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BY E-MAIL AND OVERNIGHT MAIL

October 17, 2018

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Re: Lathrop Gateway Business Park – Minor Specific Plan Amendment No. SPA-18-71, Site Plan Review No. SPR-18-40 and accompanying EIR Addendum - Agenda Item 9.1

Dear Chair Lazard, Commissioners, and Messrs. Meissner, Caguiat and Anderson:

I am writing on behalf of Laborers' International Union of North America Local Union No. 73 and its many members living in and around the City of Lathrop ("LIUNA") concerning the proposal to construct 3,035,000 square feet of high cube warehouse buildings within the Lathrop Gateway Business Park Specific Plan area ("Project"). The Project involves construction of ten distribution center warehouse buildings and accompanying parking, internal roads, trailer and container storage, and storm water detention ponds. The Project would use all of the area in the Specific Plan zoned Light Industrial for high cube warehouse uses. The proposed warehouse will directly abut several residences located along McKinley Avenue.

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Staff is relying upon a 2011 EIR prepared for the Lathrop Gateway Business Park Specific Plan as the environmental review for the Project pursuant to the California Environmental Quality Act ("CEQA"), Pub. Res. Code section 21000, et seq. and has prepared an addendum to the EIR. At the time of the 2011 EIR, development of the portion of the Lathrop Gateway Specific Plan zoned "Light Industrial" only anticipated 2,335,000 square feet of high cube warehouse would be constructed, with the remaining area open to the long list of potential uses consistent with Light Industrial. See Appendix F, p. 15 ("the LI component is expected to support approximately 2,335,000 square feet of high-cube warehouse floor space and 778,000 square feet of "Industrial Park" floor space").

The current proposal to use all of the Light Industrial as a distribution center, adding an additional 700,000 square feet of high cube warehousing that was not evaluated by the Specific Plan EIR, is a substantial change from the 2011 version of the Specific Plan. The change also requires a major revision to the previous EIR because toxic air contaminant emissions from either the prior light industrial development considered in the EIR or the newly proposed additional 700,000 square feet of high cube warehouse buildings, were not evaluated in the prior EIR. Instead, the 2011 EIR deferred analysis of that potential impact until the proposal of any specific distribution center proposals. In order to proceed with the proposed Project, TAC impacts must be evaluated in a subsequent or supplemental EIR.

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When changes are proposed to a project for which an EIR has already been prepared, the agency must prepare a subsequent or supplemental EIR if the changes are "[s]ubstantial" and require "major revisions" of the previous EIR. *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937, 943. "[W]hen there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations 'turn[ ] on the value of the new information to the still pending decisionmaking process.'" *Id.*, 1 Cal.5th at 951-52. The agency must "decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects." *Id.*, 1 Cal.5th at 952. Under Section 21166 or CEQA Guidelines § 15162, "[w]hen there is a proposal to modify a project originally approved through EIR, no "major revision" to the initial EIR is required if the initial EIR already adequately addresses any additional environmental effects that may be caused by the proposed modification." *Id.*, 1 Cal.5th at 958. Section 21166 and CEQA Guidelines § 15162 "do[] not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects." *Id.*, 1 Cal.5th at 958.

Although the prior EIR acknowledged that development pursuant to the Specific Plan would pose potential health risks to nearby residences, the EIR did not attempt to identify those risks, determine their significance, or establish any mitigations reducing toxic air contaminant emissions. Instead, the EIR expressly deferred analyzing this

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potential impact for any proposed development within the Specific Plan area:

Whether or not these risks are or will be significant in the future requires some speculation as to the potential risk that currently exists and which may or may not exist in the future. Risk evaluation involves an assessment of exposure to certain contaminant levels, which are assumed to be sustained over a 70-year lifetime. In this case, contaminant levels are expected to decline dramatically within a 10-15 year period and may be reduced to insignificant levels in a comparable timeframe. Accounting for this uncertainty, this effect is for the purposes of this EIR considered potentially significant.

DEIR, p. 6-27. The DEIR does contain some discussion of the potential for toxic air contaminants from existing sources outside of the planning area such as State Route 120. *Id.*, pp. 6-26 - 6-27. None of this discussion addresses the Specific Plan project's toxic air contaminant emissions or the impacts to nearby residents. The DEIR does note that "the Specific Plan would allow some land uses that may generate TACs, such as distribution centers, dry cleaners using perchloroethylene, and gasoline dispensing facilities." DEIR, p. 6-27. The DEIR also notes that "[a]ir toxics include diesel particulate emissions from trucks, railroads, shipping and stationary diesel combustion sources; diesel particulate was identified as a TAC under the State programs; according to the ARB, diesel particulate constitutes approximately 70% of the statewide health risk associated with air toxics. *Id.*, p. 6-7. However, no effort to assess these emissions is included in the DEIR. Instead, the analysis is deferred to subsequent reviews of the specific development proposals. This is reflected in Mitigation Measure 6-10, which states:

ODSA<sup>1</sup> health risk assessment shall be conducted for the following future development projects that meet the following criteria:

A distribution center that accommodates more than 100 trucks per day, more than 40 trucks with operating transport refrigeration units per day, or where transport refrigeration unit operations exceed 300 hours per week, placed within 1,000 feet of a residence in or adjacent to the Plan Area.

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If the health risk assessment identifies a significant risk as defined by GAMAQI, the assessment shall identify measures to reduce the health risk to levels that are less than significant, which the project shall incorporate in its design and construction.

DEIR, p. 6-28. The DEIR requires that "[t]he owners, developers, and/or successors-in-interest will be responsible for incorporating these measures in project improvement

<sup>1</sup> ODSA refers to owners, developers and/or successors-in-interest.

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plans." *Id.* The City's Planning Division is "responsible for ensuring that these are incorporated in project improvement plans submitted by owners, developers, and/or successors-in-interest." *Id.* Thus, rather than mitigate any TAC emissions, this measure commits the City to evaluate TAC emissions for any proposed distribution center and develop pollution control mitigations at that time.

The current proposed Project has now triggered the need to conduct the impact assessment and identify mitigation measures. Large portions of the proposed distribution facility are well within 1,000 feet of homes on McKinley Avenue. See Master Site Plan. Indeed, the residence on Assessor Parcel No. 241-400-280-000, owned by Frank "Raymond" and Christine Mendes, is surrounded on three sides by the distribution center project, including warehouses on two sides and a trailer yard immediately to its south. *Id.*

The Project developer has failed to comply with Mitigation Measure 6-10. None of the project improvement plans refer to any health risk assessment performed by the applicant. No measures from any health risk assessment have been included in any of the project improvement plans submitted to the Planning Commission.

Nor can the developer wait until after the Planning Commission action to conduct a health risk assessment and disclose the Project's potential impacts from toxic air contaminant emissions on the Mendeses and other nearby residents.

First, the Addendum cannot be supported by substantial evidence that the Project will not have health risk impacts from the emission of TACs if no assessment of those TAC emissions and resulting health risks has as yet been performed.

Second, the DEIR already admits that health risks of TAC emissions from a distribution center such as is proposed by the Project is a potentially significant impact. As a result, in order to analyze this impact, the City must make a substantial change to the EIR. Indeed, LIUNA's initial screening evaluation of the health risks posed by the Project indicates that the Project may result in cancer risks to nearby residents well above the San Joaquin Valley Air Pollution Control District's significance threshold of 20 in a million.

Third, for the City to again defer analyzing this impact and identifying feasible mitigations to address the Project's health risk impacts is contrary to CEQA's requirements. CEQA prohibits deferring the formulation of mitigation measures to post-approval studies. CEQA Guidelines § 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

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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, by deferring the development of specific mitigation measures, the Applicant has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the *Sundstrom* court:

An EIR ... [is] subject to review by the public and interested agencies. This requirement of "public and agency review" has been called "the strongest assurance of the adequacy of the EIR." The final EIR must respond with specificity to the "significant environmental points raised in the review and consultation process." ... Here, the hydrological studies envisioned by the use permit would be exempt from this process of public and governmental scrutiny.

*Sundstrom*, 202 Cal.App.3d at 308. The Specific Plan deferred both the health risk impact analysis as well as any possible future mitigations. No performance standards of any sort were identified or discussed in that DEIR relating to toxic air contaminant emissions. The City cannot claim that any analysis of these impacts was conducted in the earlier DEIR nor that the mitigation measures for this potential impact already have been identified and required by the previous EIR. The decision to use all of the area zoned as Light Industrial for high cube warehousing is a substantial change to the previous more general specific plan project. And to conduct the requisite analysis and mitigation measure evaluation previously called for by the Specific Plan EIR requires a "major revision" to that EIR's previously nonexistent analysis of health risk impacts to nearby residents.

Staff has indicated that there is no TAC analysis as yet and that such an analysis would only be required before the issuance of building permits for the Project. As discussed above, staff's suggested timeline is inconsistent with CEQA. Nor is staff's position consistent with the EIR. The Mitigation and Monitoring Program matrix merely identifies the "Monitoring Phase" for Mitigation Measure 6-10 as "Pre-Construction of Individual Phases." FEIR, p. 5-6. The matrix does not suggest that the required evaluation of TACs can be completed after the distribution center's Site Plan Review already is approved. Indeed, such an interpretation would violate CEQA. Likewise, the matrix' identification of "Issuance of Grading and Building Permits" as the "Action Indicating Compliance" with Measure 6-10, also does not suggest that the City can approve the Project and then evaluate the Project's TAC emissions just prior to the issuance of grading permits. Although those permits may confirm that a health risk

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analysis, CEQA and the EIR require that the health risk assessment be completed and mitigation measures be identified prior to the City approving the Project, including the proposed Site Plan.

Health risks of the Project on future workers both during construction of the Project as well as those employed at the distribution center also must be evaluated. No analysis of health risks to those workers was included in the prior EIR. In order to address this impact from the proposed Project, major revision of the EIR is required. To the extent the City believes that CEQA does not require analysis of impacts to future workers or residents of a proposed project, the Supreme Court in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("CBIA") has ruled to the contrary. CBIA expressly holds that potential adverse impacts to future users and residents from pollution generated by a proposed project must be addressed under CEQA. At issue in CBIA was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. CBIA, 62 Cal.4th at 800-801. However, to the extent a project may exacerbate existing adverse environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801 ("CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present"). In so holding, the Court expressly held that CEQA's statutory language required lead agencies to disclose and analyze "impacts on **a project's users or residents** that arise **from the project's effects** on the environment." *Id.* at 800.

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The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the environment that must be addressed in an environmental review. "Section 21083(b)(3)'s express language, for example, requires a finding of a 'significant effect on the environment' (§ 21083(b)) whenever the 'environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.'" CBIA, 62 Cal.4th at 800 (emphasis in original). Likewise, "the Legislature has made clear—in declarations accompanying CEQA's enactment—that public health and safety are of great importance in the statutory scheme." *Id.*, citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d). Of course, workers are as much human beings as nearby or future residents. There is no meaningful distinction suggesting CEQA should ignore a Project's emissions to air within the Project site that may result in adverse health impacts to future workers.


LIUNA also believes that new information or circumstances must be considered for the Project. These include (1) the ever worsening traffic in the surrounding area and the need to update the Project's cumulative traffic impacts to reflect current traffic conditions, (2) the current degraded air quality in the area and dramatic increase in truck and other vehicle traffic that has occurred since 2011, (3) impacts to wildlife, including burrowing owls and other animals currently using the site and the absence of

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any update on current conditions or uses of the site by wildlife, (4) impacts to wetlands or sensitive vegetation that have grown or otherwise changed at the site since 2011, (5) the projects greenhouse gas emission impacts, and (6) the availability of more up-to-date and effective mitigation measures to address the Specific Plan's or Project's significant air quality impacts.

As a result, LIUNA hereby requests that the City prepare a supplemental EIR to analyze the significant environmental impacts of the Project and to propose all feasible mitigation measures and alternatives to reduce those impacts.

Sincerely,



Michael R. Lozeau  
Lozeau Drury LLP

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