P: (626) 381-9248
F: (626) 389-5414
E: mitch@mitchtsailaw.com

Mitchell M. Tsai
Attorney At Law

155 South El Molino Avenue
Suite 104
Pasadena, California 91101

VIA U.S. MAIL & E-MAIL

July 15, 2020

City of San Diego Planning Commission
1222 First Avenue, MS 501
San Diego, CA 92101
Em: planningcommission@sandiego.gov

RE: Agenda Item 4: 3Roots Project, Project No. 587128

Dear Chairperson Hofman, Vice-Chairperson Whalen and Commissioners,

On behalf of Southwest Regional Council of Carpenters as well as Michael Carmen LaBruno (collectively "**Commenters**" or "**Southwest Carpenters**"), my Office is submitting these comments on the City of San Diego's ("**City**" or "**Lead Agency**") Final Environmental Impact Report ("**FEIR**") (SCH No. 2018041065) for the 3Roots Development Project ("**Project**").

The instant letter responds to the City's FEIR responses to the Commenters' prior comments submitted during the comment period for the DEIR.

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.

Individual members of the Southwest Carpenters include Michael Carmen LaBruno. Mr. LaBruno lives, works, and recreates in the City of San Diego and surrounding communities and would be directly affected by the Project's environmental impacts. Commenters expressly reserves 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. Cal. Gov. Code § 65009(b); Cal. Pub. Res. 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 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. Cal. Gov. Code § 65009(b); Cal. Pub. Res. 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 EIR submitted prior to certification of the EIR for the Project. *Citizens for Clean Energy v City of Woodland* (2014) 225 CA4th 173, 191 (finding that any party who has objected to the Project's environmental documentation may assert any issue timely raised by other parties).

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**"), Cal Public Resources Code ("**PRC**") § 21000 *et seq*, and the California Planning and Zoning Law ("**Planning and Zoning Law**"), Cal. Gov't Code §§ 65000–65010. California Public Resources Code Sections 21092.2, and 21167(f) and Government Code Section 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.

The City should seriously consider proposing that the Applicant provide additional community benefits such as requiring local hire and paying prevailing wages to benefit the City. Moreover, it would be beneficial for the City to require the Applicant to hire workers: (1) who have graduated from a Joint Labor Management apprenticeship training program approved by the State of California, or have at least as many hours of on-the-job experience in the applicable craft which would be required to graduate from such a state approved apprenticeship training program and; (2) who are registered apprentices in an apprenticeship training program approved by the State of California.

I. EXPERTS

This comment letter includes comments from air quality and greenhouse gas experts Matt Hagemann, P.G., C.Hg. and Paul Rosenfeld, Ph.D. concerning the DEIR. Their comments, attachments, and Curriculum Vitae ("**CV**") are attached hereto and are incorporated herein by reference.

Matt Hagemann, P.G., C.Hg. ("**Mr. Hagemann**") has over 30 years of experience in environmental policy, contaminant assessment and remediation, stormwater compliance, and CEQA review. He spent nine years with the U.S. EPA in the RCRA and Superfund programs and served as EPA's Senior Science Policy Advisor in the

Western Regional Office where he identified emerging threats to groundwater from perchlorate and MTBE. While with EPA, Mr. Hagemann also served as Senior Hydrogeologist in the oversight of the assessment of seven major military facilities undergoing base closer. He led numerous enforcement actions under provisions of the Resource Conservation and Recovery Act (RCRA) and directed efforts to improve hydrogeologic characterization and water quality monitoring.

For the past 15 years, Mr. Hagemann has worked as a founding partner with SWAPE (Soil/Water/Air Protection Enterprise). At SWAPE, Mr. Hagemann has developed extensive client relationships and has managed complex projects that include consultation as an expert witness and a regulatory specialist, and a manager of projects ranging from industrial stormwater compliance to CEQA review of impacts from hazardous waste, air quality, and greenhouse gas emissions.

Mr. Hagemann has a Bachelor of Arts degree in geology from Humboldt State University in California and a Masters in Science degree from California State University Los Angeles in California.

Paul Rosenfeld, Ph.D. ("Dr. Rosenfeld") is a principal environmental chemist at SWAPE. Dr. Rosenfeld has over 25 years' experience conducting environmental investigations and risk assessments for evaluating impacts on human health, property, and ecological receptors. His expertise focuses on the fate and transport of environmental contaminants, human health risks, exposure assessment, and ecological restoration. Dr. Rosenfeld has evaluated and modeled emissions from unconventional oil drilling operations, oil spills, landfills, boilers and incinerators, process stacks, storage tanks, confined animal feeding operations, and many other industrial and agricultural sources. His project experience ranges from monitoring and modeling of pollution sources to evaluating impacts of pollution on workers at industrial facilities and residents in surrounding communities.

Dr. Rosenfeld has investigated and designed remediation programs and risk assessments for contaminated sites containing lead, heavy metals, mold, bacteria, particular matter, petroleum hydrocarbons, chlorinated solvents, pesticides, radioactive waste, dioxins and furans, semi- and volatile organic compounds, PCBs, PAHs, perchlorate, asbestos, per- and poly-fluoroalkyl substances (PFOA/PFOS), unusual polymers, fuel oxygenates (MTBE), among other pollutants, Dr. Rosenfeld also has experience evaluating greenhouse gas emissions from various projects and is an expert on the assessment of odors from industrial and agricultural sites, as well as the

evaluation of odor nuisance impacts and technologies for abatement of odorous emissions. As a principal scientist at SWAPE, Dr. Rosenfeld directs air dispersion modeling and exposure assessments. He has served as an expert witness and testified about pollution sources causing nuisance and/or personal injury at dozens of sites and has testified as an expert witness on more than ten cases involving exposure to air contaminants from industrial sources.

Dr. Rosenfeld has a Ph.D. in soil chemistry from the University of Washington, M.S. in environmental science from U.C. Berkeley, and B.A. in environmental studies from U.C. Santa Barbara.

II. 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 unavoidable significant 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 is 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].)

B. CEQA Requires Revision and Recirculation of an Environmental Impact Report When Substantial Changes or New Information Comes to Light

Section 21092.1 of the California Public Resources Code requires that "[w]hen significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 … but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report" in order to give the public a chance to review and comment upon the information. (CEQA Guidelines § 15088.5.)

Significant new information includes "changes in the project or environmental setting as well as additional data or other information" that "deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative)." (CEQA Guidelines § 15088.5(a).) Examples of significant new information requiring recirculation include "new significant environmental impacts from the project or from a new mitigation measure," "substantial increase in the severity of an environmental impact," "feasible project alternative or mitigation measure considerably different from others previously analyzed" as well as when "the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (*Id.*)

An agency has an obligation to recirculate an environmental impact report for public notice and comment due to "significant new information" regardless of whether the agency opts to include it in a project's environmental impact report. (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 95 [finding that in light of a new expert report disclosing potentially significant impacts to groundwater supply "the EIR should have been revised and recirculated for purposes of informing the public and governmental agencies of the volume of groundwater at risk and to allow the public and governmental agencies to respond to such information."].) If significant new information was brought to the attention of an agency prior to certification, an agency is required to revise and recirculate that information as part of the environmental impact report.

For all of the reasons as explained in full below, the City must revise and recirculate the FEIR to comply with CEQA.

C. Due to the COVID-19 Crisis, the City Must Adopt a Mandatory Finding of Significance that the Project May Cause a Substantial Adverse Effect on Human Beings and Mitigate COVID-19 Impacts

CEQA requires that an agency make a finding of significance when a Project may cause a significant adverse effect on human beings. PRC § 21083(b)(3); CEQA Guidelines § 15065(a)(4).

Public health risks related to construction work requires a mandatory finding of significance under CEQA. Construction work has been defined as a Lower to High-risk activity for COVID-19 spread by the Occupations Safety and Health Administration. Recently, several construction sites have been identified as sources of community spread of COVID-19.[1]

SWRCC recommends that the Lead Agency adopt additional CEQA mitigation measures to mitigate public health risks from the Project's construction activities. SWRCC requests that the Lead Agency require safe on-site construction work practices as well as training and certification for any construction workers on the Project Site.

In particular, based upon SWRCC's experience with safe construction site work practices, SWRCC recommends that the Lead Agency require that while construction activities are being conducted at the Project Site:

Construction Site Design:

- The Project Site will be limited to two controlled entry points.
- Entry points will have temperature screening technicians taking temperature readings when the entry point is open.
- The Temperature Screening Site Plan shows details regarding access to the Project Site and Project Site logistics for conducting temperature screening.
- A 48-hour advance notice will be provided to all trades prior to the first day of temperature screening.

[1] Santa Clara County Public Health (June 12, 2020) COVID-19 CASES AT CONSTRUCTION SITES HIGHLIGHT NEED FOR CONTINUED VIGILANCE IN SECTORS THAT HAVE REOPENED, *available at* https://www.sccgov.org/sites/covid19/Pages/press-release-06-12-2020-cases-at-construction-sites.aspx.

- The perimeter fence directly adjacent to the entry points will be clearly marked indicating the appropriate 6-foot social distancing position for when you approach the screening area. Please reference the Apex temperature screening site map for additional details.
- There will be clear signage posted at the project site directing you through temperature screening.
- Provide hand washing stations throughout the construction site.

Testing Procedures:

- The temperature screening being used are non-contact devices.
- Temperature readings will not be recorded.
- Personnel will be screened upon entering the testing center and should only take 1-2 seconds per individual.
- Hard hats, head coverings, sweat, dirt, sunscreen or any other cosmetics must be removed on the forehead before temperature screening.
- Anyone who refuses to submit to a temperature screening or does not answer the health screening questions will be refused access to the Project Site.
- Screening will be performed at both entrances from 5:30 am to 7:30 am.; main gate [ZONE 1] and personnel gate [ZONE 2]
- After 7:30 am only the main gate entrance [ZONE 1] will continue to be used for temperature testing for anybody gaining entry to the project site such as returning personnel, deliveries, and visitors.
- If the digital thermometer displays a temperature reading above 100.0 degrees Fahrenheit, a second reading will be taken to verify an accurate reading.
- If the second reading confirms an elevated temperature, DHS will instruct the individual that he/she will not be allowed to enter the Project Site. DHS will also instruct the individual to promptly notify his/her supervisor and his/her human resources (HR)

representative and provide them with a copy of Annex A (attached hereto).

`Planning

- Require the development of an Infectious Disease Preparedness and Response Plan that will include basic infection prevention measures (requiring the use of personal protection equipment), policies and procedures for prompt identification and isolation of sick individuals, social distancing (prohibiting gatherings of no more than 10 people including all-hands meetings and all-hands lunches) communication and training and workplace controls that meet standards that may be promulgated by the Center for Disease Control, Occupational Safety and Health Administration, Cal/OSHA, California Department of Public Health or applicable local public health agencies.[2]

The United Brotherhood of Carpenters and Carpenters International Training Fund has developed COVID-19 Training and Certification to ensure that Carpenter union members and apprentices conduct safe work practices. The Agency should require that all construction workers undergo COVID-19 Training and Certification before being allowed to conduct construction activities at the Project Site.

D. The City Fails to Adequately Respond to, Justify or Correct SWAPE's Concerns Regarding the Project's Air Quality Impacts

As submitted in Commenters' comments to the DEIR, along with SWAPE's August 9, 2019 comment letter, the DEIR'S air model (CalEEMOD) artificially reduced the Project's construction and operational emissions by failing to include all proposed land uses of the Project and failing to account for all hauling truck trips during construction. (FEIR, RTC-60~63.)

The City's responses to comments in the FEIR was woefully deficient. In essence, the City claimed that parking does not need to be independently analyzed in CalEEmod is

[2] *See also* The Center for Construction Research and Training, North America's Building Trades Unions (April 27 2020) NABTU and CPWR COVIC-19 Standards for U.S Constructions Sites, *available at* https://www.cpwr.com/sites/default/files/NABTU_CPWR_Standards_COVID-19.pdf; Los Angeles County Department of Public Works (2020) Guidelines for Construction Sites During COVID-19 Pandemic, *available at* https://dpw.lacounty.gov/building-and-safety/docs/pw_guidelines-construction-sites.pdf.

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unsupported. As fully explained by SWAPE in its comment letter attached herein as Exhibit C, the City's response to comments failed to justify or correct the modeling error of failing to include all proposed land uses for the Project. (Exhibit C, p. 2.) More specifically, the City failed to include the Project's proposed parking land use in the CalEEMod model in direct contravention of both CEQA and the CalEEMod User's Guide. (*Id.* p. 3.) As a result, the FEIR failed to adequately evaluate the Project's impact on the air quality of the surrounding environment.

Next, as previously commented by Commenters with SWAPE, the DEIR failed to include the total number of hauling truck trips anticipated to occur during Project construction. (FEIR, RTC-61~63.) The City, in its response to comments in the FEIR, appears to take the position that reclamation demolition activities aren't required to be included in the number of truck haul trips because such activities have been completed. (FEIR, p. RTC-61.) However, as SWAPE explains in detail in Exhibit C, CalEEMod models for Phase I and II of the Project should include all hauling trips indicated in the Transportation Impact Analysis (TIA). (Exhibit C, p. 4-5.)

As a result of the City's failure to adequately evaluate the Project's air quality impacts, and its failure to justify or correct this error, violates CEQA.

E. The City Fails to Adequately Respond to, Justify or Correct SWAPE's Concerns Regarding the Project's Diesel Particulate Matter Impacts

As previously raised in our comment letter to the DEIR, the significance determination regarding diesel particulate matter is incorrect and unsubstantiated, as the City and Project Applicant cannot claim that the Project would result in a less than significant health risk impact without properly assessing the risk posed to sensitive receptors as a result of diesel particulate matter (DPM) emissions that will be emitted during Project activities. Until the Project's construction and operational health risk impacts are adequately quantified and compared to applicable thresholds, the DEIR and associated appendices cannot make any significance determination regarding the Project's health risk impacts. (FEIR, p. RTC-63~69.) In addition, by failing to prepare a construction or operational HRA for existing sensitive receptors, the DEIR is inconsistent with recommendations set forth by the Office of Environmental Health Hazard Assessment (OEHHA), the organization responsible for providing recommendations for health risk assessments in California. (*Id.*)

The City fails to adequately respond to, justify or correct these issues with FEIR. As explained in detail in SWAPE's letter attached hereto as Exhibit C, the DEIR's DPM analysis and the City's failure to adequately respond to the issues SWAPE has raised are deficient for the following reasons: (1) the DEIR and the City's response to comments fail to comply with CAPCOA and City guidance, (2) the DEIR and the City's response to comments fail to justify the omission of a quantified construction HRA, (3) the DEIR and the City's response to comments fail to justify the omission of a quantified operational HRA, and (4) the DEIR and the City's response to comments fail to address the potentially significant health risk impact. (Exhibit C, p. 6-10.)

As a result, the City failed to adequately analyze the Project's DPM and health risk impacts in violation of CEQA.

F. The DEIR Does Not Adequately Evaluate the Project's Impacts On Air Quality and Should Be Revised and Recirculated

An agency is required to revise and recirculate an EIR for public comment for information disclosures showing "[a] significant new environmental impact," "[a] substantial increase in the severity of an environmental impact," "[a] feasible project alternative or mitigation measure" or when [t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (*See also* CEQA Guidelines § 15088.5.) Revisions to environmental analysis in an environmental impact report requires recirculation of the environmental impact report to give the public a meaningful opportunity to comment. (*Gray v. Cty. of Madera* (2008)167 Cal. App. 4th 1099, 1121 – 22.)

As discussed above, due to omitted information and incorrect input parameters in the CalEEMod models, the DEIR significantly underestimates Project emissions and air quality impacts. Additionally, health risk impacts from the Project's diesel emissions should have been evaluated in the DEIR. Moreover, the FEIR failed to correct these errors. A revised FEIR addressing these significant omissions and impacts should be recirculated for public review and comment according to CEQA standards.

G. CEQA Bars the Deferred Development of Environmental Mitigation Measures

As noted in the Commenters' earlier comments to the DEIR, CEQA mitigation measures proposed and adopted into an environmental impact report are required to describe what actions that will be taken to reduce or avoid an environmental impact.

(CEQA Guidelines § 15126.4(a)(1)(B) [providing "[f]ormulation of mitigation measures should not be deferred until some future time."].) While the same Guidelines section 15126.5(a)(1)(B) acknowledges an exception to the rule against deferrals, but such exception is narrowly proscribed to situations where "measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." (Id.) Courts have also recognized a similar exception to the general rule against deferral of mitigation measures where the performance criteria for each mitigation measure is identified and described in the EIR. (*Sacramento Old City Ass'n v. City Council* (1991) 229 Cal.App.3d 1011.)

Impermissible deferral can occur when an EIR calls for mitigation measures to be created based on future studies or describes mitigation measures in general terms but the agency fails to commit itself to specific performance standards. (*Preserve Wild Santee v. City of Sante*e (2012) 210 Cal.App.4th 260, 281 [city improperly deferred mitigation to butterfly habitat by failing to provide standards or guidelines for its management]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671 [EIR failed to provide and commit to specific criteria or standard of performance for mitigating impacts to biological habitats.])

1. Biological Mitigation Measures

Commenters previously raised that the City impermissibly defers the EIR's biological mitigation measures. In response, the City claims that there is no impermissible deferral because each biological mitigation measure is tied to each phase of the Project. (FEIR, pp. RTC-40, 41.)

Specifically, the City claims that BIO-1 is deferred because "the land cannot be conveyed as MHPA with inappropriate encumbrances and BIO-2 addresses construction activities and their timing. (FEIR, pp. RTC-40.) The City also claims BIO-3 contains elements that are impossible to implement prior to their appropriate timeline and that BIO-4 expressly calls out the timing limited to Phase 2 because least Bell's vireo are only impacted during Phase 2. (FEIR, pp. RTC-40, 41.)

However, it's not just the phased timing of these mitigation measures that violates CEQA but the fact that each of these steps are deferred until after project approval without adequate performance standards that is problematic. For one, BIO-1 defers the preparation of "Temporary Covenant of Easement/Irrevocable Offers of

Dedication (IODs)" for MHPA land to be dedicated in fee title to the City and a "Covenant of Easement (COE)" for MHPA land remaining in private ownership. Based on the information contained in BIO-1, it's unclear whether the Project's significant biological resources impacts will actually be mitigated to a less than significant level with the use of these yet to be known covenants. And except for the mitigation of 0.18 acre of wetland habitat, BIO-1 does not provide any mitigation ratio the City will institute to mitigate the Project impacts to 7.5 acres of Tier II, IIA, and IIB habitats. (DEIR, pp. S-20, 21.) As for BIO-4, it impermissibly defers the consultation requirements under Section 7 of the Endangered Species Act ("ESA") until after Project approval to mitigate the impacts to least Bell's vireo. Regardless of the phases involved, the City violated CEQA by deferring the legally required consultation with the United States Fish and Wildlife Service ("USFWS") until after project approval.

2. Noise Mitigation Measure

Commenters previously commented that mitigation measure NOI-1 constitutes an improper deferral. Specifically, NOI-1 defers the development of a future installation plan under Option 1 and also leaves open the options to mitigate the Project's noise impacts to the extent feasible.

City responds in the FEIR that presentation of two potential options does not constitute deferral of mitigation. (FEIR, p. RTC-43.) However, the City's response ignores that by allowing these two options for NOI-1, the City is admitting by adopting Option 1 that eliminating the noise impacts related to NOI-1 completely is in fact feasible (Option 1: "Prohibit public address systems."). Thus, by allowing Option 2, the City is not only deferring mitigation, but also failing to mitigate the Project's noise impacts to the extent feasible.

Next, Commenters previously commented that mitigation measure NOI-2 improperly defers mitigation by deferring the noise analysis and "appropriate noise attenuation measures" until after Project approval. (DEIR, p. S-19.) The City responds that noise analysis cannot be conducted until the Project is actually built. (FEIR, p. RTC-43.) However, the City ignores that the noise attenuation measures can be adopted and implemented as part of NOI-2 prior to Project approval. As a result, the City fails to commit to specific performance standards and improperly defers mitigation of the Project's noise impacts.

3. Hydrology and Water Quality

As noted by Commenters in their comment letter to the DEIR, the DEIR acknowledges that the Project will have significant and unmitigated impacts to hydrology and water quality. However, the City fails to adopt any mitigation measures for the Project by stating that there will be no mitigation for this impact pending the release of FEMA's verification of the hydrology analysis. (DEIR, p. S-50.)

The City claims in its FEIR response that there is no mitigation measure to adopt due to the pending regulatory compliance with FEMA and obtaining a Section 401 permit. (FEIR, p. RTC-43.)

However, by failing to incorporate the CLOMR documentation the Project proponent submitted to FEMA, the EIR fails to provide adequate information on whether the Project adopted all feasible mitigation measures. Moreover, the DEIR and FEIR fail to document if the City considered any feasible mitigation measures outside of the regulatory framework. As a result, not only does the City improperly defer the mitigation of the Project's hydrological impacts but also fails as an informational document.

The FEIR must be revised and recirculated to include the hydrology analysis that was submitted to FEMA for the CLOMR. Moreover, the future receipt of FEMA's verification of the Project's hydrology analysis and subsequently proposed mitigation measures for the Project "significant and unmitigated impacts as acknowledged by the DEIR would also require revision and recirculation of the FEIR. (DEIR at 5-50.)

III. THE PROJECT VIOLATES STATE PLANNING AND ZONING LAW BY BEING INCONSISTENT WITH THE CITY'S GENERAL PLAN HOUSING ELEMENT

A. Background Concerning 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.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.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.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 impedes achievement of its policies is invalid and cannot be given effect. *See Lesher*, 52 Cal.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 a 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.3d at 544 (zoning ordinance restricting development conflicted with growth-oriented policies of general plan).

B. The Project Is Inconsistent With the City's General Plan Affordable Housing Requirement

As explained in Commenters' earlier comments to the DEIR, the Housing Element of the City's General Plan requires that the City produce at least 700 additional units for moderate-income households, 3,600 additional units for low income households, 3,000 additional units of housing for very low-income households and 3,000 additional units for extremely low-income households by December 31, 2020. (City of San Diego Housing Element at p. HE-48.) Objective I Community Balance of the Housing Element of the City's General Plan implements a policy intended towards meeting that requirement by requiring that "a minimum of ten percent of all new units . . . be affordable to low- and very low- income residents or for moderate income homebuyers." (City of San Diego Housing Element at p. HE-122.)

The Project blatantly violates that requirement by setting aside 10 percent of the Project's total proposed residential units for market rate senior housing, and setting aside no units for moderate, low and very low income residents. The City, in its response in the FEIR, claims that "this comment is incorrect" and cites to Chapter 3.0 of the DEIR. (FEIR, p. RTC-45.) However, Chapter 3.0 of the DEIR confirms Commenters earlier point that the City will be setting aside 180 units (or 10 percent of total residential units) for "age-restricted, affordable (10 percent of total units) options," not non-restricted affordable housing. (DEIR, p. 3-1.)

Curiously, after claiming that the Commenter was "incorrect," the City revised the FEIR to remove the age restriction on the affordable housing units, heeding the very advice Commenter provided to the City. (FEIR, p. 1, Information Sheet for the Final EIR.) In fact, the FEIR admits that the elimination of age-restrictions on affordable housing resulted in the following changes to the DEIR:

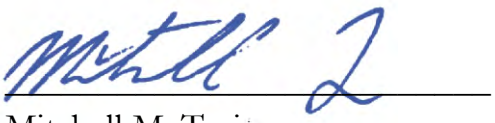
> "[u]pdates to assumptions regarding additional potential school-age children (Section 5.14), and updates to calculations on SDG&E facility impacts west of Camino Santa Fe to provide specifics promised in the Draft EIR and retaining wall descriptions (Section 5.3), as well as de minimis acreage modifications to vegetation communities (Section 5.9). The SDG&E facility changes also resulted in modification of impact footprint west of Camino Santa Fe on four figures: Figure 3-4, SDG&E Facility Modifications, Figure 3-18, Carroll Canyon Road Extension (West), 5.9-6, Project Impacts to Vegetation and Land Cover Types, and 5.9-7, Project Impacts to Sensitive Biological Resources."

Pursuant to the laws requiring recirculation as set forth in full above, the City's revision of the DEIR was significant new information which must be recirculated for public comment.

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

Attached:

Matthew F. Hagemann, P.G. C.Hg, QSD, QSP, Curriculum Vitae (Exhibit A);

Paul Rosenfeld, Ph.D., Curriculum Vitae (Exhibit B); and

Letter from Hagemann and Rosenfeld from SWAPE to Mitchell M. Tsai, Mitchell M. Tsai, Attorney At Law re: Comments on the 3Roots Project (SCH No. 2018041065) (July 14, 2020) (Exhibit C);

Santa Clara County Public Health (June 12, 2020) COVID-19 CASES AT CONSTRUCTION SITES HIGHLIGHT NEED FOR CONTINUED VIGILANCE IN SECTORS THAT HAVE REOPENED (Exhibit D);

The Center for Construction Research and Training, North America's Building Trades Unions (April 27 2020) NABTU and CPWR COVIC-19 Standards for U.S> Constructions Sites (Exhibit E); and

Los Angeles County Department of Public Works (2020) Guidelines for Construction Sites During COVID-19 Pandemic (Exhibit F).