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June 25, 2020 Via E-Mail

City of Hayward
Planning Commission
c/o Sara Buizer, Planning Manager
777 B Street
Hayward, CA 94541
Sara.Buizer@hayward-ca.gov
cityclerk@hayward-ca.gov

Re: Mission Village Mixed Use Development, PH 20-046 (June 25, 2020 Planning Commission Meeting, Agenda Item 1)

Dear Planning Commissioners and Ms. Buizer:

I am writing on behalf of the Laborers International Union of North America, Local Union 304 and its members living in and around the City of Hayward ("LIUNA") regarding the pending appeal of various time extensions for the Mission Village Mixed Use Development proposed for the corner of Mission Boulevard and Industrial Parkway. The Planning Commission is considering an appeal of the Planning Director's approval of the applicant's request to extend the deadline for the Project's entitlements for two years. LIUNA recommends that the Commission find in favor of the appeal and deny the requested time extension because the City must address new significant information concerning the Project identifying a significant health risk to future workers and residents of the Project that was not and could not have been addressed at the time of the City's initial approval of the Project. Certified Industrial Hygienist Francis "Bud" Offermann, PE, CIH has reviewed the documents provided to the Planning Commission and prepared expert comments on the Project's indoor air emissions and associated health risks, especially from the emission of formaldehyde from interior building materials that will be included in the Project. Mr. Offermann's comments and his curriculum vitae are attached as Exhibit A.

Formaldehyde is a toxic air contaminant that has significant carcinogenic and other health impacts. When the Project was originally approved by the City in early 2017, it was reasonable to assume that health risks from formaldehyde emissions would have been addressed by the California Air Resources Board's adoption in April 2007 of the composite wood airborne toxic control measure ("ATCM") to reduce formaldehyde emissions from composite wood products that are sold, supplied, used, or manufactured

for sale in California. Mr. Offermann was involved in a study of indoor air quality in homes that was instrumental in the development of the composite wood ATCM. As Mr. Offermann's comments explain, although the ATCM has resulted in significant reductions of formaldehyde emissions in the indoor air of homes and offices throughout California, a new 2019 study of homes constructed after the ATCM's implementation demonstrates that, even when new buildings are constructed and furnished using materials that comply with the CARB ATCM, those new residences and other occupied structures will still contain materials that will emit formaldehyde into the interior air that pose significant cancer risks to residents and workers. Mr. Offermann calculates the cancer risk to future residents of the Project will be 112 cancers per million people, assuming the Project will only use CARB compliant materials. That cancer rate is about 11 times higher than the BAAQMD health risk significance threshold established for CEQA. Workers also will be exposed to a health risk of 16.4 per million, also well above the significance threshold. The newly available data from the 2019 study revealing that the CARB ATCM does not reduce formaldehyde emissions to indoor air to levels less than the BAQMD significance threshold is significant new information that requires the City to reopen the prior mitigated negative declaration adopted for the Project and prepare a supplemental environmental impact report to address the Project's significant health risks.

I. LEGAL STANDARD

When changes to a project's circumstances or new substantial information comes to light subsequent to the certification of an EIR or MND for a project, the agency must prepare a subsequent or supplemental EIR if the changes are "[s]ubstantial" and require "major revisions" of the previous CEQA document. *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937, 943. "[W]hen there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations "turn[ ] on the value of the new information to the still pending decisionmaking process." *Id*., 1 Cal.5th at 951–52. The agency must decide under CEQA's subsequent review provisions whether new information "will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects." *Id*., 1 Cal.5th at 952.

Section 15162 provides, in relevant part,

> (a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:
>
> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

> (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
> (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
> (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
> (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
> (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
> (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.
> (b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subdivision (a).

14 Cal. Admin. Code § 15162(a)-(b).

The California Supreme Court has addressed the application of Section 21166 and CEQA Guidelines § 15162 to a previously certified MND and unequivocally stated those provisions "do[] not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, ***potentially significant environmental effects***." *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 958 (emphasis added). Thus, potential significant effects must be addressed in any subsequent EIR or negative declaration. Plaintiffs in that case had argued that CEQA Guidelines § 15162 should be voided in part because its language would create a loophole around CEQA's fair argument standard. The Court assuaged that concern by explaining that Section 15162 does not change the application of the fair argument standard to issues that had not previously been addressed in a negative declaration or EIR:

> In short, the substantial evidence standard prescribed by CEQA Guidelines section 15162 requires an agency to prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant

> environmental impact not previously considered in connection with the project as originally approved, and courts must enforce that standard. (See *Friends of "B" Street v. City of Hayward*, *supra*, 106 Cal.App.3d at p. 1002, 165 Cal.Rptr. 514.) ***It therefore does not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects***. So understood, CEQA Guidelines section 15162 constitutes a valid gap-filling measure as applied to projects initially approved via negative declaration, including the project at issue in this case.

1 Cal.5th at 959 (emphasis added).

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. 14 CCR § 15064(f)(1); *Pocket Protectors* (2004) 124 Cal.App.4th 903, 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,* 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 & Zischke*, 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.

Mr. Offermann's comments identify new information of substantial importance, which was not known and could not have been known prior to 2019, showing that the

Project will have a significant effect on health risks from formaldehyde emissions, which impact was not discussed in the prior MND. In addition, Mr. Offermann also identifies mitigation measures which are considerably different from those addressed in the MND and which would substantially reduce the health risks posed by the project. For these reasons, the prior MND must be substantially changed. Indeed, an EIR is required for the Project because Mr. Offermann's expert comments and analysis are substantial evidence of a fair argument that potential significant health risks will result from the Project.

II. Important New Information Showing the Project's Potentially Significant Health Risk Impacts the Project May Have From Its Emission of Formaldehyde to Indoor Air Requires the Preparation of an EIR.

One component of an air quality impact analysis under CEQA is evaluating the health risk impacts of toxic air contaminant ("TACs") emissions contributed by a proposed project as well as cumulatively with other nearby TAC sources. Mr. Offermann has conducted a review of the Project and relevant documents regarding the Project's indoor air emissions. Indoor Environmental Engineering Comments (June 22, 2020) (attached as Exhibit A). Mr. Offermann is one of the world's leading experts on indoor air quality, in particular emissions of formaldehyde, and has published extensively on the topic. As discussed below and set forth in Mr. Offermann's comments, as of the release of the study entitled "Chan, W., Kim, Y., Singer, B., and Walker I. 2019. Ventilation and Indoor Air Quality in New California Homes with Gas Appliances and Mechanical Ventilation. Lawrence Berkeley National Laboratory, Energy Technologies Area, LBNL-2001200, DOI:10.20357/B7QC7X", it is now shown that, despite the Project's use of materials that are compliant with CARB's composite wood ATCM, the Project's emissions of formaldehyde to indoor air nevertheless will result in significant cancer risks to future workers at the Project. As a result of this important new information, an EIR or at least a new mitigated negative declaration must be prepared for the Project.

BAAQMD has established significance thresholds for a project's TAC emissions as well as cumulative emissions from a project and other nearby TAC sources. BAAQMD considers an increased risk of contracting cancer that is 10 in one million chances or greater to be significant risk for a single source. BAAQMD also has established a significance threshold for cumulative exposure as an excess cancer risk of 100 in one million. The MND for the Project does not address whether the Project's indoor air emissions will exceed the 10 in a million threshold. Nor does the MND consider any cumulative health risks posed by those indoor emissions of formaldehyde when considered in light of the acknowledged TACs that will be present at and within the completed Project based on its proximity to Mission Boulevard. *See* MND, p. 19.

Mr. Offermann explains that many composite wood products typically used in home, hotel and office building construction contain formaldehyde-based glues which

off-gas formaldehyde over a very long time period. He states, “The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particleboard. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.” Offermann Comment, p. 3.

Formaldehyde is a known human carcinogen. Mr. Offermann states that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 112 per million, assuming all materials are compliant with CARB’s formaldehyde ATCM. Offermann Comment, pp 4-5. Future workers at the Project will be exposed to a cancer risk from formaldehyde of approximately 16.4 per million. *Id*., p. 4. These risk levels exceed the BAAQMD’s CEQA significance threshold for airborne cancer risk of 10 per million. Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id*., pp. 4-10. He prescribes a methodology for estimating the Project’s formaldehyde emissions in order to do a more project-specific health risk assessment. *Id*., pp. 6-10. Mr. Offermann identifies a feasible mitigation measure that would address the formaldehyde emissions - requiring the use of no-added-formaldehyde composite wood products, which are readily available. *Id*., p. 10. Mr. Offermann notes the existing condition requiring installation of MERV-13 filters to address contaminants from the adjacent roadway, noting that the filters do not remove formaldehyde and would not significantly reduce indoor formaldehyde levels. *Id*., pp. 11-12. He also notes the absence of any cumulative health risk assessment to evaluate the health risks posed by the remaining levels of outdoor TACs as well as the indoor TAC emissions. *Id*.

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. People will be residing in, employed in and using the Project once it is built and begins emitting formaldehyde. Once built, the Project will begin to emit formaldehyde at levels that pose significant health risks. The Supreme Court in *California Building Industry Ass’n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 expressly finds that this type of air emission and health impact by the project on the environment and a “project’s users and residents” must be addressed in the CEQA process. Because the Project itself will pose significant health risks to the project’s residents and workers, an EIR or MND for the Project also would have to evaluate the cumulative health risks posed by the Project’s indoor air pollution combined with the significant air pollution from the nearby highway as well.

In addition, based on the above, the Planning Commission cannot make a number of key findings identified by staff in order to extend the Project’s entitlement deadlines. In regard to the Vesting Tentative Tract Map, the Commission cannot make the finding that the design of the Project is “not likely to cause substantial environmental damage.” *See* Staff Report, p. 7. The Commission also cannot find that the Project is

not likely to cause serious public health problems. *Id*., pp. 7-8. Lastly, the Commission cannot make the finding that the "development has been designed and will be conditioned to address potential noise and air quality impacts to ensure minimum standards are met for future residents of these townhome units." *Id*., p. 8.

CONCLUSION

For the foregoing reasons, the Project's entitlement deadlines should not be extended and any future application for the Project must be accompanied by a legally adequate CEQA document addressing the above health risks. Thank you for considering our comments.

Sincerely,

Michael R. Lozeau
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