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*Via Email*

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Re: Comment on the Final Environmental Impact Report for the Proposed 1 AMD Place Redevelopment Project (Sunnyvale Planning Project No. 2016-8035; SCH No. 2017082043)

Dear Chair Howard, Commissioners Simons, Harrison, Olevson, & Weiss, Mr. Caruso, and Ms. Netto:

I am writing on behalf of the Laborers International Union of North America, Local Union 270 and its members living in Santa Clara County and the City of Sunnyvale (collectively "LIUNA") regarding the Environmental Impact Report ("EIR") prepared for the 1 AMD Place Redevelopment Project (Sunnyvale Planning Project No. 2016-8035; SCH No. 2017082043) ("Project").

We have reviewed the EIR with the assistance of expert biologist Shawn Smallwood, Ph.D., environmental consulting firm SWAPE, and industrial hygienist Francis "Bud" Offermann, PE CIH. These experts have identified a number of significant omissions and flaws

in the EIR's analysis of the Project's potential health risks, impacts to biological resources and indoor air quality. Therefore, we request that the City of Sunnyvale ("City") refrain from certifying the EIR, address the issues discussed below and recirculate the amended EIR for further public review and comment. We reserve the right to supplement these comments during upcoming public hearings concerning the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, 60 Cal. App. 4th 1109, 1121 (1997).

## I. PROJECT DESCRIPTION

The Project is proposed to be located on an approximately 33 acre site bounded by Stewart Drive, East Duane Avenue, and, about 0.10 miles to the west, the Lawrence Expressway. The Project includes the demolition of three existing office buildings and the construction and operation of a residential community. The new buildings would include four large five-story apartment buildings including 887 apartment units. Each building would be designed to wrap around an interior parking structure. The parking garages would contain about 1,650 parking spaces. Overall, the Project will include almost 2,000 parking spaces and anticipates generating up to 6,670 daily trips as a result of new residents and guests accessing the Project. Four additional three-story apartment buildings containing 57 units would be located on the southwest portion of the site. The northern portion of the site would include 22 three-story buildings containing 130 townhouses. 6.5 acres of the site would be dedicated as a public park. The Project site will include extensive landscaped areas. Of the 512 existing larger trees on the site, 202 will be protected in place and 49 will be transplanted. Another approximately 572 replacement trees will be planted on site.

## III. LEGAL STANDARDS

### A. **The EIR Must Afford the Fullest Possible Protection of the Environment and Have Sufficient Detail to Enable Those Who Did Not Participate in Its Preparation to Understand and to Consider Meaningfully the Issues Raised by the Proposed Project.**

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR (except in certain limited circumstances). (See, e.g., Pub. Resources Code, § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 ("*CBE v. CRA*").)

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1).) "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Citizens of Goleta*

*Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.) The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” (*Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

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 at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” (CEQA Guidelines, §15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” (Pub. Resources Code, § 21081; CEQA Guidelines, § 15092(b)(2)(A) & (B).)

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

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

More recently, the California Supreme Court has emphasized that:

When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted]....

(*Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 510 (2018), citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405.) The Court in *Sierra Club v. Cty. of Fresno* also emphasized at another primary consideration of sufficiency is whether the EIR “makes a reasonable effort to substantively connect a project’s air quality impacts to likely health consequences.” (6 Cal.5th at 510.) “Whether or not the alleged

inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document.” (*Id.* at 516.) Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, “a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including ‘detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” (6 Cal.5th at 516, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197.) “The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency’s factual conclusions.” (6 Cal.5th at 516.) As the Court emphasized:

[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

(*Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 514.)

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

#### **IV. THE EIR IS INCONSISTENT WITH CEQA’S REQUIREMENTS.**

##### **A. The EIR’s Air Quality Analysis Is Not Based on Substantial Evidence Because it Fails to Address All of the Land Uses Proposed for the Project.**

The EIR’s air quality analysis is based on modeling runs using the California Emissions Estimator Model Version CalEEMod.2016.3.2 (“CalEEMod”). In order for this model to work as intended and to provide accurate results, the inputs relating to the proposed Project must accurately reflect the Project’s components. SWAPE has reviewed the CalEEMod modeling conducted for the Project, including comparing the model inputs to the EIR’s project description. (See SWAPE Comments, attached as Exhibit C.) SWAPE has identified a number of significant omissions and errors in the model inputs which demonstrate that its results are less than substantial evidence and which underestimate the Project’s air emissions and health impacts.

About 2,000 parking spaces are proposed for the Project, many in four large parking garages located in the larger apartment buildings. Despite that large parking focus, parking is not

one of the uses included in the air modeling. As SWAPE’s comment points out, “[r]eview of the Project’s CalEEMod output files ... demonstrates that the proposed parking land uses were not included in the construction or operational air modeling[.]” (SWAPE Comments, p. 2, citing EIR, Appendix B, pp. 161, pp. 222, pp. 283, pp. 57).)

In addition to ignoring the extensive parking, the modeling also inaccurately inputs only 22 townhouses when in fact 130 townhouses (in 22 buildings) are proposed. (SWAPE Comments, pp. 3-4.) Thus, the model assumes only 63 people will be living in 130 townhouses spread out over 22 buildings. The expected population for the townhomes would appear to be closer to 370 persons. This faulty input results in the model arbitrarily underestimating the Project’s air pollution emissions. (*Id.*, p. 4.)

The model inputs also assume a greater level of pollution control equipment for the on-site construction equipment than is required by the Project’s conditions. (SWAPE Comments, pp. 4-8.) The modeling inputs assume that all but one of the 89 pieces of heavy construction equipment needed to construct the Project will be fitted with “Final” Tier 4 pollution control equipment. However, the mitigation measure seeking to lower diesel emissions from this equipment - MM 4.2-1a - only requires Tier 4 level of equipment. There happen to be two types of Tier 4 equipment – “Final” as well as “Interim” Tier 4. MM 4.2-1a does not limit the Tier 4 equipment only to the Final Tier 4. The Interim Tier 4 Level results in significantly more diesel particulate emissions than the Final Tier 4. In addition, MM 4.2-1a allows the Project to use Tier 3 models “if a Tier 4 version of the equipment type is not yet produced by manufacturers.” By inputting only Final Tier 4 controls in the model, the model fails to take into account the possible use of lower levels of pollution control allowed by MM 4.2-1a and likely underestimates emissions once again.

Lastly, the modeling inputs also completely omit any entries addressing the import and export of soil, concrete and asphalt to the site during construction. The EIR states that “overall site development is anticipated to export approximately 15,000 cubic yards of soil and the import of approximately 13,800 cubic yards of new concrete and 13,400 cubic yards of new asphalt” (DEIR, p. 3-18; SWAPE Comments, pp. 8-9). No hauling trips for these large amounts of material are included the modeling inputs, resulting in another underestimation of the Project’s air pollution emissions. (SWAPE Comments, pp. 8-9).

These mistakes in the air modeling render the air pollution analysis and corresponding EIR discussion inaccurate and not based on substantial evidence. In order to provide accurate information to the public and decision makers and to determine whether or not the Project will have significant air quality impacts and sufficient mitigation requirements, a new discussion of air impacts must be prepared and circulated to the public.

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**B. The EIR's Brief Mention of Health Risks From the Project's Construction and Operation is Insufficient and Not Supported by Substantial Evidence.**

Existing residents live about 25 meters from the site. SWAPE Comments, p. 13. Despite these nearby sensitive receptors, the EIR cavalierly attempts to interpolate that the Project's construction and operational emissions will not have any health impacts on nearby sensitive receptors based on claims that construction will be short-term and that the Project will not exceed any BAAQMD significance thresholds. (DEIR, pp. 4.2-16 – 4.2-17.) These general assertions are not sufficient to evaluate the Project's potential health impacts on nearby existing residents. The EIR's conclusion is not supported by a quantitative health risk assessment ("HRA"). (*Id.*; SWAPE Comments, p. 2.) As SWAPE points out:

the Project Applicant cannot claim that the Project would result in a less than significant health risk impact without properly assessing the risk posed to existing sensitive receptors as a result of diesel particulate matter (DPM) emissions that will be emitted during Project activities.

(SWAPE Comments, p. 11.) In order to fully disclose the potential health risks associated with the Project, an accurate health risk assessment for the entire Project consistent with guidelines published by the Office of Environmental Health Hazard Assessment must be prepared. (*See id.*, pp. 11-12.) Moreover, as noted above, whether or not the Project even complies with the BAAQMD thresholds is unknown given the above-described omissions in the air pollution modeling for the Project. Currently, the EIR's conclusion that the Project will not result in any significant health risks is not supported by substantial evidence and the EIR's discussion and conclusion that the Project may have significant health risk impacts is insufficient pursuant to CEQA.

Based on the limited information provided by the EIR, substantial evidence establishes that the Project may have a significant health risk impact to nearby sensitive receptors. SWAPE has prepared a Level 2 health risk screening assessment ("HRSA") for the project. (SWAPE Comments, pp. 12-16.) BAAQMD recommends a significance threshold of 10 in one million cancer risk for infants, children and lifetime residency which has been adopted as an applicable threshold by the City in the EIR. (DEIR, p. 4.2-12.) Applying the U.S. Environmental Protection Agency's AERSCREEN model, as recommended by OEHHA and CAPCOA, SWAPE calculates that construction and operation of the Project will result in cancer risks to children, infants, and nearby residents over the course of a 30-year residential lifetime of, respectively, 23.5 in one million, 22.3 in one million, and 50.7 in one million, well in excess of BAAQMD's threshold. (SWAPE Comment, p. 16.) Based on this substantial evidence, the Project may have significant health risk impacts on nearby residents that have not been adequately disclosed and mitigated by the EIR and the conclusion that the Project will not pose significant health risks is not supported by substantial evidence. A complete health risk assessment must be prepared for the Project in order to provide a substantial basis for any conclusions regarding the Project's health risks to current as well as future residents.

Likewise, contrary to CEQA, by adding TAC emissions to the immediate area, the Project cannot avoid evaluating the cumulative health impacts of the Project including nearby sources' of existing TAC emissions on the Project's nearby sensitive receptors as well as future residents. Given the health risks identified above, the addition of TACs from the Project's construction and operation is considerable and may significantly contribute to the Project's cumulative adverse health risk impact including the existing health impacts from adjacent TAC sources. The Project's cumulative health risk impact to existing adjacent residents as well as future residents of the Project and surrounding sources is not addressed in the EIR.

SWAPE has reviewed available data for six TAC sources adjacent to the Project site and within 1,000 feet of the nearest residential receptor. These sources include Spansion LLC (Plant 14744, 15501, and 15502); Philips Semiconductors (Plant 12128); Advanced Mirco Devices Inc (Plan 14747); and AMD (Plant 19909). (SWAPE Comments, p. 17.) Applying BAAQMD's Stationary Source Screening Analysis Tool for Santa Clara County, SWAPE calculates that the cumulative cancer risk posed to the nearest sensitive receptor is approximately 586 in one million." (*Id.*, p. 18.) That risk greatly exceeds the BAAQMD's cumulative cancer risk threshold of 100 in one million. There is no mention of these cumulative health hazards in the EIR.

The EIR's cursory discussion of the Project's direct and cumulative construction and operational health impacts is insufficient and fails to "enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises[.]" (*Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 510.) Alternatively, by failing to provide any analytical basis for the conclusion that the Project would not have significant health impacts on residents about one hundred feet away is not supported by substantial evidence.

**C. The EIR Fails To Establish an Accurate Baseline for Sensitive Biological Resources and Fails to Disclose and Mitigate Impacts of the Project on Numerous Sensitive Species.**

Expert biologist Shawn Smallwood, Ph.D., has reviewed the EIR's discussion of biological resources. (*See* Smallwood Comments, attached as Exhibit A.) Drawing on his familiarity with the Project area and decades of studying and surveying many of the species encountered at the site, Dr. Smallwood has prepared a critique of the EIR, pointing out numerous shortcomings in the baseline assessment of the presence of species at the site, failures to evaluate impacts that will result from the Project, and numerous instances where the EIR's assertions are insufficient or not supported by substantial evidence.

**1. The EIR fails to identify the likely presence of sensitive and other wildlife species at the Project site.**

Dr. Smallwood points out the absence of any detection level surveys that would provide actual evidence of the presence or absence of species at the Project site. Based on his expert opinion and his observations at the Project site, there has been no effort to detect whether or not

numerous sensitive species are in harm's way from the Project. Dr. Smallwood comments on the one site visit conducted by one of the Project's consultants on a single day:

WRA (2016) visited the site one day in November 2016 for an unreported time period and time of day. WRA's (2016:4) conclusion, "*No special-status wildlife species were observed in the Study Area during the site assessment,*" was understandable, given the inadequate survey effort committed to obtaining it. To expect to detect special-status species, one has to perform the appropriate surveys to detect them.

(Smallwood Comments, p. 5.) WRA indicated that at least 3 special-status species of birds potentially occur in the project area, including Nuttall's woodpecker, Allen's hummingbird, and oak titmouse. These potential special-status species are not even mentioned in the EIR. Not only do these species potentially occur, but the eBird records purportedly relied on by the EIR indicate these three species abound in the area. (Smallwood Comments, p. 5. *See* DEIR, p. 4.3-2.) Dr. Smallwood's review of the eBird data indicates the likely presence of 36 special-status bird species. The EIR only mentions four of these species. The EIR only acknowledges that one of these species – the White-tailed kite – is possibly present at the site. (DEIR, p. 4.3-6.) The EIR claims three of these special status species – Peregrine falcon, Alameda song bird and Tri-colored blackbird – are "not expected to occur" at the site despite documented sightings of these three species nearby to the site and the presence of suitable foraging or stopover habitat at the site. (*Id.*, p. 4.3-7 – 4.3-8; Smallwood Comments, pp. 5-7.) The remaining 32 special status bird species identified by Dr. Smallwood as likely to occur at the site are not mentioned at all in the EIR. (Smallwood Comments, pp. 5-7.)

Establishing an accurate baseline is the sine qua non to adequately analyzing and mitigating the significant environmental impacts of the Project. (*See* CEQA Guidelines, § 15125(a); *Save Our Peninsula*, 87 Cal.App.4th at 121-123.) Unfortunately, the EIR's failure to investigate and identify the occurrences of sensitive biological resources at the Project site results in a skewed baseline. Such a skewed baseline ultimately "mislead(s) the public" by engendering inaccurate analyses of environmental impacts, mitigation measures and cumulative impacts for biological resources. (*See San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 656; *Woodward Park Homeowners*, 150 Cal.App.4th at 708-711.) The EIR's failure to acknowledge the abundance of special status species that likely will be adversely affected by the extensive building proposed in the Project "lacks analysis" and "omits the magnitude of the impact" to biological resources. (*Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 514.) As a result, the EIR is insufficient as a matter of law.

The various preconstruction surveys called for in the EIR do nothing to rectify the EIR's numerous shortcomings in disclosing impacts. Nor would those surveys to be conducted just prior to construction stand-in as a proper baseline from which to disclose and evaluate impacts. (*See* Smallwood Comment, p. 5.)



By failing to conduct any surveys and disregarding the absence of key species from the project site, ignoring numerous other species likely to be present, the EIR fails to establish and otherwise skews the entire biological resources baseline for the Project. This entire section should be redone, starting with properly timed, truly focused, detection surveys of the entire site and a complete list of special status bird species that may be adversely affected by the Project.

## **2. The EIR fails to adequately address the Project's impacts on wildlife resulting from bird strikes.**

Although the DEIR makes passing references to the City's Bird Safe Guidelines in the EIR's discussion of the Project's potential light and glare impacts (EIR, p. 4.1-16) and its introduction (*Id.*, p. 3-17), no mention of the Project's impact on birds from collisions or the City's Bird Safe Guidelines is found in the EIR's discussion of potential impacts to biological resources. (*See* EIR, pp. 4.3-1 – 4.3-12.) As a result, the EIR's discussion is manifestly insufficient to describe the Project's impacts on birds colliding with the building's glass facades and other structures. By omitting this serious impact, the EIR misrepresents the Project's potential impacts and fails to give any sense of the magnitude of this potential impact.

Full disclosure of the potential impact on wildlife of window collisions is especially important because “[w]indow collisions are often characterized as either the second or third largest source of human-caused bird mortality.” (Dr. Smallwood Comments, p. 8.) As a preliminary matter, a proper EIR for the Project should include, among other things, details of window placements, window extent, types of glass, and anticipated interior and exterior landscaping and lighting. (*Id.*, pp. 11-15.) The EIR then should discuss the likely magnitude of bird collisions with the Project as well as the particular species that would be most likely to collide with the Project and evaluate the direct and cumulative impacts of those bird fatalities.

Of the 36 species of birds likely present at the site, at least 8 of those species have been identified by Dr. Smallwood as prone to window collisions based on a nearby study. (Smallwood Comments, pp. 6-7.) Unlike the EIR, Dr. Smallwood did a careful review of the City's Bird Safe Guidelines and whether or not any aspects of the Project as depicted in the EIR would adhere to the Guidelines. (*Id.*, pp. 1-4.) Of the 16 criteria laid out in the Guidelines (at least one of which is not relevant to the Project), Dr. Smallwood's review indicates that “only one of the standards appears to be met by the project as planned.” (*Id.*, p. 4). For example, rather than limiting expanses of glass on the lower 60 feet of the buildings, the EIR depicts large windows on the lower 3 floors of the mid-rise apartment buildings. (*Id.*, p. 2; DEIR Exhibit 3-5). Rather than low reflectivity glass, the EIR depicts trees reflected in the Project's windows. (DEIR, Exhibit 3-6.) Dr. Smallwood questions the wisdom of the Guideline's criteria that buildings “add architectural devices, such as louvers, awnings, sunshades or light shelves to building design to reduce massing of glass,” because, “[b]ased on the scientific literature on bird-window collisions, these devices would likely increase collision risk.” Nevertheless, no such features are depicted for the Project. (Smallwood Comments, p. 2.) Likewise, the EIR fails to discuss any of the criteria set forth in the Guidelines. As a result, Dr. Smallwood concludes “that the project is inconsistent with City of Sunnyvale's Bird-Safe Design Guidelines.” (*Id.*) The complete absence of any

meaningful discussion in the EIR of bird collisions, the rate of collisions one could expect from the Project, and any efforts to mitigate those impacts is insufficient and inconsistent with CEQA as a matter of law.

In addition, Dr. Smallwood reviewed a number of studies and the depicted building design in order to calculate the number of bird collisions per m<sup>2</sup> of glass windows per year. (*Id.*, p. 7.) According to his calculations, the Project's estimated 6,693 m<sup>2</sup> of glass windows would result in an estimated 509 bird deaths per year. (*Id.* at p. 11.) Looking ahead, Dr. Smallwood notes that "[a]fter 50 years the toll from this average annual fatality rate would be 25,433 bird deaths, with an empirically founded upper-end possibility of 26,376 deaths." (*Id.*) The project's landscaping, the extent of collision surface proposed, the exacerbating features identified by Dr. Smallwood, and the estimated number of bird deaths calculated by Dr. Smallwood each underscore the EIR's absent discussion and lack of any, never mind "sufficient[,] detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises[.]" (*Sierra Club v. Cty. of Fresno*, 6 Cal.5th 502, 510.)

In order to mitigate the impact of the window collisions on bird species, Dr. Smallwood has suggested several possible mitigation measures. Dr. Smallwood suggests: (1) marking the windows (e.g. decals, film, fritted glass); (2) managing outdoor landscape to reduce reflection of vegetation; (3) managing indoor landscape; and (4) managing nocturnal lighting. (Smallwood Comments, pp. 15-16.) For mitigation measures involving the siting and design of the Project, Dr. Smallwood suggests: (1) deciding on the location of structures; (2) deciding on the façade and orientation of structures; (3) selecting types and sizes of windows; (4) minimizing transparency through two parallel façades; (5) minimizing views of interior plants; and (6) landscaping so as to increase distance between windows and vegetation. (*Id.*) Dr. Smallwood also suggests that the City also look to the guidelines developed by the American Bird Conservancy and the City of San Francisco to minimize injuries and fatalities to bird species. (*Id.*, p. 16.)

Even with Dr. Smallwood's proposed mitigations, however, it is not likely that the Project can fully mitigate this potentially significant impact. Only a robust discussion in a new EIR subjected to public review and comment would indicate the extent of the impact and the necessary mitigation measures and fully disclose unmitigated impacts the Project may cause.

### **3. The Project may have serious impacts on wildlife from the adverse effects of future resident's cats.**

It is entirely foreseeable that 2,895 new residents will also include hundreds of house cats. As Dr. Smallwood points out, "[h]ouse cats serve as one of the largest sources of avian mortality in North America (Dauphiné and Cooper 2009, Blancher 2013, Loyd et al. 2017)." (Smallwood Comments, p. 17.) He also describes a recent UC Davis study documenting house cats' role in spreading fecal pathogens throughout local watersheds and the marine environment. (*Id.*) According to a UC Davis wildlife health research program, "*Toxoplasma gondii* is a parasite that can infect virtually all warm-blooded animals, but the only known definitive hosts

are cats – domesticated and feral house cats included. Cats catch the parasite through hunting rodents and birds and they offload it into the environment through their feces... and ...rain that falls on cement creates more runoff than rain that falls on natural earth, which contributes to increased runoff that can carry fecal pathogens to the sea” (<http://www.evotis.org/toxoplasma-gondii-sea-otters/>.” (*Id.*) The EIR fails to discuss the likely impacts on birds of the Project’s house cats or their contribution to pollution of local watersheds and San Francisco Bay.

**4. No meaningful discussion of the Project’s cumulative effects on wildlife is included in the EIR.**

Recognizing that several projects may together have a considerable impact, CEQA requires an agency to consider the “cumulative impacts” of a project along with other projects in the area. (§ 21083(b); CEQA Guidelines §15355(b).) If a project may have cumulative impacts, the agency must prepare an EIR, since “a project may have a significant effect on the environment if “[t]he possible effects of a project are individually limited but cumulatively considerable.”” (*CBE*, 103 Cal.App.4th at 98, 114; *Kings County Farm Bur.*, 221 Cal.App.3d at 721.) It is vital that an agency assess ““the environmental damage [that] often occurs incrementally from a variety of small sources . . .”” (*Bakersfield Citizens For Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214 (“*Bakersfield Citizens*”))

Despite listing numerous other pending projects in the vicinity, the EIR makes no effort to address cumulative impacts of bird collisions. As a result, the EIR’s discussion of cumulative wildlife impacts is entirely deficient.

**D. THE EIR FAILS TO ADDRESS THE POTENTIAL ADVERSE IMPACTS OF THE PROJECT ON INDOOR AIR QUALITY.**

The EIR also fails to address the significant health risks from yet another TAC, formaldehyde, posed by the Project. Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, has conducted a review of the Project, the IS/MND, and relevant documents regarding the Project’s indoor air emissions. Indoor Environmental Engineering Comments (March 21, 2019) (attached as Exhibit B). Mr. Offermann is one of the world’s leading experts on indoor air quality, in particular emissions of formaldehyde, and has published extensively on the topic. As discussed below and set forth in Mr. Offermann’s comments, the Project’s emissions of formaldehyde to air will result in very significant cancer risks to future residents at the Project’s apartments and townhomes. Mr. Offermann’s expert opinion and calculation is substantial evidence that the Project may have significant health risk impacts as a result of these indoor air pollution emissions. These impacts must be addressed in the EIR.

Formaldehyde is a known human carcinogen and listed by the State as a TAC. (See DEIR, p. 4.2-9 (“In addition to diesel PM, the TACs for which data are available that pose the greatest existing ambient risk in California are ... formaldehyde....”) As noted above, BAAQMD has established a significance threshold of health risks for carcinogenic TACs of 10 in a million and a cumulative health risk threshold of 100 in a million. The EIR fails to

acknowledge the significant indoor air emissions that will result from the Project. Specifically, there is no discussion of impacts or health risks, no analysis, and no identification of mitigations for significant emissions of formaldehyde to air from the Project.

Mr. Offermann explains that many composite wood products typically used in home and apartment building construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, “The primary source of 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, office, and retail building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.” (Offermann Comments, p. 3.)

Mr. Offermann states that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 125 per million, assuming all materials are compliant with the California Air Resources Board’s formaldehyde airborne toxics control measure. (Offermann Comments, pp. 3-4.) This is more than 12 times the BAAQMD’s CEQA significance thresholds for airborne cancer risk of 10 per million and 100 in a million for cumulative risks. (*Id.*) Adding in the other risks from adjacent TAC sources will only increase the cumulative health risks to be borne by the Project’s future residents. (*Id.*, p. 10; *see supra.*) Mr. Offermann concludes that these significant environmental impacts should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. (Offermann Comments, pp. 2-4.) He prescribes a methodology for estimating the Project’s formaldehyde emissions in order to do a more project-specific health risk assessment. (*Id.*, pp. 4-8.). Mr. Offermann also suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. (*Id.*, pp. 11-12.) Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. (*Id.*) Since the IS/MND does not analyze this impact at all, none of these or other mitigation measures have been considered.

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes substantial evidence that the project will have a significant adverse environmental impact. 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 substantial evidence that an "unstudied, ***potentially significant environmental effect***" exists. (See *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937, 958 (emphasis added).) As a result, the EIR for the Project must address this impact and identify enforceable mitigation measures.

The failure of the EIR to address the Project's formaldehyde emissions is contrary to the California Supreme Court's decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("CBIA"). In that case, the Supreme Court 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 environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801. 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 (emphasis added).)

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. People will be residing in and using the Project once it is built and begins emitting formaldehyde. Once built, the Project will begin to emit formaldehyde at levels that pose significant direct and cumulative health risks. The Supreme Court in *CBIA* expressly finds that this type of air emission and health impact by the project on the environment and a "project's users and residents" must be addressed in the CEQA process. The existing TAC sources near the Project site would have to be considered in evaluating the cumulative effect on future residents of both the Project's TAC emissions as well as those existing off-site emissions.

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, subs. (b), (c), (d), (g), 21001, subs. (b), (d).) It goes without saying that the thousands of future residents at the Project are human beings and the health and safety of those residents must be subjected to CEQA's safeguards.

The City has a duty to investigate issues relating to a project's potential environmental impacts. (*See County Sanitation Dist. No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98. [“[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts.”].) The proposed office buildings will have significant impacts on air quality and health risks by emitting cancer-causing levels of formaldehyde into the air that will expose future residents to cancer risks potentially in excess of BAAQMD's threshold of significance for cancer health risks of 10 in a million. Likewise, when combined with the risks posed by the nearby TAC sources, the health risks inside the project may exceed BAAQMD's cumulative health risk threshold of 100 cancers in a million. Currently, outside of Mr. Offermann's comments, the City does not have any idea what risks will be posed by formaldehyde emissions from the Project or the residences. As a result, the City must include an analysis and discussion in the EIR which discloses and analyzes the health risks that the Project's formaldehyde emissions may have on future residents and identifies appropriate mitigation measures. Until that occurs, the EIR is insufficient in disclosing this important impact.

## V. CONCLUSION

For the foregoing reasons, LIUNA and its members urge the City to prepare and recirculate a revised EIR addressing the above shortcomings. Thank you for your attention to these comments. Please include this letter and all attachments hereto in the record of proceedings for this project.

Sincerely,



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