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November 26, 2018

Planning Commission
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Re: Comment on Final Environmental Impact Report, 2525 N. Main Street Multi-Family Residential Project (aka Magnolia at the Park) SCH 2018021031, DP No. 2017-34

Honorable Members of the Planning Commission, Ms. Thai, Mr. Godinez and Ms. Kelaher:

I am writing on behalf of the Laborers International Union of North America, Local Union No. 652 and its members living in and near the City of Santa Ana ("LIUNA"), regarding the Draft Environmental Impact Report ("DEIR") and Final Environmental Impact Report ("FEIR") prepared for the Project known as 2525 N. Main Street Multi-Family Residential Project (aka Magnolia at the Park) SCH 2018021031, DP No. 2017-34, including all actions related or referring to the proposed project that would demolish the existing 81,172 square foot vacant two-story office building and 442 space surface parking lot to redevelop the 5.93-acre 1

site with 405,290 square feet of residential buildings that would provide 496 market-rate multi-family residential units located at 2525 North (N.) Main Street, in the northern portion of the City of Santa Ana approximately 500 feet east of Interstate 5 (I-5) ("Project").

After reviewing the DEIR and FEIR (collectively, "EIR"), we conclude that the EIR fails as an informational document and fails to impose all feasible mitigation measures to reduce the Project's impacts. Commenters request that the Planning and Building Agency address these shortcomings in a revised draft environmental impact report ("RDEIR") and recirculate the RDEIR prior to considering approvals for the Project. We reserve the right to supplement these comments during review of the Final EIR for the Project and at public hearings concerning the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist.,* 60 Cal. App. 4th 1109, 1121 (1997). 1

PROJECT DESCRIPTION

The Project would demolish the existing 81,172 square foot vacant two-story office building and 442 space surface parking lot to redevelop the 5.93-acre site with 405,290 square feet of residential buildings that would provide 496 multi-family rental residential units. The Project would provide only market-rate housing, with no units designated for low or moderate income residents. Of the units, 77 percent would be studios or one-bedroom units, 18 percent would be two-bedroom units, and 6 percent would be three-bedroom units. The residences would be provided within 5-story buildings topped with mezzanines that would be approximately 65-feet in height along the western and central portion of the site; and would tier down to 2-story, approximately 20-foot high structures on the eastern portion of the site. The residential units would be wrapped around a central parking structure that would have 8-levels of parking above ground, and 1 level of underground parking. The parking structure would be located in the west central portion of the project site and would provide direct access to the leasing office and walkways to residential units. 2

The proposed project would require the following discretionary approvals from the City of Santa Ana:

- General Plan Amendment (GPA) Land Use Change from PAO (Professional & Administration Office) to a District Center (DC) designation
- Amendment Application (AA) for a zone change from Professional (P) to a Specific Development (SD) designation
- Development Agreement

LEGAL STANDARD

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") (except in certain limited circumstances). *See*, *e.g.*, Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Comms. for a Better Env't v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

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

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." 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.Res.Code ("PRC") § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B).

The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. PRC §

21100(b)(1); CEQA Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354. The 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. "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 Env't v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 109.

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

The lead agency must evaluate comments on the draft EIR and prepare written responses in the final EIR ("FEIR"). (PRC §21091(d)) The FEIR must include a "detailed" written response to all "significant environmental issues" raised by commenters. As the court stated in *City of Long Beach v. LA USD* (2009) 176 Cal.App.4th 889, 904:

> The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful.

The 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 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.3rd 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) 3

The FEIR abjectly fails to meet these legal standards, as it is riddled with conclusory statements lacking any factual support or analysis.

DISCUSSION

1. The EIR Fails to Analyze Indoor Air Quality Impacts.

We submit herewith the comments of indoor air quality expert, Francis Offermann, PE, CIH. (Exhibit A). Mr. Offermann, a Certified Industrial Hygienist, concludes that it is likely that the Project will expose future residents to significant impacts related to indoor air quality, and in particular, emissions for the cancer-causing chemical formaldehyde. Mr. Offermann is one of the world's leading experts on indoor air quality and has published extensively on the topic.

Mr. Offermann explains that many composite wood products typically used in modern home construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, "The primary source formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." 4

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 180 per million. This is far above the South Coast Air Quality Management District (SCAQMD) CEQA significance threshold for airborne cancer risk of 10 per million.

Even if the Project uses modern "CARB-compliant" materials, Mr. Offermann concludes that formaldehyde will create a cancer risk of 126 per million, which is

more than ten times above the SCAQMD CEQA significance threshold. Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. 4

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes a fair argument that the project will have a significant adverse environmental impact and an EIR is required. Indeed, in many instances, such air quality thresholds are the only criteria reviewed and treated as dispositive in evaluating the significance of a project's air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant"). The California Supreme Court made clear the substantial importance that an air district significance threshold plays in providing substantial evidence of a significant adverse impact. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 ("As the [South Coast Air Quality Management] District's established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact"). Since expert evidence demonstrates that the Project will exceed the BAAQMD's CEQA significance threshold, there is a fair argument that the Project will have significant adverse and an EIR is required. 5

Mr. Offermann suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. Since the EIR does not analyze this impact at all, none of these or other mitigation measures are considered. 6

2. The EIR Fails to Address or Adequately Mitigate Significant Soil Contamination Impacts.

The California Department of Toxic Substances Control ("DTSC") has submitted a comment letter pointing out deficiencies in the EIR related to soil and groundwater contamination at the Project site. DTSC points out that soil and groundwater at the Project site contains levels of the cancer-causing and toxic chemicals, benene, toluene, ethylbenzene, xylene and methyl-tertiary butyl ether (MTBE) above residential standards. DTSC commented that the EIR failed to 7

analyze the possibility of soil-vapor intrusion – a process by which toxic vapors enter the building constructed on the contaminated soil. DTSC also pointed out that the soil on the Project site is contaminated with arsenic – a known human carcinogen.

In both cases, the EIR dismissed DTSC's comments, failed to conduct additional analysis and failed to adopt adequate mitigation measures. This is a patently inadequate response to expert comments from a State Agency. A Revised DEIR is required to analyze these impacts and to respond to DTSC's comments. 7

In response to DTSC's comments, the FEIR merely states that a soil mitigation plan will be developed at a later time. CEQA does not allow such deferral of mitigation. Mitigation measures must be set forth in the EIR, so that the public can analyze the adequacy of the mitigation measures. The EIR fails to comply with this requirement.

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.) 8

LIUNA is very concerned about the soil contamination identified by DTSC. Construction workers, such as LIUNA members, will be exposed to higher levels of soil and groundwater contamination than anyone else since they will be involved in direct excavation of potentially contaminated soil and groundwater. It is critical to LIUNA that adequate mitigation measures be identified prior to Project construction, not after contaminated soil is discovered. 9

3. The EIR Fails to Adequately Mitigate the Project's Significant Traffic Impacts.

CalTrans has submitted at least two comment letters concluding that the EIR fails to adequately analyze and mitigate the Project's significant traffic impacts. In particular, CalTrans expressed concern over the Project's impacts on nearby I-5 and SR22. In CalTrans' second comment letter, the agency concluded that the FEIR failed to adequately respond to CalTrans' initial comments. The FEIR's dismissive response to an expert agency's comments itself renders the EIR legally inadequate. 10

Furthermore, the EIR improperly abrogates responsibility for mitigating the Project's traffic impacts. The EIR states that CalTrans has authority to adopt certain mitigation measures, and as a result, the City of Santa Ana would not adopt or impose mitigation. CEQA does not allow the lead agency to abrogate its responsibility to mitigate significant impacts, even if those impacts are within the jurisdiction of another agency. The lead agency is responsible for ensuring that impacts are mitigated, even if it is necessary to cooperate with other responsible agencies. In *Lexington Hills v. State of Calif.* (1988) 200 Cal.App.3d 415, the court held that a CEQA lead agency cannot delegate responsibility to develop mitigation measures to a responsible agency, even if the responsible agency has more expertise in a particular area. The lead agency must use its authority to analyze the entire project and to devise mitigation measures. *Id*. at 433-435. See also, *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443 (Lead agency cannot refrain from considering means of exercising its own regulatory power simply because another agency has general authority over the impacted natural resource. City could not delegate mitigation measure development for project impacts to wetlands to US Army Corps of Engineers). 11

4. The Project Lacks Affordable Housing in Conflict with the General Plan.

The Project does not include any affordable housing units, in complete disregard of the applicable General Plan policies. All of the rental units will be market-rate, and none will be designated or deed-restricted for low or moderate income residents. This is of particular concern to LIUNA members who are increasingly priced out of the area. 12

The General Plan Housing Element Policy 2.3 requires housing for all income levels. Yet, the Project includes only market-rate housing, with not a single unit set aside for low or moderate income residents. This is unacceptable given the area's extreme shortage of affordable housing. Furthermore, the EIR does not analyze whether it is feasible to include income-restricted housing, as has been done throughout the State. 13

The Final EIR rejects comments made concerning affordable housing, arguing that the issue is socio-economic and not environmental, and therefore not within the scope of CEQA. This is mistaken. It is well-established that urban decay is a CEQA issue. The lack of affordable housing has led to an increase in homelessness, which is a prime contributor to urban decay. In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) (124 Cal.App.4th 1184) (*Bakersfield Citizens*), the court expressly held that an EIR must analyze a project's potential to cause urban decay if there is substantial evidence showing that the project may lead to such impacts. The court pointed out that CEQA requires the project proponent to discuss the project's economic and social impacts where "[a]n EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic and social changes." (CEQA Guidelines §§ 15131(a) and 15064(f).) 14

Where a local or regional policy of general applicability, such as an ordinance, is adopted in order to avoid or mitigate environmental effects, a conflict with that policy in itself indicates a potentially significant impact on the environment. (*Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. (14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist*. (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).) A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp*. (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).) 15

A Recirculated Draft EIR should be prepared to analyze the impacts of the Project's lack of affordable housing and the impact on urban decay. It should propose feasible mitigation measures, such as requiring more affordable housing in the Project, contributions to low-income housing funding, etc. 16

5. The EIR Fails to Adequately Analyze or Mitigate the Project' Significant Air Quality Impacts.

The expert consulting firm, Soil, Water, Air Protection Enterprise (SWAPE), demonstrates that the EIR improperly calculates air quality impacts. SWAPE calculates that the Project will have highly significant airborne cancer risk impacts, far above CEQA significance thresholds. SWAPE calculates that the Project will create an airborne cancer risk from construction and operation of the Project of 220 per million – far above the SCAQMD CEQA significance threshold of 10 per million. Most of this cancer risk is created by diesel engine exhaust associated with construction and operation of the Project.

SWAPE states:

> As demonstrated above, the excess cancer risk to adults, children, infants, and 3rd trimester gestations at a sensitive receptor located approximately 25 meters away, over the course of Project construction and operation, are approximately 10, 92, 110, and 5.5 in one million, respectively. Furthermore, the excess cancer risk over the course of a residential lifetime (30 years) is approximately 220 in one million. Consistent with OEHHA guidance, exposure was assumed to begin in the 3rd trimester stage of pregnancy to provide the most conservative estimates of air quality hazards. The infantile, child, adult, and lifetime cancer risks all exceed the SCAQMD's threshold of 10 in one million, thus resulting in a potentially significant impact not previously addressed or identified by the DEIR or FEIR. 17

The EIR also conducts a different health risk assessment that allegedly shows a cancer risk less than 10 per million. However, the HRA used in the EIR fails to comply with the recent California Office of Environmental Health Hazard Assessment (OEHHA) methodology. The lead agency is required to use the

agency-approved methodology, not some other obsolete methodology. *Endangered Habitats League v. Orange* (2005) 131 Cal.App.4th 777.

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Since the Project will create significant airborne cancer risks, a Revised Draft EIR is required to analyze this risk and propose all feasible mitigation measures.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by other commenters (which are incorporated herein by reference), the EIR for the Project is legally inadequate. A revised draft EIR is required to analyze and mitigate the proposed Project's significant impacts.

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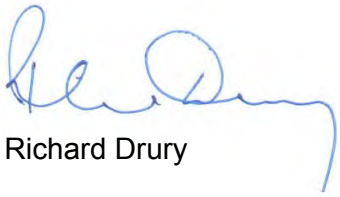
Sincerely,



Richard Drury