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**Re: Merge 56 Environmental Impact Report; Project No. 360009;  
SCH No. 2014071065**

Honorable Members of the City of San Diego Planning Commission:

This letter is submitted on behalf of **Laborers International Union of North America, Local 89**, and its members living in and near the City of San Deigo (collectively "LIUNA") regarding the Final Environmental Impact Report ("FEIR") prepared for Merge 56 Development, Project No. 360009 (SCH No. 2014071065) (the "Project").

After reviewing the FEIR, together with our team of expert consultants, LIUNA is concerned that the FEIR fails to adequately respond to comments raised by others, fails to adequately analyze significant environmental impacts, and fails to mitigate significant impacts that will occur as a results of the Project.

In addition to these comments, LIUNA submits the expert comments of wildlife biologist Dr. Shawn Smallwood. Dr. Smallwood's comments and resume are attached hereto as Exhibit A. LIUNA also submits herewith comments from the environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE"). SWAPE's comments and the resumes of their consultants are attached hereto as Exhibit B. LIUNA also submits 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. Although this comment will highlight some of the experts' technical comments below, the Commission should review each of the concerns raised in those expert comments.

LIUNA requests that the Planning Commission refrain from certifying the EIR at this time but request staff to reconsider the analyses and require additional mitigation measures in order to address the Project's significant air quality impacts, GHG emissions, health risks, biological impacts, and traffic impacts that the Project as proposed will cause.

## **I. Project Description**

The Project consists of two components: 1) a mixed-use development, and 2) the public roads that adjoin the proposal. FEIR, p. 3-2. The mixed-used development component of the Project consists of a local mixed-use center that would contain commercial, office, hotel, and residential uses on a 41.34 acre, triangular shape property. *Id.* The Project would allow for construction of 525,000 square feet of commercial office, theater/cinema, and hotel uses. *Id.* It would also allow for 242 residences (158 multi-family and 84 single family). *Id.* The Project also includes associated site improvements such as utilities, storm drains/detention basins, internal private streets, hardscape, site walls, and landscaping. In addition, a 3.83-acre area in the northern portion of the site would be retained as Open Space and placed in a conservation easement. The Project also includes a 0.93-mile extension of Camino Del Sur, and a 0.38-mile extension of Carmel Mountain Road. FEIR, p. 3-4. Part of the Project includes reclassification to downgrade these roads from four-lane majors to two-lane collectors.

## **II. Analysis**

### **A. The Project Will Have Significant Air Quality and Greenhouse Gas Impacts that Have Not Been Mitigated.**

The environmental consulting firm, Soil, Water, Air Protection Enterprise ("SWAPE"), concludes that the Project will have very significant air quality impacts, far above applicable CEQA significance thresholds set by the San Deigo Air Quality Management District ("SDAQMD"). In particular the *Project will create cancer risks more than four times above the SDAQMD's CEQA significance thresholds*, due largely to the close proximity of the Project to nearby residences. In addition, the FEIR fails to demonstrate that the Project will not generate greenhouse gas emissions (GHGs) above significance thresholds. As such, an EIR is required to analyze these impacts, and to propose feasible mitigation measures and alternatives to reduce or eliminate the impacts.

#### **1. The FEIR Fails to Disclose the Serious Cancer Risks to the Nearby Residential Communities Created by the Project's Diesel Engine Exhaust.**

SWAPE conducted a health risk assessment to demonstrate the potential health risk posed by Project construction to nearby sensitive receptors. SWAPE, p. 2. The result of this analysis demonstrates that the Project will have a significant health risk impacts as a result of Project-related diesel particulate matter ("DPM"). *Id.* SWAPE concludes that the Project will create cancer risks in the nearby residential community more than four times above the CEQA

significance thresholds. The EIR fails to analyze this impact at all.

A project will result in a significant impact if it would impact a sensitive receptor, and result in a cancer risk of greater than 10 in one million. A two-story, single family residential development associated with the Rancho Penasquitos community is located east of the Project site. FEIR, p. 2-2. In addition, the southern portion of the Project site is adjacent to single-family residential development in the Park Village neighborhood, as well as a public elementary school (Park Village Elementary School). FEIR, p. 2-2. Despite the proximity of these sensitive receptors to the Project, the EIR contains no quantified health risk assessment or any other analysis of the Project's potential health impacts from Project-related emissions.

The Maximum Exposed Individual at an Existing Residential Receptor (MEIR)					
Activity	Duration (years)	Concentration ( $\mu\text{g}/\text{m}^3$ )	Breathing Rate ( $\text{L}/\text{kg}\cdot\text{day}$ )	ASF	Cancer Risk
Construction	2.00	0.1317	1090	10	4.3E-05
<b>Infant Exposure</b>					
<b>Duration</b>	<b>2.00</b>			<b>Infant Exposure</b>	<b>4.3E-05</b>
Construction	0.35	0.1317	572	3	1.2E-06
Operation	12.65	0.1290	572	3	4.2E-05
<b>Child Exposure Duration</b>	<b>14.00</b>			<b>Child Exposure</b>	<b>4.3E-05</b>
Operation	14.00	0.1290	261	1	7.1E-06
<b>Adult Exposure Duration</b>	<b>14.00</b>			<b>Adult Exposure</b>	<b>7.1E-06</b>
<b>Lifetime Exposure</b>				<b>Lifetime</b>	
<b>Duration</b>	<b>30.00</b>			<b>Exposure</b>	<b>9.4E-05</b>

According to SWAPE's analysis, the excess cancer risks in children and infants at a sensitive receptor located approximately 50 meters away would be 43 in one million. *Id.* at 4. In addition, the excess cancer risk over the course of a residential lifetime (30 years) is approximately 94 in one million, or more than nine times the threshold of significance. *Id.* at 4-5. These child, infantile, and lifetime cancer risks all exceed the San Diego Air Pollution Control District threshold of 10 excess cancer deaths per one million people. *Id.* at 5. This is a significant impact that must be disclosed in a revised EIR and mitigated. By failing to include any discussion of this significant impact, the FEIR fails as an informational document.

**2. The FEIR Does Not Include Feasible Mitigation Measures to Reduce the Project's Significant Health Risk Impacts, and Without Requiring These Feasible Measures, the City Cannot Adopt a Statement of Overriding Considerations.**

An agency may adopt a statement of overriding considerations only *after* it has imposed all feasible mitigation measures to reduce a project's impact to less than significant levels. CEQA Guidelines §§ 15126.4, 15091. CEQA prohibits agencies from approving projects with

significant environmental impacts when feasible mitigation measures can substantially lessen or avoid such impacts. Pub. Res. Code § 21002. As explained in CEQA Guidelines section 15092(b)(2), an agency is prohibited from approving a project unless it has “[e]liminated or substantially lessened all significant effects on the environment where feasible.”

As SWAPE’s analysis demonstrates, the Project will have a significant air quality and health risk impact. As a result, the EIR must require all feasible mitigations to reduce these impacts stemming from the Project’s Diesel Particulate Matter emissions. As SWAPE notes, DPM is a byproduct of diesel fuel combustion, and is emitted by on-road vehicles and off-road construction equipment. SWAPE, p. 5. The following feasible mitigation measures will reduce DPM, and are described more fully in SWAPE’s comment letter (pages 5-10:

**Construction-related mitigation measures:**

- Require implementation of diesel control measures
- Repower or replace older construction equipment engines
- Install retrofit devices on existing construction equipment
- Use electric and hybrid construction equipment
- Institute a heavy-duty off-road vehicle plan
- Implement a construction vehicle inventory tracking system

**Mobile Source Mitigation to Reduce Operational Emissions:**

- Reduce vehicle miles traveled by increasing transit accessibility
- Increased bike paths/bike lanes
- Provide electric vehicle parking and charging
- Limit parking supply
- Unbundle parking costs from property costs
- Implement commute trip reduction program
- Provide ride sharing programs
- Implement subsidized or discounted transit program
- Provide end of trip facilities
- Encourage telecommuting and alternative work schedules
- Implement car-sharing programs
- Provide employer-sponsored vanpool/shuttle
- Implement commute trip reduction marketing
- Implement preferential parking permit program
- Price workplace parking
- Implement employee parking “cash out”
- Implement transit access improvements
- Expand transit network

Until each of the above mitigation measures are incorporated as enforceable measures into the Project approval, the City will not be in a position to make a finding of overriding considerations for the Project’s significant health-related impacts.

**3. The FEIR's Greenhouse Gas Analysis and Mitigation Measures Do Not Comply with CEQA.**

The FEIR concludes that the Project's GHG impacts will be less than significant, but the analysis and conclusion are not properly supported. CEQA allows the significance of a project's GHG impacts to be determined based on whether the Project would conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of GHGs. When an agency bases its GHG analysis on such a plan, certain requirements must be met. For example, CEQA Guidelines section 15183.5(b)(2) specifies that:

An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project.

The FEIR does not comply with this standard.

In order to conclude that the Project's GHG impacts will be insignificant, the FEIR relies on the City of San Diego's Climate Action Plan ("CAP"). FEIR, p. 5.7-20. The CAP includes a "CAP Consistency Checklist" which contains measures that are required to be implemented on a project-by-project basis to ensure that the emissions targets identified in the CAP are met. *Id.* at 5.7-11. Implementation of the measure ensures that new development is consistent with the CAP's assumptions for relevant CAP strategies to achieve the identified GHG reduction targets. *Id.*

A CAP Consistency Checklist was prepared for the Project. The Checklist purports to identify which requirements of the CAP the Project will comply with. Using compliance with the CAP as a significance threshold, the FEIR concludes, "through implementation of the project design features outlined above related to reducing GHGs, the project would ensure that it would be consistent with the CAP's assumptions and GHG reduction strategies geared toward achieving the identified GHG reduction targets in the CAP." *Id.* The FEIR therefore concludes that "no significant GHG emissions impacts are identified; no mitigation would be required." *Id.*

The CAP Consistency Checklist, however, is not, in and of itself, "binding and enforceable." As a result, CEQA requires each of the requirements specified in the CAP that apply to the Project be incorporated as enforceable mitigation measures. 14 CCR 15183.5(b)(2). Yet none of the CAP consistency checklist requirements are included as mitigation measures or as mandatory conditions of Project approval. By failing to include the CAP requirements as enforceable mitigation measures, the FEIR fails to comply with CEQA.

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**4. The FEIR Fails to Demonstrate Compliance with Executive Order B-30-15.**

The CAP Consistency Checklist, on which the Project's GHG analysis relies, only accounts for the reductions in GHG emissions required to meet the 2020 emission reduction targets set forth in AB 32. In relying exclusively on the CAP, the FEIR fails to demonstrate consistency with the more stringent 2030 reduction targets set forth in Executive Order B-30-15. Executive Order B-30-15 requires statewide emissions reductions of 40% below 1990 levels by 2030. Without any evidence showing that the Project would comply with these more stringent goals, the Project may have a potentially significant impact that has not been analyzed and mitigated. A revised FEIR should be prepared to demonstrate the Project's consistency with Executive Order B-30-15.

**B. The FEIR Fails to Fully Analyze and Mitigate the Project's Biological Impacts.**

**1. The FEIR Fails to Analyze the Project's Potentially Significant Impacts on Animals as a Results of Window Collisions.**

Window collisions are estimated to be the second or third largest source of human-caused bird mortality in the United States, involving up to one billion bird fatalities per year. Smallwood, p. 12. Despite these drastic numbers, the FEIR includes no analysis of the Project's potential window collision impacts. As Dr. Smallwood notes

The EIR was prepared for the construction of 242 dwelling units without any regard to window materials or the numbers and sizes of windows, window orientation, or landscaping around windows. All of these factors contribute to rates of bird collisions with windows.

Smallwood, p. 12.

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

- Minimizing use of glass
- Placing glass behind some type of screening (i.e. grilles, shutters, exterior shades)
- Using glass with inherent properties to reduce collisions, such as patterns, window films, decals, or tape
- Turning off lights during migration season

*Id.* The FEIR should be revised to fully analyze and mitigate this potentially significant impact.

**2. The FEIR's Cumulative Biological Resources Analysis Violates CEQA and is Not Supported by Substantial Evidence.**



The FEIR's conclusion that the Project will not result in a cumulatively significant biological impact is based on improper reasoning and is not supported by substantial evidence.

An EIR must discuss 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."

"Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." 14 CCR § 15355(a). "[I]ndividual effects may be changes resulting from a single project or a number of separate projects." *Id.* "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." *Comm. for a Better Env't v. Cal. Resources Agency ("CBE v. CRA")* (2002) 103 Cal.App.4th 98, 117; 14 CCR § 15355(b). 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.

The FEIR's cumulative biological impact analysis consists of two paragraphs. It starts by acknowledging that the Project:

would result in a number of significant direct and indirect impacts to biological resources, most of which would occur outside of the MHPA. This would include impact to a number of sensitive habitats, areas under Corps, CDFW, and/or City jurisdiction (i.e. wetlands and non-wetland waters/streambed), including vernal and road pools, and sensitive plant and wildlife species.

FEIR, p. 6-4. The FEIR even goes on to admit that:

According to the City Biology Guidelines, direct impacts to vernal pools may be considered cumulatively significant, as would impacts to State or federal listed species not covered by the MSCP, on a case-by-case basis.

*Id.* But then the FEIR completely dismisses these potential cumulative impacts, stating:

Due to each project's need to comply with City regulations pertaining to impacts to biological resources, impacts would not be considerable and not cumulatively significant.

*Id.*

This conclusion does not constitute an analysis. A cumulative impact analysis, like the rest of the EIR, must provide specificity, and must be more than a conclusion “devoid of any reasoned analysis.” *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 411. “[I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. (CEQA, § 21061.)” *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723.

The FEIR’s conclusory cumulative impacts analysis provides no such information. Without even the most basic information about any of the cumulative projects or their environmental impacts, the FEIR’s general cumulative impact conclusions is not supported by substantial evidence. Lacking any substantial evidence, the FEIR fails to provide sufficient information for the public and decisionmakers to evaluate cumulative biological impacts that may result from approval of the proposed Project. The amount of information provided for each of the listed projects does not give the reviewing public or decisionmakers any information about the cumulative projects’ biological impacts, information that is needed to assess the validity of the cumulative impacts conclusions included in the FEIR. Indeed, the FEIR provides no specific information about any environmental impact that any of the listed cumulative projects will have.

Even if the conclusion was supported by evidence, it is based on the flawed premise that a Project cannot have a cumulative impact as long as it, and the other cumulative projects, comply with applicable laws and regulations. The entire purpose of the cumulative impact analysis is to prevent the situation where projects individually comply with applicable laws, without looking at the bigger picture. This argument, applied over and over again, has resulted in major environmental damage, and is a major reason why CEQA was enacted. 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.

A new cumulative impacts analysis is needed for the Project that complies with CEQA’s requirement to look at the Project’s environmental impact, combined with the impacts of other past, current, and probable future projects. The FEIR must be revised to fully analyze the Project’s cumulative impacts.

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### 3. The FEIR Fails to Analyze Impacts to Certain Special-Status Species.

Dr. Smallwood concludes that the biological analysis conducted as part of the FEIR is incomplete and inadequate. According to Dr. Smallwood, the FEIR “dismisses the occurrence potential of some special-status species by mischaracterizing their habitat needs.” Smallwood, p. 4.

For example, the occurrence potential of Burrowing owl was determined by the FEIR to be low because the species “*would have been observed if present.*” Dr. Smallwood disagrees with this premise, noting:

Having performed many burrowing owl surveys for many years, I have to object to this conclusion. Burrowing owls are often difficult to detect, especially during the winter months which is when surveys were performed for Coastal California Gnatcatcher. According to Alden (2017), one or more biologists spent 7 hours and 47 min on site searching for Coastal California Gnatcatcher on three dates: 10 and 17 December 2013 and 7 January 2017. This survey effort comes nowhere close to the standards listed in the burrowing owl survey guidelines (CDFW 2012).

Smallwood, p. 5.

Similarly, the FEIR states that the occurrence potential for Loggerhead shrike were determined to be low because the species “*would have been observed if present.*” Dr. Smallwood disagrees. “Like other special-status species, loggerhead shrikes are not easy to detect. One cannot expect to detect this species after a few winter visits searching for Coastal California Gnatcatcher.” *Id.*

In addition to mischaracterizing the potential for certain species, the FEIR also fails to adequately address impacts on certain species that were observed on site because their special-status was not taken into account. *Id.* Specifically, Dr. Smallwood points to the Red-tailed hawk, Red-shouldered hawk, and American kestrel, all of which are protected by California Department of Fish and Wildlife Code 3503.5 (Birds of prey).

Moreover, Dr. Smallwood concludes that 35 special-status species were not, but should have been, considered in the EIR. *Id.* These species are listed in Table 1 of Dr. Smallwood’s comments. Most of these species are not covered under the MSCP, and nearly all of the bird species have been detected nearby the project site and reported on eBird (<http://ebird.org/ebird/explore>). In addition, with no justification, the EIR completely failed to analyze any potential impacts on bats, pocket mice, and American, which Dr. Smallwood is certain occur on site. *Id.* at 6.

The FEIR is incomplete because it fails to analyze potential impacts to these species. A revised FEIR should be drafted that fully accounts for each of the species discussed in Dr. Smallwood’s comments.

**4. 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 constitutes just the type of deferred mitigation CEQA prohibits. The FEIR provides that:

Prior to the issuance of the first construction and/or grading permit, mitigation for direct impacts to San Diego fairy shrimp in two vernal pools located on the Mixed-Use Development site and direct impacts to San Diego fairy shrimp designated Critical Habitat shall be determined through consultation with USFWS through a Section 7 Consultation with the Corps and addressed in an amended and/or new Biological Opinion.

FEIR, p. ES-29. Mitigation measures Bio-4 then goes on to state that the “mitigation shall be conducted in accordance with a mitigation plan to be approved by the USFWS and City prior to issuance of grading permits.” *Id.* at p. ES-30.

Mitigation measures Bio-4 defers the preparation of a mitigation plan until after completion of CEQA review, without imposing any substantive standards, without providing for any public review, and subject to approval by the USFWS. It is improper for a mitigation plan to be created at some later time, after the CEQA process is complete. CEQA requires mitigation measures be

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 FEIR 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 the USFWS. MM BIO-4 calls for a mitigation plan that is prepared by the Project Applicant, “through consultation with the USFWS through a Section 7 Consultation with the Corps,” approved by USFWS and the City.

The FEIR may not rely on a fairy shrimp mitigation plan to be developed, approved, and implemented later, at some future time after the Project has been approved. Without valid mitigation, the Project’s significant impact on San Diego fairy shrimp remains significant.

#### **5. There is No Evidence that Mitigation Measure Bio-3 is Feasible.**

Mitigation measures must be feasible, enforceable, and effective. A public 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 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. 14 CCR § 15364. 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. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. (14 CCR § 15126.4(a)(2).)

Here, there is no evidence that Mitigation Measures Bio-3 is feasible. MM Bio-3 requires that, prior to the issuance of the first construction and/or grading permit, mitigation for direct impacts to 61.2 acres of sensitive upland vegetation communities and Nuttall’s scrub oak

shall be accomplished through preservation of a minimum of 51.8 acres of suitable habitat/mitigation credit. FEIR, p. ES-27 to 28. As part of this measure, the FEIR provides that:

The Applicant shall meet the 32.7-acre upland mitigation requirement for the Mixed-Use Development through the assignment of credits in the Deer Canyon Mitigation Bank, the acquisition of land available at the Crescent Heights site owned by Pardee Homes and/or the acquisition of land available in the East Elliot community. Any MHPA land acquired from Pardee Homes or others for Project mitigation would be dedicated in fee title to the City of San Diego. Conveyance of any land in fee title to the City shall require approval from the Park and Recreation Department Open Space Division Deputy Director.

*Id.* at ES-28. The measure then states:

Final mitigation compliance may be a combination of these three options; **would be dependent upon credit/land availability**; and would be subject to City and wildlife agency approval prior to issuance of the first grading permit.

*Id.* (emph. added).

This mitigation measure does not comply with CEQA because there is no evidence that it is feasible. There is no evidence that sufficient land and/or mitigation credits are available to fully satisfy this mitigation measure.

In comments on the DEIR, the U.S. Fish and Wildlife Service (“USFWS”) and the California Department of Fish and Wildlife (“CDFW”) raised concerns about the feasibility of Mitigation Measure Bio-3. They requested that the EIR provide a description of available and appropriate mitigation banks, and required the EIR include an accounting of the available credits by vegetation type. They also requested documentation on the establishment of the Crescent Heights site for contribution and banking of excess mitigation. The FEIR provides none of this information in response to comments. *See* RTC-12.

In response to comments from USFWS and CDFW, the FEIR states that “the proposed mitigation sites and/or combination of sites currently include sufficient land for the project’s required mitigation. Further, prior to issuance of the first grading permit Mitigation Measure Bio-3 requires the project to demonstrate that the required amount and type of habitat has been secured, to the satisfaction of the City.” RTC-12.

The conclusory statement that sites “currently include sufficient land for the project’s required mitigation” is not a sufficient response. First, there is no evidence to support the conclusion that sufficient land is available. No accounting was provided, as requested by the wildlife agencies. Moreover, just because land is currently available, does not mean it will be available when the Project developer is ready to obtain the land.

Without substantial evidence that mitigation measures Bio-3 is feasible, the Project’s impact to upland vegetation communities remains significant. A revised EIR must fully mitigate

this significant impact in a manner that complies with CEQA.

**C. The FEIR Fails as an Informational Document Because It Does Not Disclose the Full Extent of the Project's Traffic Impacts.**

**1. The FEIR's Project Description is Incomplete.**

The FEIR fails to describe the Project in a manner sufficient to allow for an assessment of the Project's traffic impacts, as well as air quality impacts that are based on the traffic analysis. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally adequate EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192; 14 CCR 15124. Without an accurate description on which to base the EIR's analysis, CEQA's objective of furthering public disclosure and informed decision making would be stymied. A project description that omits integral components of the project may result in an EIR that fails to disclose all of the impacts of the project. *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829. "[A]n accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Ca.App.4th 713, 730.

Table 8-1 of Appendix B of the FEIR contains the FEIR's trip generation analysis for the Project. It describes the Project in very vague terms, including 9,000 square feet of "Retail – Unnamed," a 120-room hotel with no description of whether it will include a restaurant, conference, function or banquet facilities will be included, 10,564 square feet of "Market Hall," and 39,262 square feet of "Other Retail." Smith, p. 2. The lack of information about what the Project will actually entail prevents an accurate assessment of the Project's traffic impacts. As Traffic Engineer Dan Smith points out, "[t]he public and public policy decisionmakers are simply asked to accept on good faith that whatever goes into these undetermined spaces is truly represented by the trip generation rates employed in FEIR Appendix B." Smith, p. 2. A more detailed Project description is required to more accurately analyze the Project's traffic impacts.

**2. The FEIR's Traffic Analysis Contains an Implausible Level of Service/Delay Calculations and an Underlying Inconsistencies.**

Traffic engineer Dan Smith reviewed the comparison of LOS/Delay calculations for Existing versions Existing + Project scenarios, presented in FEIR Appendix B, Table 9-1. Smith, p. 5. Mr. Smith took notice of Intersection #3, the intersection of Camino Del Sur, Wolverine Way, and Fallhaven Road. *Id.* at 6. Despite the fact that the intersection was already at a LOS E in the AM Peak, the addition of Project traffic did not change the average vehicle delay at the intersection at all. *Id.* at 4. Mr. Smith took issue with this finding because the Project Trip Distribution figure indicates that 11 or 12 percent of Project traffic will pass through this intersection. *Id.* The 11 to 12 percent of total Project traffic amounts to at least 131 to 142 trips through this intersection in the AM Peak. *Id.* According to Mr. Smith, this is enough to cause a change in delay at an intersection that was already LOS E. *Id.*

Having found the discrepancy at Intersection #3, Mr. Smith also looked at the Existing and Existing + Project calculations sheets for Intersection #21, the intersection of Black Mountain Road with Park Village road and Adolphia Street. *Id.* This intersection is already at LOS E with existing conditions. *Id.* According to the trip distribution calculations, the total Project generated trips added to the intersection is supposed to be 13 percent of Project trips. *Id.* This would amount to 155 added trips in the AM peak period. *Id.* However, when the calculation sheets are compared, the Existing + Project scenario has 96 fewer trips passing through the intersection than the Existing conditions. *Id.* at 6-7. At PM peak hours for this location, the Existing + Project scenario should have 272 more traffic movements at the intersection than Existing conditions. *Id.* at 7. Instead, the FEIR shows a net decrease of 3 traffic movements in the Existing + Project conditions. *Id.* According to Mr. Smith, "This is not credible." *Id.*

As Mr. Smith explains, the FEIR's calculation sheets and data sheets are significantly different from the narrative description, tables, and figures that are supposed to be analyzing the data. "When the actual calculation sheets and base data sheets are significantly discrepant from the narrative description and tables and figures embedded therein, the validity of the entire analysis is undermined. The entire traffic analysis must be redone in a manner that renders the calculations, figures, tables, and the narrative consistent." Smith, p. 7.

#### **D. The FEIR Fails to Adequately Respond to Comments.**

An FEIR's responses to comments must be detailed and must provide a reasoned, good faith analysis. 14 CCR §15088(c). Failure to provide a substantive response to a comment render the EIR legally inadequate. *Rural Land Owners Assoc. v. City Council* (1983) 143 Cal.App.3d 1013, 1020.

The responses to comments on a draft EIR must state reasons for rejecting suggested mitigation measures and comments on significant environmental issues. "Conclusory statements unsupported by factual information" are not an adequate response. 14 CCR §15088(b, c); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348. The need for substantive, detailed response is particularly appropriate when comments have been raised by experts or other agencies. *Berkeley Keep Jets v. Bd. of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1367; *People v. Kern* (1976) 72 Cal.App.3d 761. A reasoned analysis of the issue and references to supporting evidence are required for substantive comments raised. *Calif. Oak Found. v. Santa Clarita* (2005) 133 Cal.App.4th 1219.

The FEIR's response to comments fail to meet these standards. See the comments of Dr. Shawn Smallwood, attached hereto as Exhibit A, regarding the inadequacy of the FEIR's response to comments on biological resources. A revised FEIR should provide reasoned responses, supported by factual information.

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**E. The FEIR Fails to Provide Substantial Evidence to Support a Finding of Overriding Consideration.**

The FEIR admits that the Project will have significant, unmitigated environmental impacts. As a result, a statement of overriding considerations will be required. Under CEQA, when an agency approves a project with significant environmental impacts that will not be fully mitigated, it must adopt a “statement of overriding considerations” finding that, because of the project’s overriding benefits, it is approving the project despite its environmental harm. 14 CCR § 15043; PRC § 21081(B); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222.) A statement of overriding considerations expresses the “larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes and the like.” *Concerned Citizens of South Central LA v. Los Angeles Unif. Sch. Dist.* (1994) 24 Cal.App.4th 826, 847.

A statement of overriding considerations must be supported by substantial evidence in the record. 14 CCR § 15093(b); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1223. The agency must make “a fully informed and publicly disclosed” decision that “specifically identified expected benefits from the project outweigh the policy of reducing or avoiding significant environmental impacts of the project.” 14 CCR § 15043(b). As with all findings, the agency must present an explanation to supply the logical steps between the ultimate finding and the facts in the record. *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

Key among the findings that the lead agency *must* make is that:

Specific economic, legal, social, technological, or other considerations, including ***the provision of employment opportunities to highly trained workers***, make infeasible the mitigation measures or alternatives identified in the environmental impact report ... [and that those] benefits of the project outweigh the significant effects on the environment.

PRC § 21081(a)(3), (b).

Thus, the City must make specific findings, supported by substantial evidence concerning both the environmental impacts of the Project and the economic benefits including, “the provision of employment opportunities for highly trained workers.” The FEIR fails to provide substantial evidence to support a statement of overriding considerations.

The FEIR makes no effort whatsoever to analyze the fiscal impacts related to jobs to be created by the proposed project or the quality of the new jobs. The FEIR makes no attempt to determine whether new jobs created by the Project, in either the construction phase or the operational phase, will be for “highly trained workers,” and what the likely salary and wage ranges of these jobs will be. Without this information, the City lacks substantial evidence to make any statement of overriding considerations.



In short, the City cannot find that the economic benefits of the Project outweigh the environmental costs if it does not know what the economic benefits will be. A revised FEIR is required to provide this information.

### **III. Conclusion**

LIUNA asks that the Planning Commission refrain from certifying the FEIR or recommending approval of the Merge 56 Project in order to allow staff additional time to address the attached expert comments and the following additional concerns. Please include this letter and all accompanying expert comments and enclosures hereto in the record of proceedings for this project. Thank you for your attention to these comments.

Very truly yours,

A handwritten signature in dark ink, appearing to be 'RL' followed by a long horizontal stroke.

Rebecca L. Davis