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Re: Green Valley II Mixed-Use Project Environmental Impact Report

Dear Honorable Members of the Fairfield Planning Commission and Ms. Sheehan:

This comment letter is submitted on behalf of **Laborers International Union of North America, Local 324**, and its members living in and near the City of Fairfield (“LIUNA”) regarding the Draft and Final Environmental Impact Report (“DEIR”) prepared for the Green Valley II Mixed-Use Project (“Project”).

We have reviewed the EIR with the assistance of expert biologist Shawn Smallwood, Ph.D., environmental consulting firm SWAPE, and industrial hygienist and professional engineer Francis Offermann, PE, CIH. Mr. Offermann identifies the likelihood that the Project will emit carcinogenic formaldehyde at levels that will cause significant health risks to future residents of the Project and the DEIR’s failure to analyze cumulative health risks posed by those indoor TAC emissions as well as TAC emissions from the nearby highway. Mr. Offermann’s comments are attached as Exhibit A. SWAPE’s comments identify a number of significant flaws in the air modeling underlying the DEIR’s air quality analysis and flaws in the analysis of GHG impacts. SWAPE’s comments are attached as Exhibit B. Lastly, Dr. Smallwood identifies flaws in the wildlife baseline information relied on by the MND and the likelihood that the Project will have significant impacts on birds colliding with the new structures. His comments are attached as Exhibit C.

LIUNA urges the City to revise and recirculate the EIR to adequately describe, analyze, and mitigate the Project and its impacts. LIUNA further reserves its right to submit additional comments and evidence up until the date of the City Council's final decision on the Project. (*See Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109.)

I. Project Description

The Project includes a proposal to construct a 270-unit apartment complex and a 22,000 square-foot commercial complex on an undeveloped 13.32-acre parcel. The apartment complex would include four buildings ranging in height from about 47 to 53 feet. The approximately 22,600 square feet of commercial space would be contained in four additional buildings from about 23 to 31 feet in height. The project would include parking for 591 cars. Single-family residences are located about 260 feet from the Project. The Project site currently is an undeveloped field. The site is about 600 feet northwest of Interstate 80.

II. Legal Background

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." (*Communities for a Better Environment 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)

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*, *supra*, 91 Cal. App. 4th at pp. 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.” (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 § 21081; 14 Cal.Code Regs. § 15092(b)(2)(A) & (B)) 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, 732.).

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*, *supra*, 91 Cal. App. 4th at p. 1355 [emphasis added] [quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 409, fn. 12].) As the court stated in *Berkeley Jets*, “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.’” (*Berkley Jets*, *supra*, 91 Cal. App. 4th at p. 1355.) 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], and (2) makes a reasonable effort to substantively connect a project's air quality impacts to likely health consequences.

(*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.) “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.” (*Sierra Club v. Cty. of Fresno*, 6 Cal.5th 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, 22 Cal.Rptr.3d 203 (*Bakersfield*).) 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.)

III. Analysis

A. The EIR’s List of Past, Current and Future Projects Used to Assess Cumulative Impacts is Dramatically Deficient.

To assess cumulative impacts, the City relies upon a list of 16 projects – five of which are constructed, six of which are under construction, four of which are approved but not constructed, and one which is under review. (DEIR, p. 4.0-3.) The list only includes residential projects and a few commercial projects (one restaurant, a preschool, and one office building). (*Id.*) However, the list relied upon in the DEIR ignores several warehouse/distribution center facilities that are proposed immediately adjacent to the Project. Several those projects are on the Planning Commission’s agenda for the same meeting as the project. (See Exhibit D attached.) Three nearby projects are part of a master planned business park proposed for the area that includes about 2,000,000 square feet of construction. Other significant warehousing projects, including the Cordelia Industrial Buildings project being reviewed for Watt Drive at Red Top Road also are occurring near Cordelia Road on the south side of Highway 80.

Project’s included in the cumulative impact analysis must include “[a] list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency.” 14 CCR § 15130(b). “The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added

to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” (*Communities for a Better Environment v. Cal. Resources Agency (“CBE v. CRA”)*, (2002) 103 Cal.App.4th 98, 117.) A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” (CEQA Guidelines § 15355(b).)

The adjacent warehouse projects and business park either proposed or master planned for areas adjacent to the Project obviously are closely related to the project. Likewise, similar to several of the listed residential projects south of Highway 80, the Cordelia Industrial Buildings project and other industrial buildings in the vicinity of Cordelia Road are closely related to the Project. These nearby projects and their accompanying truck and vehicle traffic, air emissions, coverage of undeveloped lands, noise, and other effects must be considered in order for the EIR to accurately describe and evaluate the Project’s cumulative impacts.

As the court stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(Citations omitted). “[I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. (Pub. Res. Code, § 21061.)” (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79. *See also Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723.) Because the EIR ignores some of the most significant nearby projects with which the Project will interact, the EIR’s cumulative impacts analysis is insufficient and contrary to law.

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B. The FEIR Fails to Analyze Indoor Air Quality Impacts.

The EIR fails to address any indoor air pollution sources that would be associated with the Project nor any resulting health impacts to residents from breathing in those pollutants over time. We have attached the comments of indoor air quality expert, Francis Offermann, PE, CIH. 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 from 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. Offerman's comment letter and curriculum vitae are attached as Exhibit A.

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, "[t]he 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 building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." (Ex. A, pp. 2-3.)

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 125 per million. (Ex. A, p. 3.) This is far above the Bay Area Air Quality Management District (BAAQMD) 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 more than ten times above the CEQA significance threshold. (*Id.*)

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 effect. Because this potential significant effect was not addressed at all in the EIR, the EIR fails as an informational document and fails to provide substantial evidence that there will not be significant impacts on human health due to indoor air quality.

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.”].) “If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) Given the lack of analysis conducted by the City on the health risks posed by emissions of formaldehyde from the Project, such emissions from the Project may pose significant health risks. Likewise, the complete omission of any discussion of this likely environmental health impact is insufficient as a matter of law. (*Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 516.) As a result, the City must supplement and recirculate the EIR to include an analysis and discussion which discloses and analyzes the health risks that the Project’s formaldehyde emissions may have on future residents and workers and identify appropriate mitigation measures.

Mr. Offermann lays out a pathway for the City to analyze the formaldehyde emissions and health risks of the proposed project, including not only the building materials but reasonably anticipated formaldehyde levels that will be present in furnishings and other materials brought into the homes by future residents. (Offermann Comments, pp. 4-9.) Mr. Offermann also suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products in finishing materials, which are readily available. (*Id.*, p. 11.) 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 have been considered.

C. Failure to Analyze Cumulative Health Impacts of TACs from Indoor Sources Combined With TACs from Nearby Highways, Truck Intensive Warehouse Projects, and Other Sources.

A related omission in the EIR is the absence of any analysis of the cumulative health risks posed by emissions of TACs from the Project's finishing materials, future residents' furnishings, and TAC emissions entering the residences from outdoor sources, including for example TACs generated by vehicles using nearby Interstate 80 and other roadways. Of particular note is the absence of any evaluation of cumulative health risks posed by the Project's indoor TAC omissions coupled with diesel particulate matter emitted by the thousands of trucks that will be accessing warehouses proposed to be constructed in the immediate vicinity of the Project. As the EIR notes, levels of PM_{2.5} already exceed the California ambient air standard in the region and near the Project site. (EIR, p. 4.1-6 – 4.1-7.) BAAQMD establishes a cumulative health risk threshold of 100 per million. The health risks from the Project's indoor air emissions already will exceed that risk level. Hence, the additional risks posed by PM_{2.5}s and other TACs emitted from Interstate 80, nearby trucking facilities, diesel generators, and construction sites must be analyzed and the quantified risk to the Project's future residents disclosed and addressed in the EIR.

D. The EIR's Air Quality Impacts Have Not Been Adequately Evaluated.

1. The Project's Air Emissions were Improperly Analyzed Because the EIR Relied on Unsubstantiated Input Parameters.

The EIR's Air Quality Assessment estimates emissions using the California Emissions Estimator Model Version CalEEMod.2013.2.2 ("CalEEMod"). CalEEMod provides recommended default values based on site specific information entered by the user, such as land use type, meteorological data, total lot acreage, etc. (SWAPE, pp. 1-2.) The user can change these default values, but must provide a justification for doing so. *Id.* The EIR generally provides the Project parameters to be input into CalEEMod, such as site location and characteristics, duration of construction, number of worker trips, etc. As pointed out in SWAPE's expert comments, however, several of the values inputted into the model are inconsistent with information disclosed in the DEIR or were changed without an adequate justification. (*Id.*, pp. 1-7.) By relying on incorrect modeling parameters, the Project's impacts are underestimated. (*Id.*)

i. The air modeling is inaccurate because it assumes Final Tier 4 equipment rather than Interim Tier 4 equipment to predict emission levels.

In assessing the Project's air emissions, the EIR states that "All diesel-powered off-road equipment larger than 50 horsepower and operating on the site for more than two days continuously" as well as "All diesel-powered portable equipment (i.e., air compressors, concrete saws, and forklifts) operating on the site for more than two days" shall meet U.S. EPA particulate matter emissions standards for "Tier 4 engines or equivalent" (p. 4.1-25 & 4.1-26.) However, the EIR and mitigation measures do not specify whether that requirement is the Interim Tier 4 engines or the Final Tier 4 engines. (*Id.*) As SWAPE points out, emissions from Interim Tier 4 engines are significantly higher than the Final Tier 4 engines. (SWAPE Comments, pp. 3-4 (attached as Exhibit B).) For example, for the 50 hp equipment, the Interim Tier 4 is ten times higher than the Final Tier 4 emissions. (*Id.*, p. 4). Despite this range of emissions, the air modeling assumes that only Final Tier 4 engines would be used for 31 pieces of equipment . (*Id.*, p. 2, citing EIR, Appendix 4.1, pp. 4.) Because the EIR does not preclude Interim Tier 4 engines from being used, the air modeling fails to estimate emissions from the Project utilizing Interim Tier 4 equipment.

In addition, it is not certain Tier 4 equipment will be available for the Project. As a result, the Tier 4 mitigation may not prove feasible. SWAPE notes that Tier 4 Final Equipment can be particularly challenging to source in California as there is a limited amount of this equipment available. "[T]he Tier 4 Final and Interim equipment only account for 4% and 18%, respectively, of all off-road equipment currently available in California" (*Id.*, p. 5.) Given this, the EIR should have assessed the feasibility in obtaining the use of limited engines equipped with Tier 4 engines, especially Final Tier 4 engines. Because the cited equipment may not be available, this mitigation measure is uncertain and may not be feasible to implement.

Because the air modeling does not address higher pollution emissions from Interim Tier 4 that may be used for the Project, the EIR also fails to substantiate the determination that Mitigation Measure MM Air-3 will reduce the health risks on nearby existing residents identified during the Project's construction will be reduced to insignificant levels. (See SWAPE Comment, p. 8.) This should be address in a revised EIR.

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ii. Failure to Include Club House in Modeling.

The air modeling relied on by the EIR fails to include all of the land uses identified for the Project. In particular, the model fails to include the proposed 6,737 square feet club house.

iii. Inconsistent Weekend Trip Rates

The air modeling also lowers the number of vehicle trips on weekends, contrary to the trip rates evaluated in the traffic analysis prepared for the Project. (SWAPE, p. 6.) According to the traffic analysis, the Project will generate about 4,120 trips per day. (DEIR, Appendix 4.9, p. 38, Table 8). No reductions are assumed for trips on weekends. The air model, however, does significantly reduce daily trips on Saturdays and Sundays by about 1,200 trips. (*Id.*, Appendix 4.1, pp. 27). As a result, the air modeling is not substantial evidence and the EIR's air analysis and project description is internally inconsistent.

iv. Inclusion of Mitigation Credits That May Not Occur.

The modeling also includes emission reductions for installing solar panels and a water conservation strategy. No justifications for these two reductions is evident in the EIR.

In regard to solar panels, the EIR only provides for “[a] minimum of 15 percent of the roof areas will be reserved for future photovoltaic (PV) solar installation. Infrastructure (conduit, structural elements, etc.) will be provided to facilitate the future PV solar installation” (EIR, p. 4.4-23). The air modeling cannot credit the Project with emissions for solar panels that may or may not be installed in the future. (*See* SWAPE, p. 7.)

The model's application of a water conservation strategy also is not justified by anything in the EIR. No such strategy is referenced in the EIR. Other water saving components, such as low flow faucets and toilets are already credited in the modeling. The water conservation strategy is not justified and should not be included in the modeling inputs.

Because of these inconsistencies and omissions, the EIR's air analysis is not based on substantial evidence.

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2. The EIR Fails to Disclose Potential Health Risk Impacts to Nearby Sensitive Receptors.

The EIR concludes that the Project will have a less-than-significant impact on the health of nearby sensitive receptors during Project construction and operation, but it makes this conclusion without conducting a quantitative Health Risk Assessment (“HRA”) for Project operations. (EIR, p. 4.1-24.) Moreover, the EIR relies on air modeling which assumed implementation of Final Tier 4 engines, even though Interim Tier 4 engines also would be permitted. Without conducting an HRA and by relying on a potentially inaccurate modeling assumption, the EIR’s health risk conclusion is not supported by substantial evidence. (SWAPE, pp. 7-9.)

SWAPE conducted a screening level health risk assessment to demonstrate the potential health risk posed by Project construction to nearby sensitive receptors. (SWAPE, pp. 9-12.) The results of this analysis demonstrate that the Project will have a significant health risk impact as a result of Project-related diesel particulate matter. SWAPE’s analysis shows that the excess cancer risk posed to children is 28 in one million, to infants is 38 in one million, and the excess cancer risk over the course of Project operation is 72 in one million. (SWAPE, p. 12.) Each of these exceeds the Bay Area Air Quality Management District’s (“BAAQMD”) threshold of significance of 10 in one million. (*Id.*) A revised EIR should be prepared to fully analyze and mitigate this potentially significant impact.

E. The DEIR Fails to Adequately Analyze and Mitigate the Project’s Significant Climate Change Impact.

The EIR acknowledges that the Project is projected to emit approximately 3,779 MTCO₂e/year – well above the BAAQMD threshold of 1,100 metric tons of CO₂e per year. (DEIR, pp. 4.4-25.) The EIR further states that the Project’s per capita emissions of 4.4 MT/capita/year will exceed the locally derived, per capita emission of 2.75 MT/capita/year required to comply with SB 32’s 2030 goals. (*Id.*, pp. 4.4-25 – 4.4-26.) Likewise, the Project’s operational GHG emissions exceed BAAQMD’s substantial progress Tier 4 service population efficiency target goal of 2.6 MT CO₂e/SP/year for target year 2030. (SWAPE, pp. 16-17.) However, the EIR then claims that because the Project may be consistent with the Solano County Climate Action Plan and Plan Bay Area, the Project will not have any significant impacts from its GHG emissions. (EIR, pp. 4.4-29 – 4.4-34.) Neither of these plans are qualified climate action plans for the City. For example, Solano County CAP fails to include goals or targets beyond 2020. (See SWAPE, p. 13.) The Project won’t be operational until the end of 2021. Nor does the Plan Bay Area amount to substantial evidence that the Project’s GHG emissions are not considerable, that plan not meeting the criteria established in 14 CCR § 15183.5. (*Id.*, 13-15.) Because

compliance with these two referenced plans adds little of relevance to the GHG analysis and are not substantial evidence that could outweigh the evidence of the Project's quantified GHG emissions that are well above applicable thresholds of significance identified in the EIR, the EIR's conclusion that the Project will not have significant GHG emissions is not supported by substantial evidence.

F. 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 DEIR's discussion of biological resources. (Exhibit C.) 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 substantial 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 identifies 47 bird species and 8 bat species that might be adversely affected by the project, while the EIR only acknowledges 1 of those species as likely to be present – White-tailed kite. (Smallwood Comments, pp. 5-9.) Of particular concern is the absence of any acknowledgement that Swainson's hawks, burrowing owls, Northern harrier, or tri-colored blackbirds use the site for foraging, nesting or as stopover refugia. (*Id.*; DEIR, pp. 4.2-4 – 4.2-5.)

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 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, pp. 28-29.)

By failing to conduct any protocol surveys and disregarding the absence of key species from the project site and ignoring numerous other species likely to be present, the EIR fails to establish and otherwise skews the 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 the presence of birds and other wildlife.

2. The DEIR Fails to Adequately Address the Project's Impacts on Wildlife Resulting from Bird Strikes.

The EIR fails to address the Project's potential significant impacts from bird collisions with the Project's buildings. By failing to address this potential impact at all, the EIR's discussion of biological impacts is insufficient.

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. 15.) As a preliminary matter, a proper EIR for the Project should include a proper baseline of bird species using the site and specific details of window placements, window extent, types of glass, and anticipated interior and exterior landscaping and lighting, among other factors identified by Dr. Smallwood. (*Id.* at pp. 19-23.) 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.

Dr. Smallwood reviewed a number of studies in order to calculate the number of bird collisions per m² of glass windows and window curtain walls per year. (*Id.*, pp. 18-19.) According to his calculations, the Project's estimated 3,589 m² of glass windows and window curtain walls, would result in an estimated 276 bird deaths per year. (*Id.* at p. 19.) The project's location on a parcel with high use by numerous birds, its proximity to Bay marshlands, the extent of collision surface proposed, and the estimated number of bird deaths calculated by Dr. Smallwood each underscore the EIR's omission of this impact and lack of "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. (Dr. Smallwood Comments, p. 23.) 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.*, p. 24) 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.* at pp. 24-25.)

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 draft 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 EIR fails to address the Project’s impacts on wildlife movement.

The DEIR’s cursory discussion of potential impacts to wildlife movement only focuses on the presence of a wildlife movement corridor, ignoring the CEQA Guideline directive to also look at a project’s direct and cumulative impacts “*with the movement of any native resident or migratory fish or wildlife species...*” (CEQA Guidelines, Appendix G.) As Dr. Smallwood explains:

The CEQA standard is whether a project will “*Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors...*” The primary phrase of the CEQA standard goes to wildlife movement regardless of whether the movement is channeled by a corridor. In fact, a corridor is a human construct more than it is a natural channelization of wildlife movement (Smallwood 2015). Humans construct corridors to mitigate the impacts of habitat fragmentation, so corridors are mischaracterized in the DEIR.

(Smallwood Comments, pp. 18-19.) Dr. Smallwood explains how important these remaining undeveloped parcels are to the many birds attempting to make their way over increasingly developed areas such as in Fairfield:

When crossing anthropogenic environments, wildlife stopover on available open spaces and trees. Because industrialization and urban and commercial sprawl has eliminated natural surfaces from most of the landscape around the site of the proposed project, the project site likely has emerged as critically important stopover habitat for migratory wildlife (Runge et al. 2014, Taylor et al. 2011), and as staging habitat (Warnock 2010). Many species of wildlife likely use the proposed project site for movement across the area, including those species I saw flying over it and residing on it (Table 1), and those many special-status species of birds seen in the area of the project and reported on eBird (Table 2). The project would further cut wildlife off from stopover and staging habitat, and would therefore interfere with wildlife movement in the region.

(*Id.*, p. 10.) The EIR's non-substantive discussion of this potential impact identified by Dr. Smallwood is inconsistent with CEQA as a matter of law.

4. The DEIR fails to discuss the Project's likely impacts to wildlife from increased traffic.

Dr. Smallwood describes the significant role increased traffic plays in wildlife mortality. (Smallwood Comments, pp. 10-12.) Despite this scientific evidence of wildlife impacts from traffic, no attempt is made by the EIR to identify or evaluate this impact from the project's increased traffic. Dr. Smallwood identifies numerous studies confirming the significant impact of traffic collisions on wildlife in areas similar to the proposed location of the Project. (*Id.*, p. 11.) He also explains that road kill estimates from a specific Project can be estimated and mitigations measures applied. (*Id.*, p. 12.) By failing to address this potentially significant impact, the EIR is deficient as a matter of law.

5. No meaningful discussion of the Project's cumulative effects on wildlife is included in the DEIR.

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*”))

Rather than assess the cumulative wildlife impacts of the Project, the EIR blindly claims that the proposed Solano Habitat Conservation Plan would address cumulative impacts from the Project. However, in addition to that Plan only being proposed, the EIR contains no discussion explaining how the HCP would address any cumulative impacts to foraging habitat, vehicle collisions, wildlife movement, or bird collisions with buildings. Indeed, the EIR only mentions two species – special status plant pappose tarplant and special status bird white-tailed kite. No discussion of cumulative impacts to other species is mentioned at all.

Dr. Smallwood directly refutes that the Project’s impacts on foraging habitat in this area of Fairfield is not considerable. As he explains:

Just over the last 25 years, most of the low-lying wildlife habitat north and south of the project site was converted to residential, commercial and industrial uses (Figure 2). This rapid development over the past 25 years has likely disrupted movement of non-volant wildlife, but it has not prevented movement of volant wildlife. Contrary to City of Fairfield’s (2019) conclusion, connectedness of habitat patches required by volant wildlife is dictated by flight distances. The loss of stopover habitat, such as at the project site, will cumulatively affect other grassland habitat patches to the degree that flight distances between remaining habitat patches increase too far.

(Smallwood Comments, p. 25.) Dr. Smallwood’s direct observations of several special status species foraging at the site as well as his identification of other observations of Swainson’s hawks and other special status species adjacent and near to the site refute the EIR’s claim that “the project site is isolated from other biologically productive lands, is already highly disturbed, and does not provide suitable habitat for many special-status plant and wildlife species that have been documented in the region.” There is no evidence referenced by the EIR substantiating the assertion that cumulative impacts to foraging habitat or the movement of wildlife have not occurred in this rapidly developing portion of Fairfield. The biological report prepared for the Project and attached as Appendix 4.2 does not even contain the word “cumulative.”

As a result, the EIR's discussion of cumulative wildlife impacts is entirely deficient.

6. The EIR Should Address the Potential Impacts the Project May Have on Wildlife From Noise and Pets.

Dr. Smallwood provides scientific references documenting the significant impacts noise and house cats have on wildlife populations. (Smallwood Comments, pp. 12-14.) Construction of the Project will create a significant amount of noise. As a large residential project, it is reasonably foreseeable that a large number of cats would also be introduced as part of the Project. Dr. Smallwood points out the direct impacts these aspects of the Project could have on species currently using the Project site and other adjacent areas. The EIR fails to address either of these potential impacts.

7. Deficient Investigation and Improper Deferred Mitigation for Pappose Tarplant

Dr. Smallwood points out several omissions in the mitigation proposed for the Pappose Tarplant. (Smallwood Comments, pp. 26-28.) The City has failed to properly investigate the presence of this species and improperly defers mitigation. Although the EIR acknowledges that this sensitive plant species may be present on the site, neither the City nor the applicant has conducted a proper survey at the relevant time of year to confirm whether this species is in fact present. Because it does not know whether the species is present and where, the City has not considered many of the avoidance strategies identified by Dr. Smallwood and the California Native Plant Society's guidelines. Instead, the EIR suggests that preconstruction surveys for the plant, even outside of the months where the plant would be evident, are sufficient to address the Project's potential destruction of any plants present on the site. This after-the-fact look is inconsistent with the City's duty to investigate possible impacts of the Project, provides no information to the public or City disclosing whether this impact will occur, and forecloses possible mitigation measures involving redesigning parts of the Project. (*See County Sanitation Dist. No. 2*, 127 Cal.App.4th at 1597-98 (duty to investigate).)

Lastly, even the belated mitigation measures identified in the EIR are not required but only suggested. The EIR merely states that "[i]f this species is observed on the project site, then appropriate avoidance and minimization and/or mitigation measures shall be implemented, dependent upon the results of the survey, **which could include one or more of the following....**" (DEIR, 2.0-10 – 11 (emphasis added).) Stating that mitigation could include some measures is not equivalent to requiring specific mitigation to address a properly identified impact

pursuant to CEQA. Dr. Smallwood also points out uncertainty in the efficacy of transplanting the plants. (Smallwood Comments, p. 26.) Generic references to “[p]reserving land where the species is known to exist” or “[a]voiding areas where the plants occur” are conjectural. Because the City does not know where the plants may be on the site, whether or not avoiding them is feasible based on the designs being approved is entirely unknown. What lands would be “preserved” off-site or whether that is feasible for the applicant also is entirely left to conjecture. By not specifying what the mitigation for the tarplant will be, the EIR improperly defers the mitigation for potential impacts to the Pappose Tarplant.

CEQA disallows 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 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.)

G. The Traffic Analysis Is Flawed Because it Relies Upon Two Irrelevant Studies Done for the Distant Route 50

It does not appear from the EIR that impacts to traffic on Interstate 80 were evaluated sufficiently. Although various on- and off-ramps are considered, no segment of Interstate 80 itself is evaluated. (DEIR, pp. 4.9-62-63, Table 4.9-13.) Further reinforcing this concern is the fact that the EIR references two studies of traffic on US 50. (DEIR, p. 4.9-67.) US 50 is about 50 miles away and clearly not relevant to the Project. The EIR does not reference or discuss any studies of Interstate 80, which is within 600 feet of the Project site. Caltrans District 4 has prepared an *I-80 East Comprehensive Corridor Plan* dated February, 2018. That study indicates that there is heavy existing eastbound PM peak congestion and queuing on I-80 extending upstream west from Weber Road for 1.5 miles to beyond Leisure Town Road. That same study also found that there is also heavy AM peak

westbound congestion on I-80 with queues extending back 1 mile from the I-80/SR 12 West Connector to the I-80/I-680 interchange. The EIR should examine these problem areas.

IV. Conclusion

LIUNA respectfully requests that the Planning Commission refrain from recommending certification of the FEIR for the Project in order to allow staff additional time to address the concerns raised herein, prepare amendments or a supplement to the EIR, and recirculate it for public comment. Please include this letter in the record of proceedings for this project. Thank you for your attention to these comments.

Sincerely,



Michael R. Lozeau

Attachments