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DUBLIN PLANNING

VIA EMAIL AND OVERNIGHT MAIL

March 16, 2018

City of Dublin - Community Development Department
Amy Million, Principal Planner
100 Civic Plaza
Dublin, CA 94568
email: amy.million@dublin.ca.gov

RE: Draft Supplemental Environmental Impact Report (Draft EIR)
IKEA Retail Center Project (State Clearing House Number 2017082047)

Dear Ms. Million:

I am writing on behalf of **Laborers' International Union of North America Local Union No. 304**, and its many members living in an around the City of Dublin concerning the Draft Supplemental Environmental Impact Report ("DEIR") prepared for the IKEA Retail Center Project (State Clearing House Number 2017082047) ("Project"). After reviewing the DEIR, it is clear that the document fails to comply with CEQA, and fails to adequately analyze and mitigate the Project's impacts. LIUNA urges the City to revise the EIR to adequately describe, analyze, and mitigate the Project and its impacts.¹ A revised EIR should be recirculated to allow public review and comment.

I. PROJECT DESCRIPTION

IKEA Retail Center (PLPA-2016-00016). The proposed project involves the development of approximately 432,099 square feet of commercial uses on 27.45 acres. The project would be anchored by an IKEA store of approximately 339,099 square feet and feature up to 93,000 square feet of lifestyle retail-restaurant uses. The Project will be located at 5344 and 5411 Martinelli Way - Assessor Parcel Number 986-0033-005-02 & 986-0033-006-00. The Project site includes almost 2 acres of wetlands. (DEIR, p. 3.2-2).

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

II. STANDING

Members of Local Union No. 304 ("LIUNA") live, work, and recreate in the immediate vicinity of the 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 group. Hundreds of LIUNA Local Union No. 304 members live and work in areas that will be affected by traffic, air pollution, and water pollution generated by the Project.

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In addition, construction workers will suffer many of the most significant impacts from the Project as currently proposed, such as from air pollution emissions from poorly maintained or controlled construction equipment, possible risks related to hazardous materials on the Project site, and other impacts. Therefore, LIUNA Local Union No. 304 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.

III. LEGAL STANDARDS

A. EIR

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. Resources 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. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 ("CBE v. CRA").)

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*, *supra*, 91 Cal. App. 4th at p. 1354; *Citizens of Goleta Valley*, *supra*, 52 Cal.3d at p. 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." (CEQA Guidelines, §15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." (Pub. Resources Code, § 21081; CEQA Guidelines, § 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 at p. 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 p. 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.)

B. SUPPLEMENTAL EIR

Recirculation of an EIR prior to certification is required "when the new information added to an EIR discloses: (1) a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented (cf. CEQA Guidelines, § 15162, subd. (a)(1), (3)(B)(1)); (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance (cf. CEQA Guidelines, § 15162, subd. (a)(3)(B)(2)); (3) a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project's proponents decline to adopt (cf. CEQA Guidelines, § 15162, subd. (a)(3)(B)(3), (4)); or (4) that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1130, citing *Mountain Lion Coalition v. Fish & Game Comm'n* (1989) 214 Cal.App.3d 1043.)

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Significant new information requiring recirculation can include:

- (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 unless mitigation measures are adopted that reduce the impact to a level of insignificance.
- (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.
- (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

(CEQA Guidelines, § 15088.5(a).)

The DEIR fails to analyze significant environmental impacts pertaining to the Project and to fully consider available mitigation measures to address those impacts. A revised EIR is required to be prepared and recirculated to address these deficiencies.

IV. THE DEIR FAILS TO ANALYZE AND MITIGATE ALL POTENTIALLY SIGNIFICANT IMPACTS.

An EIR must disclose all potentially significant adverse environmental impacts of a project. (Pub. Resources Code, § 21100(b)(1); CEQA Guidelines, § 15126(a); *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354.) CEQA requires that an EIR must not only identify the impacts, but must also provide "information about how adverse the impacts will be." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 ("Kings County").)

CEQA requires public agencies to avoid or reduce environmental damage when feasible by requiring mitigation measures. (CEQA Guidelines, § 15002(a)(2) and (3); See also, *Berkeley Jets*, *supra*, 91 Cal. App. 4th at p. 1354; *Citizens of Goleta Valley*, *supra*, 52 Cal.3d at p. 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." (CEQA Guidelines, §15002(a)(2).) If the project will have a significant effect on the

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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. Resources Code, § 21081; CEQA Guidelines, § 15092(b)(2)(A) & (B).)

In general, mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines, § 15370.) Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (*Id.*, at § 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid the Project's potentially significant environmental impacts (Pub. Resources Code, §§ 21002, 21081(a)), and describe those mitigation measures in the CEQA document. (Pub. Resources Code, § 21100(b)(3); CEQA Guidelines, § 15126.4.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County, supra*, 221 Cal.App.3d at p. 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. (CEQA Guidelines, § 15364.) To demonstrate economic infeasibility, "evidence must show that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181.) The EIR must provide evidence and analysis to show project cannot be economically implemented. (*Kings County, supra*, 221 Cal.App.3d at pp. 734-737.) This requires not just cost data, but also data showing insufficient income and profitability. (*See Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322, 327 (infeasibility claim unfounded absent data on income and expenditures showing project unprofitable); *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 694 (upholding infeasibility finding based on analysis of costs, projected revenues, and investment requirements).) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. (CEQA Guidelines, § 15126.4, subd. (a)(2).)

A lead agency may not conclude that an impact is significant and unavoidable without requiring the implementation of all feasible mitigation measures to reduce the impacts of a project to less than significant levels. (CEQA Guidelines, §§ 15126.4, 15091.)

A. THE DEIR FAILS TO ADEQUATELY MITIGATE TRAFFIC IMPACTS.

The DEIR admits that the Project will have many significant impacts on traffic. However, the document fails to impose feasible mitigation measures to reduce or eliminate traffic impacts. For example, the DEIR states:

The proposed project would contribute new trips to the intersection of Hacienda Drive and Martinelli Way causing a queue impact under Existing With Project Conditions. While mitigation measures are proposed to fully mitigate the impact, the proposed mitigations may not be feasible. Therefore, the residual significance is significant and unavoidable. (DEIR p. ES-3).

Additionally, extending the length of the northbound left-turn pocket by approximately 100 feet through median modifications and widening along the project frontage in order to provide a second eastbound left-turn pocket at the intersection of Hacienda Drive and Martinelli Way would reduce the queue impact to less than significant. Should the widening along the project frontage to provide a second eastbound left-turn pocket not be feasible, the eastbound left turn movement queue impact would remain significant and unavoidable. (DEIR p. 3.6-70).

The proposed project would contribute new trips to freeway facilities that would operate at unacceptable levels (freeways and major arterials). All feasible mitigation measures are proposed to mitigate impacts; however, in certain cases, they would not fully mitigate the impact to a level of less than significant. In other cases, no feasible mitigation is available. Lastly, certain feasible mitigation measures require the cooperation of third-party agencies, which is not assured. Therefore, the residual significance is significant and unavoidable. (DEIR, p. ES-3).

The DEIR properly identifies mitigation measures capable of reducing certain traffic impacts to less than significant. However, the DEIR fails to impose those measure, determining that they may not be feasible. This fails to comply with CEQA.

CEQA defines "feasible" as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors. (Pub. Res. Code § 21061.1.) The guidelines add "legal" considerations as a fifth factor that must be taken into account when determining whether a mitigation measure or project alternative is feasible. (CEQA Guidelines § 15364.) Neither the statute nor the guidelines provide any substantive insights on how to analyze the economic feasibility of an alternative or measure. The cases discussed below provide some insight as to how the courts have determined whether an alternative or measure is economically feasible.

Citizens of Goleta Valley v. Board of Supervisors (1988) 197 Cal.App.3d 1167, 1181 held that "evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." See also, *Kings County Farm Bureau v. Hanford*, 221 Cal.App.3d at 734-737 (EIR must provide evidence and analysis to show project cannot be economically implemented). For a private project, this requires not just cost data, but also data showing insufficient income and profitability. *Burger v. Mendocino*, 45 Cal.App.3d at 327 (infeasibility claim unfounded absent data on income and expenditures showing project unprofitable).

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The DEIR does not demonstrate that the identified mitigation measures are infeasible. Unless there is an adequate showing of infeasibility, the City must impose the mitigation measures to reduce the Project's significant traffic impacts.

B. THE DEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE AIR QUALITY IMPACTS.

The DEIR concludes that Project construction will have significant air quality impacts due to NOx and ROG emissions far above CEQA significance thresholds. (DEIR p. 3.1-44). The DEIR recommends mitigation measures, including Tier 4 construction equipment and ultra-low VOC paints. These measures are projected to reduce emissions to slightly below significance thresholds – approximately 52 pounds per day compared to a significance threshold of 55 pounds per day.

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However, there is no showing that there is adequate availability of Tier 4 construction equipment to implement this measure. Also, the Project will have significant cumulative construction emissions together with other projects in the immediate vicinity. This includes the Carl Zeiss project and the Boulevard project (formerly the Dublin Crossing Project). The IKEA project will have significant cumulative construction emissions when considered together with the Zeiss and Boulevard projects. We incorporate the CEQA documents for the Zeiss and Boulevard projects by reference. Since all of the documents are in the City of Dublin's possession, they should be included in the record for this IKEA Project.

An EIR must discuss significant cumulative impacts. CEQA Guidelines section 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." "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines section 15355(a). "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." CEQA Guidelines section 15355(a).

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"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Communities for a Better Environment v. Cal. Resources Agency* ("CBE v. CRA"), (2002) 103 Cal.App.4th 98, 117. 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. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b).

As the court stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(Citations omitted).

In *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The court said: "The [] EIR concludes the project's contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact." The court concluded: "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin." The Kings County case was reaffirmed in *CBE v. CRA*, 103 Cal.App.4th at 116, where the court rejected cases with a narrower construction of "cumulative impacts."

Since the IKEA Project will have significant cumulative air quality impacts, the DEIR must analyze additional mitigation measures to reduce emissions.

C. THE DEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE BIOLOGICAL IMPACTS.

The DEIR fails to properly identify several species that will be directly affected by the Project. The Project site includes almost 2 acres of wetlands. (DEIR Exhibit 3.2-1). This is a new circumstance since the wetland acreage almost doubled from 2016 to 2017. (DEIR, p. 3.2-16).

The DEIR admits the presence of habitat suitable for numerous special status flora and fauna species. However, the documents relies on deferred mitigation, which is prohibited by CEQA. For example, the DEIR states:

One special-status plant species and four special-status wildlife species have a moderate or high potential to occur within the project site. The project site supports Congdon's tarplant, while burrowing owl, pallid bat, Townsend's big-eared bat, and Yuma myotis are considered to have a moderate potential to occur on the project site. It should be noted that significant impacts associated with wildlife species are associated with their potential to nest on-site; avian species can forage almost anywhere, and the loss of foraging habitat by itself does not constitute a significant impact. If any of the species are found on the project site, construction activities would directly affect these species. This would be a potentially significant impact.

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If Congdon's tarplant is found on-site during a future survey, and if impacts cannot be avoided, then mitigation will be required. Mitigation would involve the protection and enhancement of populations or suitable habitat elsewhere, as determined appropriate by the CDFW and USFWS.

(DEIR, p. 3.12-17).

The DEIR fails to identify how impacts to the species will be mitigated. Instead, the document states that "appropriate" mitigation will be developed at a later time. CEQA prohibits such deferred mitigation.

"[M]itigation 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). Feasible mitigation measures for significant environmental effects must be set forth in an EIR for consideration by the lead agency's decision makers and the public before certification of the EIR and approval of a project. The formulation of mitigation measures generally cannot be deferred until after certification of the EIR and approval of a project. Guidelines, section 15126.4(a)(1)(B) states: "Formulation of mitigation measures should not be deferred until some future

time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way."

"A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.) "[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 70, 92 (Communities).)

A Revised EIR must be prepared to identify specific mitigation measures that will be implemented to protect special status species.

In addition, the DEIR fails to identify special status species likely to be found on the Project site. In a recent site inspection of the Carl Zeiss Project site, which is very closed to the IKEA Project site, wildlife biologist Dr. Shawn Smallwood, identified red-tailed hawks and white-tailed kites. These species are protected under California law. Dr. Smallwood's comments are attached hereto as Exhibit A. Given the presence of these birds on the nearby Zeiss Project site, it is a near certainty that they exist on the IKEA site.

A Revised EIR must be prepared to analyze impacts to red-tailed hawks and white-tailed kits and to propose all feasible mitigation measures.

D. THE DEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE HAZARDOUS MATERIALS IMPACTS.

The DEIR admits that the Project site includes soil contaminated with highly toxic chemicals. The DEIR states:

The project site is listed on several hazardous materials databases compiled pursuant to Government Code Section 65962.5. These listings are associated with the project site's past military use associated with Camp Parks. Several hazardous material investigations have occurred during the past 20 years and have identified the following issues: former fuel depot, former rail spur, metals and soil stockpiles.

(DEIR, p. 3.3-17).

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The DEIR offers only improper deferred mitigation to address this impact. The DEIR states:

Prior to issuance of the first grading permit, the project applicant shall retain a qualified hazardous materials contractor to sample any soil stockpiles that may be present for polycyclic aromatic hydrocarbons (PAHs), diesel and oil range petroleum hydrocarbons, and polychlorinated biphenyls (PCBs). If sampling determines that concentrations of these substances exceed acceptable human health exposure levels, the applicant shall retain a qualified hazardous materials contractor to properly remove and dispose of the impacted soils. If sampling determines that concentrations of these substances do not exceed acceptable human health exposure levels, no further action is required.

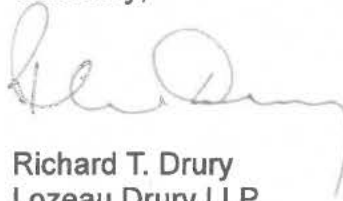
(DEIR p. 3.3.-17).

The DEIR may not mitigate this significant impact by relying on a clean-up and removal plan that will be developed after Project approval. As discussed above, CEQA does not allow such deferred mitigation. This is of particular importance to LIUNA since construction workers will suffer the highest levels of exposure from contaminated soil disturbed during Project construction. A Revised EIR is required to propose specific mitigation measures to address the hazardous materials impacts.

V. CONCLUSION

For the foregoing reasons, LIUNA Local Union No. 304 and its members living in the City of Dublin and the surrounding areas, urge the City to require preparation of a supplemental EIR addressing the Project's significant impacts and mitigation measures. Thank you for your attention to these comments. Please include this letter and all attachments hereto in the record of proceedings for this project.

Sincerely,



Richard T. Drury
Lozeau Drury LLP
Attorneys for LIUNA Local Union No. 304

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