



August 28, 2018

Via E-Mail

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**Re: Dove Hill Medical Care Project (Project Files Nos. PDC14-051 and PD16-019)**

Dear Mayor Liccardo, City Council Members, and Ms. Le:

Please accept these additional supplemental comments on behalf of the **Laborers International Union of North America, Local Union 270** and its members living in and around the City of San Jose (“LIUNA”) regarding the Initial Study and Mitigated Negative Declaration (“IS/MND”) prepared for the Dove Hill Medical Care Project (“Project”) (Project Files Nos. PDC14-051 and PD16-019). These comments supplement previous comments dated April 30, 2018 and July 25, 2018 submitted on behalf of LIUNA. LIUNA has retained the services of expert wildlife biologist Dr. Shawn

Smallwood to review the biological review contained in the Project's IS/MND as well as several responses prepared by the City's staff to prior comments submitted by Dr. Smallwood.

Dr. Smallwood has prepared the attached additional comments for the Council's and staff's review. Based on a recent visit he made to the site, Dr. Smallwood has confirmed that numerous ground squirrel burrows are located immediately adjacent to the Project site. Such burrows are commonly used by burrowing owls and indicate there is a likelihood that burrowing owls may be present at or adjacent to the Project site, especially during their nesting season. Likewise, the burrows observed by Dr. Smallwood are the type of burrows utilized by California tiger salamanders as upland habitat and are accessible to tiger salamanders documented near the site. He also observed several other sensitive bird species including Cooper's hawk, red-tailed hawk, and Common yellowthroat foraging and flying at or adjacent to the Project site.

Despite Dr. Smallwood's evidence of the likely presence of burrowing owls immediately adjacent to the site, no burrowing surveys were conducted during the owl's nesting season in order to determine whether or not the owls are actually present at the site. As a result, the IS/MND fails to address the possible impacts the Project's construction and operation may have on nearby burrowing owls and/or their habitat.

Likewise, the IS/MND makes no mention of the potential impacts the Project may have to foraging and other habitat of the sensitive bird species identified by Dr. Smallwood at or adjacent to the Project site, including Cooper's hawk, red-tailed hawk and Common yellowthroat. The IS/MND for the Project does not address potential impacts Cooper's hawk, red-tailed hawk, or San Francisco common yellowthroat. The Cooper's hawk, red-tailed hawk and San Francisco common yellowthroat are not covered by the Santa Clara Valley Habitat Plan ("VHP"). The Cooper's hawk and red-tailed hawk are not addressed at all in either the VHP EIR or 2040 General Plan EIR. Accordingly, no CEQA review of the Project's impacts to these three species has been done.

Additionally, Dr. Smallwood observed the pathways that remain between a known salamander location and the Project site and noted the likelihood that salamanders would be moving through the site to access the numerous ground squirrel burrows on the adjacent hillside. Again, no surveys were conducted by the Project capable of determining whether salamanders already are present in those burrows at certain times of the year.

As discussed below and in Dr. Smallwood's supplemental comments, staff's reliance on conclusory statements by the Project's consultants and components of a habitat conservation plan applicable to statutes other than the California Environmental Quality Act ("CEQA") do not rebut Dr. Smallwood's substantial evidence of a fair argument that the Project may have significant impacts on a number of special status bird species and California salamanders at or adjacent to the site.

**A. Staff's Rebuttal Misstates the Standard Applicable to Determining When an EIR is Required.**

Attempting to rebut Dr. Smallwood, staff applies in incorrect standard for determining when a project's impacts may be significant. Staff asserts that CEQA Guidelines section 15065 provides that "a project's effects on biotic resources are deemed significant where the project *would* (1) substantially reduce the habitat of a fish or wildlife species, (2) cause a fish or wildlife population to drop below self-sustaining levels, (3) threaten to eliminate a plant or animal community, or (4) reduce the number or restrict the range of a rare or endangered plant or animal." Appendix E, p. 2 (emphasis added). However, Guidelines section 15065 is clear that when a project *may* have such impacts, the agency must make a mandatory finding of significance and prepare an EIR.

Where an agency fails to properly investigate an impact, the scope of a fair argument becomes broader. "[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts. 'If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.'" *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311. *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544.

Dr. Smallwood has provided his expert opinion based on his observations at the site and his extensive knowledge of the habitat needs and behavior of burrowing owls and other bird species and the California salamander, that the Project may have significant direct and cumulative impacts on those species. The biological assessment relied upon by the IS/MND claims "[t]here is a low probability of occurrence of the burrowing owl, a California species of special concern, on the site due to the paucity of California ground squirrel burrows." Dr. Smallwood's observations directly refute that there is a "paucity" of ground squirrel burrows directly adjacent to the Project site. Smallwood Aug. 26, 2018 Comments. As a matter of law, "substantial evidence includes . . . expert opinion." (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1).

**B. The Santa Clara Valley Habitat Plan Does Not Relieve The City of Performing Biological Surveys Designed to Actually Detect Burrowing Owls and Other Sensitive Species and Ensuring Adequate Mitigation of Impacts Under CEQA.**

Staff relies on the VHP as justifying staff's reliance on imprecise, reconnaissance level surveys. Staff essentially argues that the VHP serves as a stand-in for a thorough investigation of the site and surrounding hillside for the presence of burrowing owls and other species and serves to mitigate any potential biological impacts from the Project. This notion is incorrect as a matter of fact and law.

The only regulatory requirements the VHP assists in streamlining is the need for individual project's to obtain incidental take permits under the federal and state endangered species acts. Nothing in the VHP relieves the City from any requirement or duty to investigate a project site under CEQA. As the California Supreme Court has held:

To the extent the agency is arguing that a technique used for planning under another statutory scheme necessarily satisfies CEQA's requirements for analysis of a project's impacts, we disagree. Except where CEQA or the CEQA Guidelines tie CEQA analysis to planning done for a different purpose (see, e.g., § 21081.2, subd. (a) [CEQA findings on traffic impacts not required for certain residential infill projects that are in compliance with other municipal plans and ordinances]), an EIR must be judged on its fulfillment of CEQA's mandates, not those of other statutes.

*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 462. A habitat conservation plan itself does not satisfy CEQA. *Env'tl. Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1027.

The EIR prepared for the VHP acknowledges that the VHP is not a stand-in for project-level CEQA review. As the FEIR for the VHP states, “[a]s part of the standard approval process, most projects would require separate, project-level environmental review under CEQA.” VHP FEIR, p. 2-7 (<https://scv-habitatagency.org/DocumentCenter/View/139/Final-Environmental-Impact-Report-Environmental-Impact-Statement-Volume-I>). *See also id.* (Response to Comment 50-66) (“The commenter is correct that project-level CEQA review will still be necessary with the adoption of the Habitat Plan”). The EIR prepared for the VHP only addresses the impacts that implementing the VHP itself would have on the environment. That EIR does not address the direct and cumulative impacts of individual projects. Although the VHP can and should be considered in the context of the Project's environmental review, it cannot be used to alter the City's duty to investigate the Project's potential environmental impacts. By not looking for burrowing owls during the nesting season, the City cannot claim potential impacts to the owl have been evaluated or whether the VHP alone will be sufficient to mitigate potential impacts.

For the foregoing reasons, as well as the reasons articulated in our previous comments and those of Dr. Smallwood, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public

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review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,



Michael R. Lozeau  
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