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 Community Development Department

Via Email

January 24, 2019

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Re: SDG Commerce 330 Warehouse Project (PL18-0010, 0011) - Mitigated Negative Declaration

Honorable Members of the Planning Commission:

I am writing on behalf of **Laborers International Union of North America, Local 324** and its members living and working in and around the City of American Canyon (“LIUNA”) regarding the Mitigated Negative Declaration (“MND”) prepared for the proposed SDG Commerce 330 Warehouse Project (the “Project”). The matter is scheduled to be presented to the City’s Planning Commission on January 24, 2019, and is listed as Agenda Item 4.1.

After reviewing the MND prepared for the Project along with our experts, we believe there is a fair argument that the Project may have significant adverse environmental impacts and that an environmental impact report should therefore be prepared pursuant to the California Environmental Quality Act, Public Resources Code §§ 21000, et seq.

LIUNA submits herewith the expert comments of wildlife ecologist Dr. Shawn Smallwood. Dr. Smallwood’s expert comments and resume are attached hereto as Exhibit A.

LIUNA also submits herewith comments on the Project's air and greenhouse gas emissions from the environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE"). SWAPE's comments and the resumes of their consultants are attached hereto as Exhibit B.

LIUNA reserves the right to supplement these comments in advance of and during public hearings concerning the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, 60 Cal. App. 4th 1109, 1121 (1997). Thank you for your attention to this matter.

PROJECT DESCRIPTION

The Project proposes to subdivide an existing 35.85-acre parcel into three parcels and issue a conditional use permit to construct and operate a 330,528 square foot wine storage and distribution center on the southern 15.24-acre parcel. The average roof height of the proposed building would be about 35 feet. The building would be bordered by 189 parking stalls on three sides and 32 truck docking bays on the north side. The building would be heavily insulated and refrigerated. Grading and filling will occur throughout the Project site. Construction of the project would be done in a single phase lasting approximately 10 months. Types of heavy diesel equipment to be used to construct the facility will include a self-loading dirt scraper, bulldozer, motor grader, compactor, roller, water truck, backhoe, excavator, trencher, drilling auger, front end loader, paving machine, laser screed, concrete finishing trowels, tractor, crane, forklift, generator, man lift, scissor lift, welding machine, and light tower. The Project only proposes to use diesel equipment that meets at a minimum CARB Tier 2 diesel emission standards, rather than the more protective Tier 3 or 4 standards currently available. The Project is estimated to generate a total of 559 daily project trips with 53 trips in the AM peak hour and 43 trips in the PM peak hour. A small seasonal wetland is located at the southeast corner of the site. The closest residential neighborhood is about 900 feet to the southeast of the site.

LEGAL STANDARDS

As the California Supreme Court held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 ["CBE v. SCAQMD"], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504-505.) "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 ["CBE v. CRA"].)

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also

functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” (*Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) The EIR process “protects not only the environment but also informed self-government.” (*Pocket Protectors*, 124 Cal.App.4th at 927.)

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” (Pub. Resources Code, § 21080(d); see also *Pocket Protectors*, 124 Cal.App.4th at 927.) In limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs., § 15371 [“CEQA Guidelines”]), only if there is not even a “fair argument” that the project will have a significant environmental effect. (Pub. Resources Code, §§ 21100, 21064.) Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” (*Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.)

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and . . . there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” (Public Resources Code §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, “may” means a *reasonable possibility* of a significant effect on the environment. (Pub. Resources Code, §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.)

Under the “fair argument” standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency’s decision. (CEQA Guidelines, § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The “fair argument” standard creates a “low threshold” favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. (*Pocket Protectors*, *supra*, 124 Cal.App.4th at 928.)

The “fair argument” standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies

weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

(Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274.) The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a **preference for resolving doubts in favor of environmental review.**" (*Pocket Protectors*, 124 Cal.App.4th at 928 [emphasis in original].)

As a matter of law, "substantial evidence includes . . . expert opinion." (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors*, 124 Cal.App.4th at 935.) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Resources Code, § 21068; see also CEQA Guidelines, § 15382.) An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." (*No Oil, Inc.*, 13 Cal.3d at 83.) In *Pocket Protectors*, the court explained how expert opinion is considered. The Court limited agencies and courts to weighing the admissibility of the evidence. (*Pocket Protectors*, 124 Cal.App.4th at 935.) In the context of reviewing a negative declaration, "neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance." (*Id.*) Where a disagreement arises regarding the validity of a negative declaration, the courts require an EIR. As the Court explained, "[i]t is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." (*Id.*)

CEQA requires that an environmental document include a description of the project's environmental setting or "baseline." (CEQA Guidelines, § 15063(d)(2).) The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. (*CBE v. SCAQMD*, 48 Cal.4th at 321.) CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency's environmental review under CEQA:

...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.

(See, *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 [“*Save Our Peninsula*”].)

ANALYSIS

I. An EIR is Required because the Project will have Significant Impacts on Biological Resources.

A. The MND Fails to Adequately Analyze Impacts to Biological Resources Because it Relies Upon an Incomplete Baseline and the Project May Have Adverse Impacts on Numerous Sensitive Bird Species Currently Using the Site or Adjacent Areas.

On January 23, 2019, Dr. Shawn Smallwood visited the site. (Smallwood Comments, pp. 1-2.) His first-hand observations of wildlife at the site as well as his review of reliable bird sightings reported on eBird demonstrate that the IS/MND relies upon a truncated list of species present at the site and fails to address impacts on numerous sensitive species that currently use the site. Dr. Smallwood’s observations and expert comments are substantial evidence that the Project may have significant biological impacts, including adverse impacts on bald eagles, great horned owls, Swainson’s hawks, burrowing owls, Nuttall’s woodpecker, Cooper’s hawks, red-tailed hawks, and other bird species.

During his brief visit on January 23rd, Dr. Smallwood observed a bald eagle flying over and hunting the site and identified a northern harrier and Cooper’s hawk foraging on the project site. (Smallwood Comments, pp. 2, 4.) He also observed numerous other bird species. (*Id.*, pp. 2-8.) Many species were not just passing by the site but actively engaged in using the habitat available there. (*Id.*, p. 2.) For example, Dr. Smallwood observed many species spending considerable time at the site and displaying courtship or territorial behaviors indicative of breeding. (*Id.*) Such species included red-winged blackbirds, Say’s phoebe, red-tailed hawks, and American kestrels. (*Id.*) He also observed a great-horned owl perched immediately adjacent to the site. (*Id.*)

Dr. Smallwood also has gathered information regarding numerous bird sightings in and around the site that are posted on a web-based service called eBird. (Smallwood Comments, pp. 8-11.) Dr. Smallwood’s experience with this service indicates that it is reliable source of bird sighting information, being based on the observations of reputable birders. (*See id.*, p. 11.) Numerous additional sensitive species are identified near the site that are not addressed in the biological report or the IS/MND, including the endangered Willow flycatcher and species of concern including the Oak titmouse, Loggerhead shrike, tricolored blackbirds and many others. (*Id.*, pp. 8-11.)

Dr. Smallwood notes the likely presence of bats utilizing the site for foraging and movement. (Smallwood Comments, pp. 1, 9.) No mention of these critical species is made in the biological report or IS/MND.

As a result of the omission of numerous sensitive species using the site and evidence of even more additional species in the immediate vicinity of the site, the IS/MND's evaluation of the project's biological impacts is not supported by substantial evidence. Dr. Smallwood's observations and expert comment is substantial evidence of a fair argument that the project may have an adverse impact on bald eagles, various hawks, and other species currently utilizing the site for courtship, foraging habitat and for movement.

The IS/MND does mention a number of species, including Swainson's hawks and burrowing owls. However, the biological report fails to disclose information that these species have been observed much closer to the project site than is indicated in the IS/MND or the biological report. (Smallwood Comments, pp. 8-11.) For example, the IS/MND indicates that Swainson's hawks and burrowing owls are, respectively, 2.5 and 2.6 miles away from the project site. However, Dr. Smallwood identifies sightings of these two species within 0.2 miles of the site. As he states, this indicates a high likelihood that these species are using this open foraging area as well.

The IS/MND is particularly unreliable in regard to its treatment of another species of special concern, the Northern harrier. As Dr. Smallwood explains:

Relying on CNDDDB records, Monk & Associates (2018) claim the nearest northern harrier location was 2.7 miles away. However, not only did I see a northern harrier fly over the project site (Photo 3), but multiple other observers reported northern harrier sightings near the site (Figure 3). I am curious why Monk & Associates failed to detect this species during multiple visits to the site. I saw northern harriers both on and off the site, multiple times.

(Smallwood Comments, p. 11.)

This evidence of nearby sightings of these species supports a fair argument that the project may have adverse impacts on their foraging and movement. For this reason and those discussed above, an EIR must be prepared to address impacts to these many sensitive bird species.

B. The Project will have a Significant Impact on Wildlife Movement and Habitat Fragmentation.

The MND fails to adequately analyze the Project's impact on wildlife movement. Instead, the MND improperly dismisses the Project's potential to impact wildlife movement by claiming there needs to be a "corridor" on the site to effect wildlife movement, that other nearby areas are better movement areas, or otherwise asserting without evidence that this particular large warehouse would not disrupt wildlife movement. As Dr. Smallwood states:

The project would obviously interfere with wildlife movement in the region. Having studied millions of GPS telemetry data from >30 golden eagles tracked since 2013, I noticed a strong avoidance of anthropogenic structures such as

warehouses and residential neighborhoods. I assume bald eagles express the same avoidance. If this assumption is true, then once the project is built, that bald eagle I saw flying over the site will no longer fly over the site. The Cooper's hawk will not fly over the site, or at minimum it will not do so at the low foraging height I observed on the 23rd of January. Movement paths for many wildlife species will be cut off or diverted as a result of the project.

(Smallwood Comments, p. 15.) Dr. Smallwood's direct observations and expert opinion are substantial evidence of a fair argument that the Project may have adverse impacts on wildlife movement at the site and in the vicinity.

C. The MND Fails to Analyze the Project's Impacts on Wildlife from Additional Traffic Generated by the Project.

The MND contains no analysis of the impacts of the Project's added road traffic on special-status species of wildlife, including species such as the California red-legged frog and California tiger salamanders. (Smallwood Comments, p. 15-16.) Regardless of whether these species live on site, these and other special status species must cross roadways that will experience increased traffic volume as a result of the Project. (*Id.*)

As Dr. Smallwood explains, "[i]ncreased use of existing roads will increase wildlife fatalities...." (*Id.*, p. 16.) "The traffic will effectively extend the project's footprint well beyond the floor space, as trucks and cars traveling to and from the warehouse will drive over County roads and highways that are also crossed by wildlife. On the 23rd I saw two road-killed striped skunks on American Canyon Drive – a road likely to be used by trucks and cars servicing the project." (*Id.*) Given the fair argument of a threat to wildlife posed by existing traffic and additional traffic from the Project, as discussed by Dr. Smallwood, an EIR is necessary to evaluate the direct and cumulative impacts of the Project's vehicle collisions with wildlife.

D. The MND Fails to Analyze the Project's Impacts from the use of Pest Control Measures.

The MND does not discuss the potential impact of using pesticides inside and outside of the proposed warehouse. As a wine storage distribution facility, there will likely be steps taken to abate pests. There are many businesses that provide services for controlling stored products pests, perching birds, and rodents and other mammal pests within and around distribution warehouses. (Smallwood, pp. 16-17.) These businesses advertise exclusion strategies and fumigation for stored products pests, glue boards for rodents, and other measures including anticoagulant poisons and acute toxicants. "[T]he use of toxicants can harm non-target wildlife through direct exposure and indirect exposure via predation and scavenging." (*Id.*) "[P]est control involving toxicants can result in the spread of toxicants beyond the warehouse." (*Id.*)

An EIR is needed to analyze the potential impacts of animal damage control associated with the proposed Project. Anticipated animal control strategies at the Project should be detailed, and impacts mitigated.

E. The Project will have Cumulative Impacts on Biological Resources.

Dr. Smallwood concludes that the Project will have a significant cumulative impact on biological resources. (Smallwood Comments, p. 17-18.) An EIR is needed to fully analyze and mitigate the Project's cumulative biological impacts, including not only future projects but the existing impacts as well.

II. The IS Utilized Unsubstantiated Input Parameters to Estimate Project Emissions.

A. The IS Used Improper Modeling Inputs for Parking.

Review of the Project's CalEEMod output files demonstrates that the Project Applicant incorrectly models the Project's parking land use. As such, the IS underestimates the Project's construction and operational emissions. (SWAPE, p. 2.) The Project proposes to construct 189 car and 32 truck dock parking spaces. (IS, p. 9.) However, the CalEEMod output files in the IS show that the parking uses of the Project were modeled as "Other Asphalt Surfaces." (IS Appendix A-3, pp. 13, 46, 75.) The CalEEMod User Guide specifically states that the "Other Asphalt Surfaces" category is not to be used for modeling emissions from a parking lot. (SWAPE, p. 2.) The CalEEMod User Guide states that parking lots require architectural coating activities from the painting and striping of parking spaces as well as electricity usage from lighting. (SWAPE, p. 3.) Therefore, the IS underestimates the Project's construction and operational emissions by improperly relying on modeling based on "Other Asphalt Surfaces" rather than using the proper modeling input for parking. (*Id.*)

B. The IS Fails to Include the Hauling of Grading Material in the Emissions Modeling.

According to the IS, "Grading of the property would consist of cuts of approximately nine (9) feet and fills of approximately seven (7) feet" (IS, p. 10.) According to these figures, the Project will have a net two feet of cut during grading that will result in grading soil that will most likely need to be exported off-site. The CalEEMod model uses the grading inputs in order to estimate the amount of fugitive dust emissions generated during grading itself and the number of hauling trips required to export the grading. (SWAPE, p. 3.) However, the CalEEMod modeling of the IS does not include any hauling trips from the grading phase of construction. (*Id.*) By not including the net two feet of cut that will need to be exported during Project construction, the IS underestimates the Project's construction emissions. (*Id.*)

III. The IS Inadequately Evaluates Emissions of Diesel Particulate Matter.

Diesel particulate matter (DPM) is a known human carcinogen. Without conducting a quantitative health risk assessment (HRA) of the construction and operational phases of the Project, the IS concludes that the health risk posed to the nearest sensitive receptors will be less than significant with mitigation. (IS, pp. 25-26.) SWAPE has identified three reasons why the

analysis of DPM in the IS is insufficient.

A. The IS Failed to Properly Evaluate the Health Risk to Sensitive Receptors Located Within 1,000 feet of the Project Boundary.

In order to justify the omission of a construction HRA, the IS states:

Health risk is evaluated for sensitive receptors within a 1,000-foot radius of a project's impact area. The nearest sensitive receptors, a residential neighborhood is situated approximately 900 feet southeast of the proposed project boundary, with two-to-three homes that could potentially be within 1,000 feet of certain project construction phases (site preparation and grading activities). . . . Site preparation and grading activities would last approximately 5 weeks and then subsequent construction phases (building construction and other construction activities) would be greater than 1,000 feet from the nearest sensitive receptor.

(IS, p. 25.) However, this justification misinterprets the health risk thresholds of the Bay Area Air Quality Management District's (BAAQMD). According to the BAAQMD's *CEQA Guidelines*, the zone of influence is 1,000 feet from the property line of the source—not 1,000 feet from the source itself. (SWAPE, p. 4.) Therefore, the sensitive receptors located approximately 900 feet from the project boundary will be within the zone of influence for not only during site preparation and grading activities but also during the subsequent construction phases. Because the total construction phase of the Project is approximately 10 months long and because sensitive receptors will be approximately 900 feet from the project boundary, a construction HRA should have been conducted. (*Id.*)

B. The IS Improperly Relies on Mitigation Measures Without Quantifying Potential Health Risks.

The IS improperly asserts that implementation of Mitigation Measure AQ-4 would result in a less than significant construction health risk. (IS, p. 26.) In order to make such a conclusion, the IS should have first quantified the health risk and compared it to the BAAQMD's risk threshold of 10 in one-million. (SWAPE, p. 5.) As SWAPE points out, other CEQA projects within the BAAQMD's jurisdiction with similar mitigation still conducted construction HRAs. (*Id.*) By failing to conduct such an HRA, the IS fails to provide substantial evidence that the health risks of the project are less than significant.

C. The IS Failed to Conduct a Quantified Health Risk Assessment.

The omission of a quantified health risk is inconsistent with the most recent guidance published by Office of Environmental Health Hazard Assessment (OEHHA), the organization responsible for providing recommendations and guidance on how to conduct health risk assessments in California. (SWAPE, p. 5.) As stated by the IS, OEHHA guidance recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors. Additionally, OEHHA recommends that exposure from projects lasting more

than 6 months be evaluated for the duration of the project, and that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident. (*Id.*) Because the construction of the Project is estimated to last approximately 10 months and because the operational phase of the Project can reasonably be assumed to last 30 years or longer, the IS should have evaluated the construction and operational health risks in accordance with the OEHHA guidelines.

CONCLUSION

For the foregoing reasons, an EIR is required to analyze and mitigate the Project's potentially significant environmental impacts. The MND is wholly inadequate. Thank you for your attention to these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Rebecca L. Davis', with a long horizontal flourish extending to the right.

Rebecca L. Davis
Lozeau | Drury LLP