Letter E

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VIA U.S. MAIL & E-MAIL

February 27, 2020

City of San Diego Development Services Center
Attn: E. Shearer-Nguyen, Environmental Planner
101 Ash Street
San Diego, CA 92101
Em: DSDEAS@sandiego.gov

RE: Black Mountain Ranch, Avion Project and the Draft Environmental Impact Report (SCH No. 97111070)

Dear Ms. Shearer-Nguyen:

E-1 On behalf of Southwest Regional Council of Carpenters ("**Commenter**" or "**Southwest Carpenters**"), my Office is submitting these comments on the City of San Diego's ("**City**" or "**Lead Agency**") Draft Environmental Impact Report ("**DEIR**") (SCH No. 97111070) for the Black Mountain Ranch, Avion Project ("**Project**").

The Southwest Carpenters is a labor union representing 50,000 union carpenters in six states, including in southern California, and has a strong interest in well-ordered land use planning and addressing the environmental impacts of development projects.

Commenters expressly reserve the right to supplement these comments at or prior to hearings on the Project, and at any later hearings and proceedings related to this Project. (Gov. Code § 65009(b); Pub. Resources Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.)

Commenters incorporate by reference all comments raising issues regarding the DEIR or the final Environmental Impact Report ("**EIR**") submitted prior to certification of the EIR for the Project. (*Citizens for Clean Energy v City of Woodland* (2014) 225 Cal. App. 4th 173, 191 [finding that any party who has objected to the Project's environmental documentation may assert any issue timely raised by other parties].)

E-1 Introductory comment. The comment provides background on Southwest Carpenters and their interest in the project. Further, the City will provide notice on all CEQA actions, approvals, determinations, and hearings as requested. The comment does not address the adequacy of the Draft EIR. No further response is required.

Moreover, Commenters request that the Lead Agency provide notice for any and all notices referring or related to the Project issued under the California Environmental Quality Act ("**CEQA**"), Pub. Resources Code § 21000 *et seq*, and the California Planning and Zoning Law ("**Planning and Zoning Law**"), Gov. Code §§ 65000–65010. Pub. Resources Code §§ 21092.2, and 21167(f) and Gov. Code § 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency's governing body.

E-2 I. **THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**

A. Background Concerning the California Environmental Quality Act

CEQA has two basic purposes. First, CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project. (14 California Code of Regulations ("**CCR**" or "**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.' [Citation.]" (*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 directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. (CEQA Guidelines § 15002(a)(2) and (3); see also, *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal. 3d 376, 400.) The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to "identify ways that environmental damage can be avoided or significantly reduced." (CEQA Guidelines § 15002(a)(2).) If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any

E-2 Comment noted. The comment provides general guidance regarding CEQA. The comment does not address the adequacy of the draft Supplemental EIR. However, the draft Supplemental EIR thoroughly analyzed and disclosed the potentially significant project impacts consistent with CEQA's information disclosure mandates. No further response is required.

significant unavoidable effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 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*, *supra,* 91 Cal. App. 4th 1344, 1355 [emphasis added, quoting *Laurel Heights,* 47 Cal. 3d at 391, 409 fn. 12]. Drawing this line and determining whether the EIR complies with CEQA's information disclosure requirements presents a question of law subject to independent review by the courts. (*Sierra Club v. Cnty. of Fresno* (2018) 6 Cal. 5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102, 131.) As the court stated in *Berkeley Jets*, *supra,* 91 Cal. App. 4th at 1355:

> A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.

The preparation and circulation of an EIR are more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. For the EIR to serve these goals, it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. (*Communities for a Better Environment v. Richmond* (2010) 184 Cal. App. 4th 70, 80 [quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 449–450].)

E-3 B. <u>The DSEIR Fails to Examine, Disclose, or Provide Mitigation Measures for Greenhouse Gas Emissions</u>

Once a first-tier EIR has been certified for a program, plan, policy, or ordinance, the significant environmental effects of a later plan or policy of lesser scope or a later development project may be examined using a tiered EIR. (Pub. Resources Code §21094(a).) The second tier EIR should be limited to environmental effects that (1) were not analyzed as significant impacts in the prior EIR, or (2) are susceptible to

E-3 The courts have consistently held that climate change and greenhouse gas (GHG) do not constitute "new information" that require preparation of a supplemental or subsequent EIR under the circumstances. (Citizens Against Airport Pollution v. City of San Jose (2014) 227 Cal.App.4th 788, 806-808; Citizens for Responsible Equitable Environmental Development v. City of San Diego (2011) 196 Cal.App.4th 515, 532.) In Citizens for Responsible Equitable Environmental Development, the court held that the effects of GHG on climate change were known or could have been discovered with the exercise of reasonable diligence when an EIR was certified in the early 1990s and therefore the effects of GHG did not have to be disclosed as "new information" in a supplemental or subsequent EIR. As explained by the court, after a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review. (Id at p. 532.) In other words, the City's determination as to whether new information or substantial changes have occurred with respect to CEQA Guidelines 15162, is subject to the more deferential- substantial evidence standard (CEQA Guidelines §150649 (e)(7)).

The potential environmental impact of GHG emissions has been known since the 1970s and, therefore, do not constitute "new information." In 1978 Congress enacted the National Climate Program Act, 92 Stat. 601, which required the President to establish a program to assist to understand and respond to natural and man-induced climate processes and their implications. In addition, the United Nations Framework Convention on Climate Change was established in 1992. In 1997, the United States adopted an international treaty among industrialized nations that sets mandatory limits on greenhouse gas emissions, known as the Kyoto Protocol.

Clearly, information about the potential environmental impact of GHG emissions was known or could have been known with the exercise of reasonable diligence at the time the 1998 EIR was certified and, therefore, does not constitute "new information."

substantial reduction or avoidance through project revisions, the imposition of conditions, or other means. (Pub. Resources Code §21068.5; CEQA Guidelines § 15152(d).)

The second-tier EIR need not examine significant environmental effects the lead agency determines were either (1) mitigated or avoided as a result of findings adopted under Pub. Resources Code § 21081(a)(1) for the prior EIR, or (2) examined in a sufficient level of detail in the prior EIR to allow them to be mitigated or avoided through revisions to the project, imposition of conditions, or other means when the later project is approved. (Pub. Resources Code §21094(a)(1).) The CEQA Guidelines note that a significant environmental effect has been "adequately addressed" if the lead agency determines that either of these statutory standards is met. (CEQA Guidelines § 15152(f)(3).) To assist it in making these determinations, the lead agency must prepare an initial study that analyzes whether the later project "may cause significant impacts on the environment that were not examined in the prior environmental impact report." (Pub. Resources Code § 21094(c).)

Reading the foregoing provisions of CEQA and the Guidelines together, the discussion and analysis in an EIR on a later project should be limited to significant environmental effects that were not examined in the prior EIR, along with significant effects that were examined and that could be substantially mitigated or avoided after further analysis. (Pub. Resources Code § 21068.5; CEQA Guidelines § 15152(d).) The EIR on a second-tier EIR for a later project need not reexamine significant environmental effects that (1) will be mitigated or avoided through measures adopted when the prior EIR was certified or (2) were examined in sufficient detail in the program EIR that they can be mitigated or avoided by modifying the project or imposing conditions when the later project is approved. (Pub. Resources Code § 21094(a)(1); CEQA Guidelines § 15152(f)(3).)

Under the foregoing provisions of the statute, significant project impacts that were ***examined in the prior EIR***, but that would not be susceptible to mitigation or avoidance after further study, need not be analyzed in a second-tier EIR. Such a limitation on the scope of a second-tier EIR follows from the statutory direction that a tiered EIR focus on significant environmental effects that can be mitigated together with significant environmental impacts that were not analyzed in the prior EIR. (Pub. Resources Code § 21068.5.) It is further reflected in the requirement that the lead agency determines with an initial study "whether the later project may cause significant

E-3 (cont.)

Nor has there been a substantial change in circumstances under which the project is undertaken that requires major revisions to the 1998 EIR. Circumstances relating to GHG emissions have not changed substantially since 1998. As described above, before the 1998 EIR was certified, it was already understood that there would be projected increases in GHG emissions and associated climate change risks. Moreover, the projected pace of increased GHG emissions in California has actually slowed since 1990 due to the state's adoption of AB 32, the California Global Warming Solutions Act, and related regulatory efforts to reduce GHG emissions statewide. In fact, according to California Air Resources Board (CARB), a recent inventory of GHG emissions in the state reflects a decrease in GHG emissions over the past decade. (First Update to the Climate Change Scoping Plan dated May 2014, p. 90.) Therefore, GHG does not represent a substantial change in circumstances.

effects on the environment that were not examined in the prior EIR." (Pub. Resources Code § 21094(c).) It is also consistent with the statutory direction that duplicative analysis of environmental impacts examined in a prior EIR be excluded from a tiered EIR. (Pub. Resources Code § 21093; *see Communities for a Better Env't v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 124.)

Here, the first-tier EIR completely omitted any discussion or analysis of greenhouse gas emissions ("GHGs") for the Black Mountain Ranch Subarea Plan.[1] This DSEIR for Parcel C of the Southeast Perimeter of that Subarea *also omits* any discussion of GHGs and fails to provide any mitigation measures under the guise that there is no requirement to do so under *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal. App. 4th 788, 806-808. The City and Applicant are now required to conduct a GHG analysis and provide all available feasible mitigation measures for this Project because this is a tiered EIR project—not a program EIR project as in *Citizens Against Airport Pollution. Citizens Against Airport Pollution* and the relating statutes simply do not apply here because the operating framework and relevant standards are not the same for program EIR projects and tiered EIR projects of the kind here.

As explained above, when a lead agency opts for the tiering method, it becomes subject to all of the provisions outlined above, including those set out in the CEQA Guidelines § 15152(f). Issues that were not examined in sufficient detail in the first EIR that are susceptible to mitigation—need to be examined now with all relevant and feasible mitigation measures attached. The DSEIR could have properly omitted analysis and mitigation, but only if it was already provided in the first tier EIR. The Supreme Court in *In re Bay-Delta etc.* (2008) 43 Cal. 4th 1143 explained the level of analysis required in first and second-tier EIRs as follows:

> In addressing the appropriate amount of detail required at different stages in the tiering process, the CEQA Guidelines state that "[w]here a lead agency is using the tiering process in connection with an EIR for large-scale planning approval, such as a general plan or component thereof … , the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate

[1] The City of San Diego provided a scanned paper copy of the first tier EIR via a Dropbox link, Black Mountain Ranch (Subarea I) Subarea Plan in the North City Future Urbanizing Area upon request on February 19, 2020. Additional copies can be obtained from the City of San Diego's Planning Dept.

> identification of significant effects of the planning approval at hand." (Cal. Code Regs., tit. 14, § 15152, subd. (c).) This court has explained that "[t]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra*, 40 Cal.4th at p. 431.)

(*Id.* at 1170.)

Subsequent courts have wholly affirmed the precedent set in *In re Bay Delta* relating to the interpretation of CEQA Guidelines § 15152. (*City of Hayward v. Trustees of California State University* (2015) 242 Cal. App. 4th 833, 849-51; *Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal. App. 5th 712, 730.)

It is clear that an analysis needs to be conducted here for GHGs and their potential significant impacts because they have not yet been analyzed in the first tier Black Mountain Ranch Subarea Plan EIR, nor for this project-specific second-tier EIR for the development of the Southeast Perimeter Parcel C. Tiering does not allow for the complete omission of an analysis—it needs to be conducted somewhere.

1. A Certified EIR for a General Plan or Community Plan Under Pub. Resources Code § 21083.3 Does Not Eliminate the Need for Analysis.

Similarly, the City or Applicant may not rely on the certification of a first-tier general plan or community plan EIR under Pub. Resources Code § 21083.3 to avoid conducting a GHG analysis because by that statute's language:

> (c)***Nothing in this section affects any requirement to analyze potentially significant offsite impacts and cumulative impacts of the project not discussed in the prior environmental impact report*** with respect to the general plan. However, all public agencies with authority to mitigate the significant effects shall undertake or require the undertaking of any feasible mitigation measures specified in the prior environmental impact report relevant to a significant effect which the project will have on the environment or, if not, then the provisions of this section shall have no application to that effect. The lead agency shall make a finding, at a public hearing, as to whether those mitigation measures will be undertaken.

(Pub. Resources Code § 21083.3(c) (emphasis added).) In any event, the DSEIR does not rely on this provision, and no reference to this statute can be found in

the DSEIR, nor did the City or Applicant analyze GHG emissions and impacts in the previous EIR—so it may not serve as an exemption here.

The sum and conclusion of the applicable statutes and guidelines are clear, tiering can defer analysis, but it does not eliminate the need for it altogether.

E-4 C. The DSEIR is Procedurally Deficient for Failing to Comply with Pub. Resources Code § 21094(f) and CEQA Guidelines § 15152(g)

The Pub. Resources Code § 21094(f) and CEQA Guidelines § 15152(g) require a second-tier EIR to 1) identify the prior EIR; 2) state that the second tier EIR is relying on the first tier EIR, and 3) indicate where a copy of the first EIR can be examined. While the City and Applicant may have followed the first two requirements, they have failed to satisfy the third requirement. The DSEIR fails to state or otherwise make known where the first tier EIR is located, how it can be examined, and fails to attach it in the appendices or incorporate it within the body of the DSEIR.

The DSEIR needs to be amended to satisfy the above requirements.

E-5 D. The DSEIR Fails to Incorporate Mitigation Measures from the Prior EIR

A second-tier EIR need not reexamine issues that were examined and provided mitigation in the first tier EIR, but the second tier EIR must state whether it is incorporating previous mitigation measures and if it is relying on the previous analysis for each issue category. (CEQA Guidelines § 15152; Pub. Resources Code §§ 21093, 21094.) However, if the second tier EIR is incorporating mitigation measures from the first tier EIR, it cannot expect the public to assume this is happening, and the EIR should state that it is relying on the previous EIR. (*See* Pub. Resources Code § 21094(e).)

E-6 *1. Noise mitigation measures from the first tier EIR were not incorporated.*

The DSEIR concludes that no noise mitigation measures are required for the Project other than compliance with MHCP, and fails to incorporate the mitigation measures from the 1998 EIR for noise impacts, despite concluding that the Project buildout is consistent with assumptions made in 1998. (DSEIR at 9-6, 7.) If noise barriers or any of the other mitigation measures provided for in Table S-1 of the 1998 EIR are no longer required, some analysis of why they are being excluded should be included here. Or, the Project needs to incorporate the noise mitigation measures outlined in the previous EIR.

E-4 The certified Environmental Impact Report No. 96-7902 (1998 EIR) prepared for the Black Mountain Ranch (Subarea I) Subarea Plan was inadvertently omitted. However, the technical appendices were available for review at the Development Services Department located as 1222 Frist Avenue, San Diego, California 92101 consistent with Section 15087(c)(5) of the CEQA Guidelines. The 1998 EIR has been added as Appendix A of the Final SEIR. All other appendices have been re-lettered accordingly.

E-5 The mitigation measures from the 1998 EIR applicable to the project are presented in Chapter 11 Mitigation Monitoring and Reporting Program, Section D. Previous Mitigation (1998 EIR).

E-6 The noise mitigation measures from the 1998 EIR cited in this comment are not required for this project. As Described in Section 9.9 of the EIR, the City's exterior noise level standard would not be exceeded on the southeastern perimeter parcels, as all development would be located outside the 60 CNEL contour area. Therefore, the project does not need to implement noise barriers or any of the other noise reduction measures suggested in the 1998 EIR.

E-7 *2. Air quality mitigation measures from the first tier EIR were not incorporated.*

Similarly, for air quality mitigation provided for in the 1998 EIR, including bike lanes and pedestrian sidewalks around the development, these mitigation measures have been excluded from the DSEIR without analysis. (*Compare* DSEIR at 9-5; 1998 EIR at Table S-1.) The DSEIR addresses dust air impacts but makes no mention of air quality issues addressed in the first tier EIR in 1998 relating to vehicle emissions that were addressed relating to air quality and non-attainment.

E-8 III. **THE PROJECT VIOLATES THE STATE PLANNING AND ZONING LAW AS WELL AS THE CITY'S GENERAL PLAN**

A. Background Regarding the State Planning and Zoning Law

Each California city and county must adopt a comprehensive, long-term general plan governing development. (*Napa Citizens for Honest Gov. v. Napa County Bd. of Supervisors* (2001) 91 Cal. App.4th 342, 352, citing Gov. Code §§ 65030, 65300.) The general plan sits at the top of the land use planning hierarchy (See *DeVita v. County of Napa* (1995) 9 Cal. App. 4th 763, 773), and serves as a "constitution" or "charter" for all future development. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. App. 3d 531, 540.)

General plan consistency is "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (See *Debottari v. Norco City Council* (1985) 171 Cal. App. 3d 1204, 1213.)

State law mandates two levels of consistency. First, a general plan must be internally or "horizontally" consistent: its elements must "comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." (See Gov. Code § 65300.5; *Sierra Club v. Bd. of Supervisors* (1981) 126 Cal. App. 3d 698, 704.) A general plan amendment thus may not be internally inconsistent, nor may it cause the general plan as a whole to become internally inconsistent. (See *DeVita*, 9 Cal. App. 4th at 796 fn. 12.)

Second, state law requires "vertical" consistency, meaning that zoning ordinances and other land-use decisions also must be consistent with the general plan. (See Gov. Code § 65860(a)(2) [land uses authorized by zoning ordinance must be "compatible with the objectives, policies, general land uses, and programs specified in the [general] plan."]; see also *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal. App. 3d 1176, 1184.) A zoning ordinance that conflicts with the general plan or

E-7 The mitigation measure cited in this comment did not require subsequent projects to implement bike lanes, but establishes a framework for how development of the Subarea Plan could reduce vehicle miles traveled. Since approval of the Black Mountain Ranch Subarea Plan, the City has subsequently identified locations for bike paths and mountain bike trails consistent with the 1998 EIR mitigation measure cited in this comment. Therefore, the project is consistent with this mitigation measure even with this specific project not including bike lanes.

E-8 The San Diego Housing Commission has approved the proposed Fairbanks Terrace Apartments Phase II that will be used as the receiver site for this projects' affordable housing requirement of 19 units. The project description has been revised to state the following:

> The project proposes to construct 84 detached multi-family units on-site and transfer 19 affordable units and 14 dwelling units to ~~Lot X~~Parcel 1 of Map ~~15919~~21331 in the Black Mountain Ranch North Village Town Center. ~~In addition, the project proposes the transfer of 14 dwelling units to Lots 12, 13, 18 and 19 of Map 15919 in the Black Mountain Ranch North Village Town Center.~~ The affordable units would be constructed as part of Fairbanks Terrace Apartments Phase II. These units would be developed as senior-affordable units match the design and unit mix of the existing Fairbanks Terrace Apartments Phase I units and would be managed by the existing Fairbanks Terrace Apartments Phase I homeowners association. The 14 transfer dwelling units would be designed consistent with the product types of the 84 detached multi-family units to be developed on-site.

impedes the achievement of its policies is invalid and cannot be given effect. (See *Lesher*, 52 Cal. App. 3d at 544.)

State law requires that all subordinate land-use decisions, including conditional use permits, be consistent with the general plan. (See Gov. Code § 65860(a)(2); *Neighborhood Action Group*, 156 Cal. App. 3d at 1184.)

A project cannot be found consistent with a general plan if it conflicts with a general plan policy that is "fundamental, mandatory, and clear," regardless of whether it is consistent with other general plan policies. (See *Endangered Habitats League v. County of Orange* (2005) 131 Cal. App. 4th 777, 782-83; *Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors* (1998) 62 Cal. App. 4th 1332, 1341-42 ["*FUTURE*"].) Moreover, even in the absence of such direct conflict, an ordinance or development project may not be approved if it interferes with or frustrates the general plan's policies and objectives. (See *Napa Citizens*, 91 Cal. App. 4th at 378-79; see also *Lesher*, 52 Cal. App. 3d at 544 [zoning ordinance restricting development conflicted with growth-oriented policies of the general plan].)

A. The DSEIR's Transfer of Affordable Housing Units to Another Project is Inconsistent with the State's RHNA Allocations

Since 1969, California has required that all local governments (cities and counties) adequately plan to meet the housing needs of everyone in the community. California's local governments meet this requirement by adopting housing plans as part of their "general plan" (also required by the state). General plans serve as the local government's "blueprint" for how the city and/or county will grow and develop and include seven elements: land use, transportation, conservation, noise, open space, safety, and housing. The law mandating that housing be included as an element of each jurisdiction's general plan is known as "housing-element law." California's housing-element law acknowledges that, in order for the private market to adequately address the housing needs and demand of Californians, local governments must adopt plans and regulatory systems that provide opportunities for (and do not unduly constrain), housing development. As a result, housing policy in California rests largely on the *effective implementation* of local general plans and, in particular, local housing elements. Existing law requires the housing element to contain a program that sets a 5-year schedule of actions to implement the goals and objectives of the housing element under RHNA allocations. Existing law also requires cities and counties to review and

E-8 (cont.)

Therefore, the project's affordable housing requirement is scheduled to be constructed.

revise their housing elements at least every 5 years for compliance. (Gov. Code § 65584.)

According to the City of San Diego's 2019 Housing Inventory Annual Report, which tracked the progress toward the City's RHNA allocation requirements and compliance with the City's Housing Element—the City is far behind meeting its RHNA allocations for very low, low, and moderate-income housing units.[2] And from this year through 2029, many thousands more affordable housing units need to be built in San Diego to keep pace with regional housing needs and the RHNA allocation.[3] The City's plan here to defer the construction of the 19 affordable housing units required for the Project to the Black Mountain Ranch North Village Town Center is inconsistent with the state's RHNA allocations for San Diego and the City's General Plan—Housing Element.[4] The City cannot expect to reach its RHNA allocations if it perpetually defers the construction of non-market rate units to future projects.

There is no reason these units cannot be included in this Project. The Project should be amended to include the 19 affordable housing units required under the City's General Plan.

E-9

B. The Proposed Density Transfer of Affordable Housing Units is Inconsistent with the City's Inclusionary Affordable Housing Regulations and the Black Mountain Ranch Subarea Plan

First, the City's Inclusionary Affordable Housing Regulations require the payment of an inclusionary affordable housing fee, or that a development project which contains at least two residential units set aside a minimum of ten percent of those units for lower-income households. (San Diego Muni. Code § 142.1301.) Second, the Project's binding Subarea Plan, the Black Mountain Ranch Subarea Plan, requires that Parcel C of the Southeast Perimeter of the Subarea (the Project site) include a minimum of nineteen affordable housing units. (DSEIR at 1-1.)

[2] City of San Diego's 2018 Housing Inventory Annual Report, available at https://www.sandiego.gov/sites/default/files/report_annualhousinginventory2019_final.pdf.

[3] Attachment 1 to Department of Housing and Community Development, Division of Housing Policy Development letter Re: Final Regional Housing Need Determination for SANDAG's Regional Housing Need demonstrated the housing needs for SANDAG for June 30, 2020 through April 15, 2029, available at https://www.hcd.ca.gov/community-development/housing-element/docs/sandag-6th-rhna.pdf.

[4] City of San Diego, General Plan—Housing Element, pp. HE-2, 3, available at https://www.sandiego.gov/sites/default/files/legacy//planning/genplan/heu/pdf/housingelementfull.pdf.

E-9 The Black Mountain Ranch Subarea Plan states that development transfers are allowed under Chapter VIII Implementation, Section G. Development Transfers, which states the following:

> Any transfers or conversions of residential units or non-residential square footage among owners of land within the North or South Villages or the Perimeter Properties is acceptable and requires no amendment of the Subarea I Plan so long as all of the following conditions are met:
>
> - The transfers or conversions result in no change in the designated land use or residential density category for the sending and receiving area;
>
> - The development application(s) includes appropriate documentation verifying that the right to construct dwelling units or non-residential square footage in a particular area is transferred from one party and/or area to another party and/or area.
>
> - An informational update describing the transfer of densities or non-residential square footage is submitted to the Development Services Department and, upon approval of the application, signed and dated by the Director of Development Services and kept by the Development Services Department with the master copy of the Subarea I Plan. A copy of the signed and dated informational update is to be sent to the project applicant.

The San Diego Housing Commission has reviewed the project's proposed affordable housing unit transfer and found it to be consistent with the requirements stipulated in the Black Mountain Ranch Subarea Plan, Chapter VIII Implementation, Section G. Development Transfers. Furthermore, the San Diego Housing Commission has approved the proposed Fairbanks Terrace

Instead of paying an affordable housing fee under San Diego Muni. Code § 142.1301 or including affordable housing units on the Project site, the DSEIR plans to "transfer" the units to "Lot X of Map 15919 in the Black Mountain Ranch North Village Town Center." (*Id.*) In other words, the DSEIR does not plan to build *any* affordable housing as a part of this Project. This is a direct conflict with both the City Municipal Code and the Black Mountain Ranch Subarea Plan. Neither of these documents allows for a "transfer" of affordable housing off-site. An entirely speculative proposition that may or may not occur. Furthermore, this decision needs to be based on substantial evidence and fair argument—not that the Applicant simply desires to move these units for financial gain or to intentionally exclude low-income occupants from the Project.

The DSEIR needs to be amended to include Affordable Housing, a binding obligation under San Diego Muni. Code § 142.1301 and the Black Mountain Ranch Subarea Plan.

E-10 IV. **CONCLUSION**

Commenters request that the City revise and recirculate the Project's environmental impact report to address the aforementioned concerns. If the City has any questions or concerns, feel free to contact my Office.

Sincerely,

Mitchell M. Tsai
Attorneys for Southwest Regional
Council of Carpenters

E-9 (cont.)

Apartments Phase II that will be used as the receiver site for this projects' affordable housing requirement of 19 units. Therefore, the project's transfer of 19 affordable units to Fairbanks Terrace Apartments Phase II in the Black Mountain Ranch North Village Town Center would be consistent with the Municipal Code and Black Mountain Ranch Subarea Plan.

E-10 Comment noted.