrogeologist Matthew Hagemann, PG, C.Hg., QSD, QSP;
- Expert Wildlife Ecologist Shawn Smallwood, Ph.D.;
- Traffic Engineer, Daniel Smith, PE.

Mr. Hagemann is an expert in the fields of hydrogeology, toxics, and air quality. He is also the former Senior Science Policy Advisor, U.S. EPA Region 9 and Hydrogeologist, Superfund, RCRA and Clean Water programs. Mr. Hagemann's comments and curriculum vitae are attached hereto as Exhibit A and are incorporated herein by reference in their entirety. Mr. Smallwood is an expert wildlife biologist and ecologist who has expertise in the areas of rare and special status plants, animal density and distribution, habitat selection, habitat restoration, interactions between wildlife and human infrastructure and activities, conservation of rare and endangered species, and on the ecology of invading species, and other species impacts relevant to this FEIR. His comments and curriculum vitae are attached hereto as Exhibit B and are incorporated by reference in their entirety. Daniel Smith, PE is a certified traffic engineer. His comments and curriculum vitae are attached hereto as Exhibit C and are

[1] We reserve the right to supplement these comments at any later hearings and proceedings related to this Project. *See Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109.

incorporated by reference in their entirety. These expert comments are incorporated herein in full. These expert comments require separate response. 1

I. BACKGROUND

The proposed Project would provide entitlement approvals for up to 3,138,600 square feet of commercial retail, office, restaurant, hotel, and entertainment uses, and up to 2,406 residential units on approximately 577 acres of land on the Agua Caliente Indian Reservation ("Reservation"). The Project Site is surrounded by the City of Rancho Mirage ("City") which is in the heart of the Coachella Valley in Riverside County, at the base of the Santa Rosa Mountains. Adjacent jurisdictions surrounding the Project Site include the City of Palm Desert to the southeast, Cathedral City to the west, and the City of Palm Springs to the northwest. The Project Site is bounded by the following roadways: 1) Ramon Road on the north; 2) Bob Hope Drive on the east; 3) Dinah Shore Drive on the south; and 4) Los Alamos Road on the west. The Section 19 Specific Plan is located directly east across Bob Hope Drive from the Project Site and directly southeast of the Agua Caliente Casino/ Resort/ Spa.

The Project consists of a specific plan for approximately 577 acres of the Reservation, located within the City Sphere of Influence designated as Section 24, Township 4 South, Range 5, and east of the San Bernardino Meridian. The Section 24 Specific Plan would be approved and adopted by the Tribal Council and serve as the zoning for the Project Site. The City would subsequently adopt the Specific Plan and approve any request(s) for annexation into the City. (DEIS 2.0-2) 2

The Tribe, acting as the Lead Agency for the planning and environmental review of this Project, has decided to prepare this EIS in compliance with both TEPA and the California Environmental Quality Act (CEQA), including the CEQA Guidelines (California Code of Regulations Title 14 Section 15000 et seq.), in order to minimize the duplication of environmental studies and documentation by other public agencies involved with the review and approval of actions related to the Project that are required to comply with CEQA, including the City of Rancho Mirage ("City") and the Riverside Local Agency Formation Commission (LAFCo). (DEIS 2.0-1).

II. STANDING

Members of LIUNA Local 1184 live, work, and recreate in the immediate vicinity of the proposed Project site. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group, or environmental organization. Members of LIUNA Local 1184 live and work in areas that will be affected by water source reduction, air pollution, traffic, and plant and wildlife 3

species generated by the Project. Therefore, LIUNA Local 1184 and its members have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the fullest extent feasible.

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III. LEGAL STANDARD

A. CEQA.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). (*See, e.g.*, Pub. Res. Code § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.)

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1).) "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564) The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 ("Berkeley Jets"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810)

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Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. (CEQA Guidelines § 15002(a)(2) and (3); See also, *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." (Guidelines §15002(a)(2)) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." (Pub.Res.Code § 21081; 14 Cal.Code Regs. § 15092(b)(2)(A) & (B))

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" (*Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 409, fn. 12 (1988)) As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at 1355:

> A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946)

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IV. DISCUSSION

A. The Tribe Is the Wrong Lead Agency for the Project's CEQA Review.

While there is no question that the Aqua Caliente Tribe ("Tribe") is the proper lead agency for purposes of environmental review under TEPA, the Tribe lacks jurisdiction to serve as lead agency for purposes of the California Environmental Quality Act ("CEQA"). Tribe is not a state agency. *Picayune Rancheria of Chukchansi Indians v. Brown*, 229 Cal. App. 4th 1416, 1429 (Cal. App. 3d Dist. 2014). The DEIS states that the document is intended to comply with both TEPA and CEQA. However, the Tribe has no jurisdiction to conduct CEQA review. It is necessary to designate a CEQA lead agency at this time. That agency must be actively involved in the preparation of the CEQA document, response to comments and imposition of mitigation measures and alternatives. It is not sufficient that a CEQA lead agency later be asked to certify the EIS after the TEPA process has been completed by the Tribe, as appears to be contemplated by the DEIS. The CEQA lead agency must be involved actively throughout the CEQA process since the document must represent the "independent judgment" of the CEQA lead agency. (Pub.Res.Code §21082.1; CEQA Guidelines §15074). The CEQA lead agency should be the City of Rancho Mirage ("City"), or possibly the Riverside Local Agency Formation Commission ("LAFCO") since both will have permitting authority over the Project.

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5b

The law is clear that CEQA review is required for projects on tribal land if a state or local agency has any permitting authority over the project. For example, in the case of Amador v. Plymouth, the court held that a City must conduct CEQA review for a casino project on tribal land because it was contemplated that the

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City will provide roads, sewer and water for the casino, which makes it a CEQA "project" requiring CEQA review by the City. The court stated, "The Tribe has miscast the project as the acquisition of the trust lands and the Gaming Development. Although neither the taking of lands in trust nor the Gaming Development requires the formal approval of the City, the City's construction of public works and the vacation of a City road to the casino hotel do require its approval. It is these activities that constitute a project within the scope of CEQA, and the MSA that constitutes an approval of the project. (Cal. Code Regs., tit. 14, § 15352, subd. (a); hereafter Guidelines.)" *County of Amador v. City of Plymouth*, 149 Cal. App. 4th 1089, 1094-1095 (Cal. App. 3d Dist. 2007).

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CEQA review is required since there will be discretionary action by the City of Rancho Mirage and the LAFCO. The DEIS states:

> "The Specific Plan requires approval by the Tribal Council, approval of annexation into the City by LAFCo, and various approvals by the City, as identified in Table 3.0-2, Intended Uses of the EIS." (3.0-34).

Table 3.0-2 Intended Uses of the EIS

Lead Agency	Action
Agua Caliente Band of Cahuilla Indians	• Record of Decision of EIS • Approval of the Section 24 Specific Plan • Adoption of the Section 24 Specific Plan • Parcel Map to Reconfigure Allottee Parcels • Consent to Annexation • Approval of Tentative Tract Maps and permits for future project development in the Tribal Planning Areas (Planning Areas 1 through 7)
Responsible Agencies	**Action**
City of Rancho Mirage	• Certification of EIS • Adoption of the Section 24 Specific Plan • Approve Request for Annexation • Approval of Tentative Tract Maps and permits for future project development in the Active Adult Community (Planning Area 8)
Local Agency Formation of Riverside County	• Approve Annexation of the Project Site into the City of Rancho Mirage

5d

3.0-35.

"Other potential requests for approval of the following actions by the City include: certification of the EIS; adoption of the Section 24 Specific Plan; approve

request for annexation; and approval of Tentative Tract Maps and permits for future development within its jurisdiction. Finally, the Local Agency Formation of Riverside County would approve annexation of the Project Site into the City." (DEIS 2.0-8) "The Section 24 Specific Plan would be approved and adopted by the Tribal Council and serve as the zoning for the Project Site. The City would subsequently adopt the Specific Plan and approve any request(s) for annexation into the City." (DEIS 2.0-2)

The DEIS appears to contemplate that the City of LAFCO will certify the Final EIS as a CEQA document. The DEIS states:

> "The Tribe, acting as the Lead Agency for the planning and environmental review of this Project, has decided to prepare this EIS in compliance with both TEPA and the California Environmental Quality Act (CEQA), including the CEQA Guidelines (California Code of Regulations Title 14 Section 15000 et seq.), in order to minimize the duplication of environmental studies and documentation by other public agencies involved with the review and approval of actions related to the Project that are required to comply with CEQA, including the City of Rancho Mirage ("City") and the Riverside Local Agency Formation Commission (LAFCo). (DEIS 2.0-1)

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However, this type of pro-forma rubber stamping of a completed document is insufficient for the CEQA lead agency. In *Gentry v. Murietta* (1995) 36 Cal.App.4th 1359, 1397-98), the court emphasized that even though the lead agency did not prepare the CEQA document itself (the document was prepared by a different public agency), the lead agency revised the draft document extensively, thereby exercising "independent judgment."

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The lead agency plays a crucial role under CEQA because it defines the scope of environmental review for a project, and it is responsible for the process by which the EIR is written, approved, and certified. CEQA requires the public agency with the principal responsibility for supervising or approving a project as a whole, and with general jurisdiction over the Project and its impacts, to assume the role of lead agency early in the process. PRC § 21067; *Planning & Conservation League v. Department of Water Resources* ("*PCL v. DWR*") (2000) 83 Cal .App .4th 892, 906.

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The CEQA Guidelines specify that where, as here, a project is to be carried out by a private party, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project "as a whole." 14 CCR § 15051(b); *Eller Media Co. v. Community Redevelopment Agency* (2003) 108 Cal.App.4th 25, 38. "Greatest responsibility" is further defined as "the agency with ***general governmental powers***, such as a city or ***county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service*** or public

utility to the project." 14 CCR § 15051(b)(1) (emphasis added). The City is the public agency that fits the language of the statute and Guidelines.

In *PCL v. DWR*, the state Department of Water Resources ("DWR") and several local water contractors agreed to revise their long-term contracts governing the supply of water under the State Water Project. The revision concerned an allocation plan in the event of a permanent water shortage. The parties agreed that the Central Coast Water Authority, a joint powers agency among nine member water agencies within Santa Barbara County, would serve as lead agency for the project's EIR. In a challenge filed after the EIR was certified and the project was approved, the court held that DWR had a statutory duty to serve as lead agency on the EIR because it had greatest responsibility over the project and greatest authority over regulating its impacts, and invalidated the EIR. 83 Cal.App.4th at 898, 907.

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The same is true here. The City must assume the role of CEQA lead agency, and must be actively involved in the CEQA review and analysis process from the beginning. It is not uncommon for the lead agency designation to change during a project's CEQA review process. For example, this can occur if a project application is submitted to a county and the area containing the project is later annexed to a city or included in a newly incorporated city. A shift of lead agency to that city despite the fact that the project is "mid-stream" in CEQA review is appropriate in such an instance. *See Gentry v. Murrieta* (1995) 36 Cal. App. 4th 1359, 1371. That is what should have occurred here.

B. THE FEIR FAILS TO ANALYZE AND MITIGATED ALL POTENTIALLY SIGNIFICANT IMPACTS OF THE PROJECT.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). (*See, e.g.*, Pub. Res. Code § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.)

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CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. (CEQA Guidelines § 15002(a)(2) and (3); See also, *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly

reduced." (Guidelines §15002(a)(2)) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." (Pub.Res.Code § 21081; 14 Cal.Code Regs. § 15092(b)(2)(A) & (B))

A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946)

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The comments provided below are supplemental to and in accord with those provided by Mr. Smith, Mr. Smallwood and Mr. Hagemann, LIUNA's expert consultants, which comments are attached hereto as Exhibits A, B, and C.

1. The DEIS is Deficient Because it Fails to Disclose that the Project has Significant Greenhouse Gas Impacts.

a. The Project Has Significant Greenhouse Gas Impacts.

The DEIR states that the Project will result in the release of a phenomenal 94,104 metric tons of carbon dioxide equivalents per year. (DEIS 2.0-33). This exceeds all potentially applicable greenhouse gas ("GHG") CEQA significance thresholds. Most significantly, it exceeds by over 900% the GHG CEQA significance threshold set by the South Coast Air Quality Management District ("SCAQMD") of 3,000 metric tons per year. When an impacts exceeds a duly adopted CEQA significance threshold, as here, the lead agency must acknowledge the impact as significant, and must adopt all feasible mitigation measures and alternatives to reduce the impacts. *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"). The California Supreme Court made clear the substantial importance that a BAAQMD significance threshold plays in providing substantial evidence of a significant adverse impact. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 ("As the [South Coast Air Quality Management] District's established significance threshold for NOx is 55 pounds per day, these estimates [of NOx

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emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact").

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However, the DEIS erroneously concludes that the Project's GHG impacts are less than significant ("LTS") because they are allegedly less than a "business as usual" ("BAU") baseline. The DEIS states that the properly could be developed much more intensively than proposed by the Project under existing zoning and general plan guidelines. Since the Project develops the property on a level that is lower than the maximum allowed by zoning, the DEIS argues that the GHG impact is LTS since the Project's GHGs are less than "business as usual." In other words, the DEIS contends that although the Project will have massive GHG emissions, it could be even worse, and therefore the GHG impacts are less than significant. The DEIS states:

> "The Project would result in short-term emissions of greenhouse gases (GHGs) during construction. Project operational GHG emissions for the Active Adult Community, Tribal Planning Areas, and Combined Development would be 8,879.39, 39,326.09, and 45,899.94 metric tons of carbon dioxide equivalents (MTCO2e) per year, respectively. Project Design Features 5.6-1 through PDF 5.6-3 require the incorporation of practices to reduce the Projects energy demand. However, the Active Adult Community would reduce GHG emissions from business as usual by approximately 25 percent which is greater than the required 17 percent reduction from business as usual target identified by the California Air Resources Board (CARB) Updated Scoping Plan or the 19.8 percent reduction target identified in the City's Sustainability Plan which is consistent with the Updated Scoping Plan." (DEIS 2.0-33)

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The DEIS's analysis has been rejected under both CEQA and NEPA. Both laws are clear that the environmental "baseline" must be the existing environment. In other words, the Project must be compared to the existing environment – not a hypothetical environment that does not and may not ever exist. The existing environment at the Project site is bare dirt. Therefore the GHG CEQA baseline should be zero. Using this real world baseline, it is clear that the Project will have significant GHG impacts. This must be disclosed in the DEIS and all feasible mitigation measures and alternatives must be implemented.

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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 Environment v. So Coast Air Qual. Mgmnt. 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.*") As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. (*Save Our Peninsula*, *supra*, 87 Cal.App.4th 99, 121-123.)

The Project will be constructed on a vacant lot. Thus, the "real condition on the ground" is a zero baseline. The EIR misleads the public into thinking the Project's emissions will be much lower by subtracting from the Project's emissions the maximum daily emissions that could be generated from a hypothetical project that does not exist. As the court has explained, using such a skewed baseline "mislead(s) the public" and "draws a red herring across the path of public input." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656.) Subtracting emissions from a project that does not even exist anymore "failed to adequately apprise all interested parties of the true scope and magnitude of the Project." (Id. at p.657.)

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The EIR's error is similar to that in *Woodward Park Homeowners v. City of Fresno ("Woodward")* (2007) 150 Cal.App.4th 683, 708-711.) In that case, a developer proposed to build a shopping mall on a vacant lot. The EIR erroneously used as a baseline an office park that was previously approved for the parcel as the baseline, and subtracted the difference. The court held that the baseline should have been zero since the property was actually vacant. Using the non-zero baseline for the vacant parcel misled the public into thinking the proposed shopping mall's impacts would be much less than they would be when compared to the existing vacant parcel. See also, *Friends of Oroville v. City of Oroville*, 219 Cal. App. 4th 832, 844 (Cal. App. 3d Dist. 2013). The DEIS in this case makes the same error.

Climate scientist Jessie Jaeger and Matthew Hagemann, C. Hg. of expert consulting firm Soil, Water, Air Protection Enterprise (SWAPE), conclude that the Project's GHG emissions are far above applicable CEQA significance threshold. He explains:

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> Furthermore, on July 1, 2013, the Governor's Office of Planning and Research (OPR) and the Natural Resources Agency discussed possible

updates to the CEQA Guidelines. [2] Section 15064.4, Determining the Significance of Impacts from Greenhouse Gas Emissions, discusses the role of the BAU scenario as a way to show compliance with GHG thresholds, and attempts to clarify the difference between a valid BAU scenario and an unrealistic one. With respect to the *Friends of Northern San Jacinto*,[3] the "trial court rejected the comparison to a "hypothetical" worse-case BAU scenario that was highly unrealistic." Another trial court also found that the BAU methodology improperly relied on a hypothetical baseline.[4] According to OPR, "the BAU scenario is not a baseline. The baseline remains actual, existing GHG emissions prior to the Project. As with any other type of impact, Project emissions are compared to the existing emissions baseline." The document continues on to state that the "BAU emissions scenario is simply an intermediate step in determining the significance threshold...as such, it is incorrect to equate the BAU-based significance threshold with an improper hypothetical baseline."

Comparing the proposed Project emissions to a realistic BAU scenario would ultimately result in non-compliance with AB 32. To determine whether the Project's GHG emissions are significant, methods that have been proposed in other recent CEQA documents should be utilized and included in a revised DEIS.[5] For example, the Commerce Retail Center Project determines significance by utilizing the SCAQMD draft local agency tiered threshold (Commerce DEIS p.3.2-62). The threshold is as follows:

- Tier 1: The project is not exempt under CEQA; go to Tier 2.
- Tier 2: There is no GHG reduction plan applicable to the project; go to Tier 3.
- Tier 3: Project GHG emissions compared with the threshold: 3,000 MTCO2e per year.
- Tier 4, Option 1: Reduce GHG emissions from business as usual by 28.4 percent. The California 2020 emissions target is 427 MMTCO2e and the 2020 baseline (without any AB 32 related regulations) is 596 MMTCO2e. Therefore, a 28.4 percent reduction is required to reduce emissions to the target.[6]

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[2] http://www.opr.ca.gov/docs/Cal_Chamber_2014_CEQA_Guidelines_Update_%282-13-14%29.pdf

[3] *Friends of Northern San Jacinto Valley v County of Riverside*, Riverside County Sup. Ct., Case No. RIC10007572 (2012)

[4] *Center for Biological Diversity v. Dept. of Fish and Wildlife*, Los Angeles Sup. Ct., Case No. BS131347 (2012)

[5] http://ca-commerce.civicplus.com/DocumentCenter/View/1875

[6] http://www.arb.ca.gov/cc/inventory/archive/sp_2008_projection.pdf

The Project DEIS utilizes Tier 4, Option 1 to achieve compliance with AB 32 for operational emissions; however, this analysis is inaccurate because, as explained above, the BAU scenario defined in the DEIS is not consistent with the CARB and OPR BAU criteria. Furthermore, establishing a BAU scenario at this site would be difficult because it is currently undeveloped. Therefore, the best approach to show compliance with AB 32 would be to compare emissions to the Tier 3 threshold of 3,000 MTCO2e per year. Table 5.6-4 in the DEIS shows that the Project's Active Adult Community Operational GHG emissions would be equal to 8,879.39 MTCO2e per year (p.5.6-24). Table 5.6-6 shows that the Tribal Planning Areas operational GHG emissions would be equal to 39,326.09 MTCO2e per year (p.5.6-27). Operational GHG emissions for both Project phases would exceed the 3,000 MTCO2e per year threshold. Therefore this Project will have significant GHG impacts that must be better characterized and mitigated. 10

Because GHG emissions are significant when compared to the Tier 3 threshold, the Applicant should obtain emission reduction credits, also referred to as carbon offsets, to serve as mitigation and reduce the Project's emissions to a less than significant level. Offsets are specifically mentioned by the California Resources Agency as a measure to mitigate the significant effects of greenhouse gas emissions.[7] Offsets should be identified in a revised DEIS for the Project. Verification that the offsets are real and measureable, such as those available from the California Climate Action Registry's Climate Action Reserve[8], should be provided in the revised DEIS. 11

b. The DEIS Fails to Propose Feasible Mitigation Measures for Greenhouse Gases.

Because the DEIS fails to acknowledge that the Project has significant GHG impacts, it fails to propose feasible, binding mitigation measures or alternatives to reduce these impacts. For example, many feasible mitigation measures are "encouraged," but not required. Under CEQA, all feasible mitigation measures must be implemented and made binding pursuant to a mitigation monitoring program. The GHG mitigation measures fail to meet these CEQA requirements. For example: 12

[7] http://ceres.ca.gov/ceqa/docs/Adopted_and_Transmitted_Text_of_SB97_CEQA_Guidelines_Amendments.pdf, p.21

[8] http://www.climateregistry.org/reserve.html

- Solar panels are only "considered," not required. Solar panels would be strongly considered as appropriate shading devices when properly mounted on overhead building overhangs and trellises. 3.0-27.
- Evaportative cooling will be "considered," but not required. Consideration of the use of evaporative cooling systems, which incorporate "cool towers" as integral architectural/mechanical system components, to minimize environmental and cost impacts of conventional air conditioning systems for buildings. 3.0-28.
- LEED certification is "encouraged," but not required. The pursuit of already established sustainable best management practices, such as Leadership in Energy and Environmental Design (LEED) certification, ComfortWise and EnergyStar Home is strongly encouraged throughout the Project Site. 3.0-28.
- Solar power and water heat is encouraged by not required. Buildings would be designed to facilitate and accommodate photovoltaic cells for solar power in accordance with Tribal Land Use Ordinance requirements. Solar-heated water is another efficient way to reduce energy needed for household activities. 3.0-28.
- Cool roofs are encouraged but not required. The use of light-colored roofing materials to reflect heat and reduce cooling requirements of buildings, particularly Energy Star-labeled roofing materials, would be encouraged. 3.0-30.

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All of the above measures, and many others, are feasible mitigation measures that must be required under CEQA, not made optional matters for further consideration. SWAPE points out dozens of feasible mitigation measures that should be considered to mitigate the Project's significant impacts, including:

- Passive Solar;
- LED lighting;
- Permeable pavement;
- CARB-certified landscaping equipment;
- Solar panels on unused area;
- Wind turbines;
- Stormwater infiltration;
- Emission credit offsets for any unmitigated GHGs.

A new Draft EIS is required to analyze these and other feasible mitigation measures. After all feasible mitigation measures are imposed, the Supplemental Draft EIS should calculate whether GHG emissions remain above the CEQA significance threshold. If so, a statement of overriding considerations would be required.

2. The Project Has Significant Impacts on Traffic.

As discussed in more detail by certified traffic engineer, Daniel Smith, PE, the DEIS traffic analysis makes critical errors that lead to a significant underestimation of the Project's traffic impacts. A supplemental DEIS is required to accurately calculate traffic impacts and to propose feasible mitigation measures and alternatives. 13

a. DEIS Underestimates Non-Residential Trip Generation.

Mr. Smith points out that the traffic analysis erroneously assumes that the non-residential portion of the project will be a single 3.1 million square foot mega-shopping mall. This is incorrect. The Project states that it is to be developed with several different shopping components including a grocery store, neighborhood retail, office space, cinema, big-box store, bank, etc. Mr. Smith states that the mix of uses proposed would generate much higher traffic numbers than a single large shopping mall. This error must be corrected in a Supplemental DEIS. 14

b. DEIS Overestimates Internal Trips.

The DEIS assumes that 15 percent of trips will remain entirely within the Project area. Such internal trips do not impact streets and highways outside of the Project. Mr. Smith concludes that the 15 percent assumption is contradicted by actual trip generation date prepared by the Coachella Valley Association of Governments 2004 Origin/Destination Survey. According to that survey, the 15 percent figure overestimates internal trips by 12 times. As a result of this miscalculation, the DEIS substantially underestimates traffic impacts of the Project. 15

c. DEIS Overestimates Passer-By Traffic.

Mr. Smith concludes that the DEIS substantially overestimates passer-by traffic. The DEIS concludes that 15 percent of trip generation for the non-residential component of the Project will be attracted from passer-by traffic. Mr. Smith points out that the support this assumption, one in seven drivers passing by the site would have to stop. Mr. Smith states that this assumption is not accurate or realistic. 16

d. DEIS Uses Erroneous Peak Hour Factor.

Mr. Smith points out that the DEIS uses an erroneous peak hour factor (PHF) of 1.0. Mr. Smith explains that the PHF accounts for variation of peak hour traffic, which is often substantial. A PHF of 1.0 assumes no variation of peak 17

hour traffic. Mr. Smith states that actual PHF is closer to 0.85. Thus, the DEIS does not reflect real world conditions on the ground and must be revised. 17

e. DEIS Fails to Analyze Project Impacts to Freeways.

The DEIS fails entirely to analyze Project impacts to nearby freeways and freeway ramps. This violates Caltrans, Guide for Preparation of Traffic Impact Studies (2012). Under that Caltrans Guide, any project that generates over 100 peak hour trips must analyze freeway impacts. The Projec would generate over 3524 peak hour trips – yet there is no freeway analysis. This is a serious omission that must be corrected in a Supplemental DEIS. 18

3. The Project Has Significant Unmitigated Criteria Air Pollution Impacts.

SWAPE concludes that the DEIS fails to accurate evaluate and mitigate construction and operational criterial air pollutant emissions of the Project. SWAPE explains that the DEIS uses CalEEMod to calculate Project emissions. However, SWAPE explains that the input parameters used in the CalEEMod model are inconsistent with the default values required by CalEEMod and are inconsistent with the DEIS itself. This renders the entire analysis faulty. SWAPE has uncovered very significant errors in the CalEEMod modelling, including:

- The DEIS states that the entire 577-acre site will be graded. (DEIS 5.2-23). However, the CalEEMod tables show that an input value was used that assumed only 450 acres would be graded. (DEIS, App. B, p. 13, 386). This results in a substantial underestimation of Project grading emissions. (SWAPE, p.6). 19
- The DEIS states that construction work will "consist of 20 worker trips/day during trenching." (DEIS 5.2-23). However, the CalEEMod used a value of 15 worker trips/day (p.15). Again, this understates emissions by 25%.
- The CalEEMod failed to use default values for construction equipment, without explanation. (SWAPE, p.6)
- The CalEEMod assumed a lower population number than set forth in the DEIS. SWAPE explains that CalEEMod assumes a population factor of 1.95, which should generate a population for the condo-townhouse portion of the project of 1206 DU x 1.75 = 2,352 residents. However, the CalEEMod model assumed only 2,028 residents. This results in a substantial underestimation of operational ongoing emissions. (SWAPE p.7).
- The CalEEMod model reduces the construction period on the Tribal Planning area by half – from the 12 years described in the DEIS (5.2-23) to six years. This results in a massive underestimation of construction emissions, and results in a failure to calculate combined emissions during

construction of the Tribal Planning area and the Active Adult Community. (SWAPE p.7).

- The CalEEMod assumed that 100% of construction roads will be paved, despite the fact that the Project site is currently unpaved. This is unrealistic and results in a significant underestimation of particulate matter emissions. (SWAPE p.7).

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SWAPE correct for these errors and ran extensive modelling. The new, accurate modelling shows that the Project's emissions are far more substantial than disclosed in the DEIS, and that the Project's criterial pollutant emission exceed SCAQMD construction and operational thresholds even with the mitigation proposed. (SWAPE p.9).

As a result of these calculation errors, the DEIS fails to impose adequate mitigation measures to reduce the Project's significant criteria air pollutant emissions. SWAPE proposes a long list of feasible air pollution mitigation measures that should be analyzed in a supplemental draft EIS. (SWAPE p. 2-5). These measures include, but are not limited to:

- Low VOC paints;
- High-volume low-pressure paint applicators with transfer efficiency of at least 65%;
- Improved bicycle lanes throughout the Project area;
- Public transit accessibility.

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In addition, a supplemental DEIS should consider:

- Electric car charging stations;
- Solar photovoltaic roofs;
- Solar water hearing;
- Passive solar construction;
- Car-share pods throughout the development;
- Energy star applicances;
- LEED platinum certification.

4. DEIS Underestimates Diesel Particulate Matter Emissions.

The DEIS fails entirely to calculate hazardous air pollutant or Toxic Air Contaminants (TACs) that will be generated during Project construction. SWAPE points out that this violates SCAQMD CEQA guidance. SWAPE calculates that the Project will generate TAC emissions well above the SCAQMD CEQA significance threshold.

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The DEIS concludes without calculation that the Project will not exceed the SCAQMD CEQA significance threshold of 10 per million. (DEIS 5.2-42). However, there are no calculations to support this conclusion.

SWAPE conducted detailed analysis using guidance from California Office of Environmental Health Hazard Assessment (OEHHA) and United States Environmental Protection Agency (US EPA). SWAPE's calculations show that Project construction will result in cancer risks that exceed SCAQMD CEQA Significance thresholds for infants and children. (SWAPE p. 18). This impact must be disclosed in a supplemental draft EIS, and mitigation measures must be considered to reduce these impacts.

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5. The FEIR Fails to Adequately Analyze Impacts to Biological Resources.

It is the policy of the State of California to

> Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities.

(Pub. Res. Code § 21001(c).) An EIR may not avoid studying impacts to biological resources by proposing future study or mitigation based on future studies unless the mitigation measures and performance standards are explicit in the DEIR. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671)

As will be more fully set forth in forthcoming comments, the DEIS fails to assess impacts to wildlife, especially sensitive species and plants. Where impacts are identified, the DEIS impermissibly relies on vague, unenforceable and deferred mitigation measures, most of which lack a foundation in science and performance standards. Consequently, the DEIS must be revised to reassess impacts to biological resources and, where appropriate, propose adequate mitigation measures with definite terms and verifiable performance standards.

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Deferral of mitigation measures is prohibited under CEQA:

> By adopting the condition that applicant would comply with environmental standards for sludge disposal, the County effectively removed this aspect of the project from environmental review, trusting that the Regional Water Quality Control Board and the applicant would work out some solution in the future..... Having no "relevant data" pointing to a solution of the sludge disposal problem, the County evaded its duty to engage in a

> comprehensive environmental review by approving the use permit subject to a condition requiring future regulatory compliance. *Sundstrom*, 202 Cal.App.3d at 309.
>
> [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. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th at 92.

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Similarly, an agency cannot fail to analyze potentially significant impacts, then rely on that failure to conclude that a Project has no significant impacts. An agency may not assert that there is no evidence of a significant environment impact because the agency failed to undertake an adequate environmental analysis. *(Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 ("The agency should not be allowed to hide behind its own failure to gather relevant data.").

C. THE CITY OF RANCHO MIRAGE SHOULD PREPARE AND RECIRCULATE A SUPPLEMENTAL FEIR.

Recirculation of an EIR prior to certification, as here, is addressed in CEQA § 21092.1, and CEQA Guidelines §15088.5. "When significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 ... ***but prior to certification***, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report." PRC § 21092.1. "Significant new information" includes:

> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
> (2) A substantial increase in the severity of an environmental impact would result...
> (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project...
> (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.
> 14 CCR §15088.5; *Mountain Lion Coal. v. Fish and Game Comm'n* (1989) 214 Cal.App.3d 1043.

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In *Mountain Lion,* the court held that when a detailed project analysis is not prepared until the FEIR, then the document must be recirculated for public comment.

> If we were to allow the deficient analysis in the draft EID[9] to be bolstered by a document that was never circulated for public comment ... we would be subverting the important public purposes of CEQA. Only at the stage when the draft EID is circulated can the public and outside agencies have the opportunity to analyze a proposal and submit comment. No such right exists upon issuance of a final EID unless the project is substantially modified or new information becomes available. (See Cal. Code Regs., tit. 14, § 15162.) To evaluate the draft EID in conjunction with the final EID in this case would only countenance the practice of releasing a report for public consumption that hedges on important environmental issues while deferring a more detailed analysis to the final EID that is insulated from public review.

Mountain Lion, 214 Cal.App.3d at 1052.

In *Laurel Heights Impr. Assn. v. Reg. of Univ. of Cal.* (1993) 6 Cal. 4th 1112 ("*Laurel Heights II,* the Supreme Court explained that Section 21092 favors EIR recirculation prior to certification. The Court stated:

> ***Section 21092.1 was intended to encourage meaningful public comment***. (See State Bar Rep., supra, at p. 28.) Therefore, new information that demonstrates that an EIR commented upon by the public was so fundamentally and basically inadequate or conclusory in nature that public comment was in effect meaningless triggers recirculation under section 21092.1. (See, *Mountain Lion Coalition v. Fish & Game Com., supra*, 214 Cal.App.3d 1043.)

Laurel Heights II, 6 Cal.4th at 1130 (emph. added).

Here, the DEIS was prepared by the wrong lead agency. Also, the DEIS has failed entirely to analyze impacts, such as toxic air contaminants, and erroneously analyzed impacts to traffic, greenhouse gases, criteria air pollutants, and many others. A supplemental DEIS must be prepared to address these impacts. Unless the DEIS is revised to address these deficiencies and unless that DEIS is recirculated for further public review, the public and decision makers will be deprived of an opportunity for full input and informed decision making.

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[9] EID is essentially the same as an EIR since the Dept. of Fish and Game had a certified environmental program.

V. CONCLUSION

LIUNA Local Union No. 1184 believes the Project DEIS is wholly inadequate and requires significant revision, recirculation and review. Thank you for your attention to these comments. Please include this letter and all attachments hereto in the record of proceedings for this project.

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Sincerely,

Richard T. Drury
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