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January 8, 2019

Agenda Item 7

**Via Email and Hand Delivery**

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**Re: January 8, 2019 City Council Agenda Item 7: Comments on the Avalon Town Center II (PL18242-GP) Disposition and Development Agreement**

Dear Mayor and City Council Members:

We are writing on behalf of **Concord Residents for Responsible Development** (“Concord Residents”) to urge the members of the City Council to reject the proposed Disposition and Development Agreement (“DDA”) between the City of

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Concord (“City”) and AvalonBay Communities, Inc. (“Developer”) regarding the Avalon Town Center II project (“Project”). The Project consists of the sale and future development of up to 310 market rate apartments and approximately 6,500 square feet of ground-floor retail on an approximately 3.1 acre lot located at 1765 Galindo Street in downtown Concord.

The DDA is inconsistent with General Plan Policies regarding the hiring of local workers and apprentices and fails to maximize community benefits from the discretionary sale of public property. In addition, approval would violate CEQA due to the failure to prepare an environmental impact report (“EIR”) to address potential soil contamination from the historic agricultural use on the Project site. As demonstrated by the attached expert comments of hazards expert Matt Hagemann of Soil Water Air Protection Enterprise (“SWAPE”), a fair argument exists that the Project site may be contaminated by persistent organochlorine pesticides that could be disturbed by Project construction and present a health risk to workers, future residents and nearby neighbors. SWAPE’s technical comments and curricula vitae are attached hereto as **Attachment A**.<sup>1</sup>

As explained more fully below, we urge the City Council to reject the DDA as currently proposed, and to direct staff to renegotiate an agreement providing for the maximum possible community benefit from the sale of this property, including a binding commitment to the hiring of local workers and apprentices in project construction. In addition, the City may not approve the Project until it prepares an EIR that adequately analyzes the Project’s potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

## I. STATEMENT OF INTEREST

Concord Residents is an unincorporated association of individuals and labor organizations that seeks to ensure that development in the City is sustainable, environmentally friendly, and provides maximum economic and employment benefits to the City’s residents. Concord Residents includes the **International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483**, and their members

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<sup>1</sup> **Attachment A**: January 7, 2019 Letter from Matt Hagemann (SWAPE) re: Comments on the Town Center II Infill Project (“SWAPE Comments”).

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and families; and other individuals that live and/or work in the City of Concord and Contra Costa County.

Individual members of Concord Residents and the affiliated labor organizations live, work, recreate and raise their families in the City of Concord and Contra Costa County. Individual members may also work on the Project itself. Accordingly, they will be directly affected by both the environmental and economic impacts of projects such as this.

## **II. APPROVAL OF THE DDA WOULD VIOLATE CEQA DUE TO THE FAILURE TO PREPARE AN EIR TO DISCLOSE AND EVALUATE POTENTIALLY SIGNIFICANT SOIL CONTAMINATION IMPACTS**

City staff concluded that no further CEQA review is required because it determined the Project to be consistent with the Specific Plan, CEQA review was previously performed for the Specific Plan, and there are no project-specific impacts. Substantial evidence exists, however, that the Project site may be contaminated with pesticides due to its use as an orchard from the late 1930's to the 1970's. The DDA may not be approved until a CEQA document is prepared to evaluate soil contamination risks.

The Project site has not been tested for such contamination. Instead, City staff assumes that any pesticides used on the site would have degraded by now and would no longer pose a danger. This assumption is incorrect. DDT and the other pesticides commonly used on orchards in this area do not degrade for hundreds of years (which is in part why they were eventually banned). The failure to disclose, evaluate and mitigate this potential contamination in an EIR violates CEQA and puts construction workers and future residents at risk.

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.<sup>2</sup> 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.<sup>3</sup> The EIR has been described as “an environmental

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<sup>2</sup> See Pub. Resources Code § 21000; CEQA Guidelines § 15002.

<sup>3</sup> *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.

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‘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.”<sup>4</sup>

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.<sup>5</sup> CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard. Under that standard, a lead agency “shall” prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.<sup>6</sup>

The fair argument standard creates a “low threshold” favoring environmental review through an EIR, rather than through issuance of a negative declaration.<sup>7</sup> An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.<sup>8</sup> Substantial evidence can be provided by technical experts or members of the public.<sup>9</sup> “If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”<sup>10</sup>

Here, the attached comments of SWAPE provide substantial evidence that a fair argument exists that the Project site may be contaminated by persistent organochlorine pesticides that could be disturbed by Project construction and present a health risk to workers, future residents and nearby neighbors. The Initial Study prepared for the Project states that a General Plan EIR and 2012 Supplement considered whether the development could result in significant impacts

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<sup>4</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>5</sup> See Pub. Resources Code § 21100.

<sup>6</sup> Pub. Resources Code §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

<sup>7</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

<sup>8</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street, supra*, 106 Cal.App.3d at p. 1002.

<sup>9</sup> See, e.g., *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1340; *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 199.

<sup>10</sup> CEQA Guidelines § 15062(f).

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relating to hazardous materials use. The General Plan EIR and 2012 Supplement concluded that these impacts would be further assessed at a project level.

This further assessment was provided in a May 22, 2018 Phase I Environmental Site Assessment (“Phase I”) prepared for the Initial Study for this Project. The Phase I concluded:

The property appears to have been used as agricultural farmland from at least 1939 to 1974. While pesticide and/or herbicide residue may be present in site soil based on historical site use as agricultural, potential residual concentrations are anticipated to be low based on the length of time since past agricultural use and subsequent site disturbance, development, and demolition.<sup>11</sup>

The conclusion in the Phase I that potential residual concentrations are “anticipated” to be low is speculative, not supported by substantial evidence and is contrary to the well-established scientific evidence that these pesticides can remain at hazardous levels for hundreds of years. No sampling was conducted to confirm the Phase I’s assumption that residual pesticide concentrations would be low.

Because agriculture was practiced on the Project site prior to 1972, pesticides, including dichloro-diphenyl-trichloroethane (DDT), are likely to be present in Project site soils. Organochlorine pesticides, such as DDT, 1,1-Dichloro-2,2-bis(p-chlorophenyl)-ethylene (DDE), and Chlordane, were used from the 1940s until they were banned in the 1972.<sup>12</sup> The California Department of Toxic Substances Control (DTSC) states:

DDT is ubiquitous to California soil due to heavy agricultural usage prior to cancellation in 1972. Therefore, agricultural land which is currently being developed or considered for new uses [...] frequently contains DDT.<sup>13</sup>

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<sup>11</sup> May 22, 2018 Phase I Environmental Site Assessment at p. 19.

<sup>12</sup> U.S. EPA, DDT – A Brief History and Status. <https://www.epa.gov/ingredients-used-pesticide-products/ddt-brief-history-and-status>

<sup>13</sup> Office of the Science Advisor, DDT in Soil: Guidance for the Assessment of Health Risks to Humans. <https://www.dtsc.ca.gov/AssessingRisk/upload/chap8.pdf>, p. 11.

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Despite being banned for almost 50 years, these compounds can persist in soil for hundreds of years.<sup>14</sup> Without cleanup, prior site disturbance would not eliminate this risk. Merely moving dirt around does not remediate hazardous soil conditions – if anything, it expands the potential areas of contamination. The Phase I thus lacks substantial evidence to support its assumption that pesticide concentrations in the Project soil would be less than significant.

Exposure to DDT can result in headaches, nausea, and convulsions.<sup>15</sup> The U.S. EPA identifies DDT and DDE as probable human carcinogens.<sup>16</sup> Chlordane has also been classified as a probable human carcinogen by the U.S. EPA.<sup>17</sup> Construction workers, future residents and nearby residents may be exposed to pesticide-containing soils and dust when the Project site is developed and earth moving activities commence. Google Earth images show sensitive residential receptors are directly adjacent to the Project. Accordingly, a fair argument exists that the Project may result in significant hazard impacts requiring evaluation in an EIR.

Pesticide sampling in soil should be conducted site-wide. The sampling should adhere to guidance published by the DTSC, entitled “Interim Guidance for Sampling Agricultural Properties.”<sup>18</sup> The results of the sampling should be evaluated in an EIR for health risks. In addition, mitigation should be identified and required to protect construction worker health, future resident health and the health of adjacent residents.

Unlike other similar projects in Contra Costa County, where cities have required on-site sampling and due diligence, here, the City acknowledged the former agricultural use but then simply assumed that any pesticide residue would not be significant. Without testing to disclose the levels of existing contamination, this assumption is speculative and not supported by substantial evidence. The City must comply with CEQA and disclose, analyze and mitigate this potentially significant hazards impact.

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<sup>14</sup>Agency for Toxic Substances and Disease Registry, Public Health Statement for DDT, DDE, and DDD <https://www.atsdr.cdc.gov/phs/phs.asp?id=79&tid=20>

<sup>15</sup> <https://www.atsdr.cdc.gov/phs/phs.asp?id=79&tid=20>

<sup>16</sup> <https://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=80&tid=20>

<sup>17</sup> <https://www.epa.gov/sites/production/files/2016-09/documents/chlordane.pdf>

<sup>18</sup><https://www.dtsc.ca.gov/Schools/upload/Ag-Guidance-Rev-3-August-7-2008-2.pdf>

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**III. THE DDA SHOULD BE REJECTED ON THE GROUNDS IT FAILS TO PROVIDE THE MAXIMUM ECONOMIC BENEFIT TO THE CITY AND IS INCONSISTENT WITH GENERAL PLAN POLICIES REGARDING THE HIRING OF LOCAL WORKERS AND APPRENTICES**

**A. Development Agreements Are Voluntary and May Be Denied for Any Good Faith Reason**

The City is under no obligation to enter into a DDA for this Project. DDAs are voluntary contractual agreements. As such, the City Council may modify or reject the DDA for any good-faith reason.<sup>19</sup> It is up to the City Council to determine if a DDA provides sufficient benefits to the City to justify entering into the agreement.

Indeed, the City has broader discretion to reject the DDA than it has to approve it. If the City wants to approve a DDA, the Council is required to find the DDA is consistent with the general plan and any applicable specific plan, among other required findings pertaining to the general health, welfare, and safety.<sup>20</sup>

Because the City has limited public land available for development, the Council has a duty to ensure that it is maximizing the benefits to the City and its residents when it agrees to transfer such land to a private entity.

**B. The Project Maximizes Development Profits at the Expense of Local Job Opportunities by Proposing a Predominantly Residential Project with Minimal Commercial Space**

The Project is a predominantly residential project (310 units) with minimal commercial space (6,500 sf) in an area designated Downtown Mixed Use. This is inconsistent with the City's intent for the area. The City has expressed its intent that the area be used for high density mixed use development in the General Plan, Specific Plan and development code.

Mixed use development reduces reliance on motor vehicles and lessens the related impacts such as traffic and emissions. It also spurs economic growth by creating job opportunities and bringing retail/commercial uses closer to residents.

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<sup>19</sup> Concord Municipal Code § 18.460.060(A).

<sup>20</sup> Concord Municipal Code § 18.460.060(B).

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These objectives will not be achieved with the current residential to commercial ratio.

**C. The Project Is Inconsistent with General Plan Policies Regarding the Hiring of Local Workers and Apprentices**

The DDA may not be approved because it is inconsistent with General Plan Policy E.2.1.7. General Plan Policy E.2.1.7, in the Economic Vitalization chapter, sets forth a City goal to:

Support the creation of job and contracting opportunities for Concord residents and businesses through the establishment of local hire preference, apprenticeships, internships, and other programs which support local hiring, training, and skill enhancement. Within the Concord Reuse Project Area, a good faith goal of 40% of project labor—first from Concord, and then from Contra Costa County—will be set on a project by project basis for public and private construction.

The Planning Commission concluded that the Policy E.2.1.7 is only applicable to the Concord Reuse Project. That is incorrect. The Policy is a generally applicable policy that also includes a specific goal for the Concord Reuse Project.

In contrast, the General Plan contains numerous other policies that are expressly limited to the Concord Reuse Project (e.g., Policy E-7.1.3). For example, there is an entire other section in the same Economic Vitalization chapter that sets forth policies that apply solely to the Concord Reuse Project. (See Concord 2030 General Plan, Chapter 2, Goal E-7). Policy E.2.1.7 is not in that section.

If the City is going to allow a largely residential project in this area, it should ensure that the sale and development of the property yields the maximum benefit to the people of Concord. It can do that by modifying the DDA to include a binding commitment to hire local workers and apprentices engaged in the building trades, which is consistent with Policy E.2.1.7.

The failure to maximize the economic benefits for local workers in the construction of the Project provides a good faith rationale to deny or modify the DDA. Moreover, the failure to apply Policy E.2.1.7 provides grounds to determine that the DDA cannot be approved because it is inconsistent with the General Plan.



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The City has limited opportunities to implement the local hire and apprenticeship goals of General Plan Policy E.2.1.7. These policy goals may not be imposed as conditions to land use entitlements. Disposition and Development Agreements thus provide one of the few tools available to the City for implementing this policy. In exchange for the benefits being provided to the Developer through this agreement, the City should require a binding commitment to use local workers and apprentices engaged in the building trades. Such a requirement ensures that the economic and employment benefits from the purchase and development of City-owned land stays in the community.

Local hire and apprenticeship requirements will help provide job and career opportunities for disadvantaged workers in the City. As Policy E.2.1.7 states: “*Certified training and apprenticeship programs with proven performance can create stable employment opportunities and create jobs for returning veterans and others in the community.*” Registered apprenticeship programs help to diversify the construction industry by bringing more underrepresented minorities and women into the trades. Each apprentice is a full-time worker who is receiving on-the-job training as an employee of a contractor on a jobsite. Increasing the number of apprenticeship opportunities through application of General Plan Policy E.2.1.7 to this Project will enable more of the City’s disadvantaged workers to enter the pathway to a long-term, family-supporting career in construction. In addition, apprenticeship programs have been found to “reduce wage differentials and occupational segregation in the workplace itself, as well as help offset the negative career effects of unequal access to good schools and job-hiring networks.”<sup>21</sup>

As the current owner of the property, the City’s objective in entering a DDA should be to ensure that the sale and development of the property yields the maximum benefit to the people of Concord in accordance with General Plan Policy E.2.1.7. The City of Concord has a finite amount of land available that it can transfer for private development. The people of Concord deserve assurances that, when public land is transferred for private development, the development will provide maximum economic and job benefits to the community.

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<sup>21</sup> Thomason & Bernhardt, UC Berkeley Center for Labor Research and Education, *The Union Effect in California #2: Gains for Women, Workers of Color, and Immigrants* (June 2018) at p. 1.

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#### IV. CONCLUSION

We urge the City to fulfill its responsibilities under CEQA by preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter and the attached letter from SWAPE. By doing so, the City and the public will be able to ensure that the Project's significant environmental impacts are mitigated to less than significant levels.

In addition, we urge the City to reject the DDA until it is amended to ensure that the Project will meet the local hire and apprenticeship goals set forth in General Plan Policy E.2.1.7.

Thank you for your attention to these comments.

Sincerely,

A handwritten signature in blue ink that reads "Thomas A. Enslow". The signature is written in a cursive style and is positioned above the printed name.

Thomas A. Enslow

TAE:ljl