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Letter 5

December 21, 2020

Via Email

Carmela Campbell
City of Union City
Economic & Community Development
Department
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Telephone: (510) 675-5316
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Re: Draft Environmental Impact Report for the Station East Residential/Mixed Use Project (SCH No. 2020039032)

Dear Ms. Campbell:

I am writing on behalf of Laborers International Union of North America, Local Union No. 304 and its members living and working in and around Union City (collectively "LIUNA") regarding the Draft Environmental Impact Report ("DEIR") prepared for the Station East Residential/Mixed Use Project, located in Union City, California (SCH No. 2020039032) ("Project"). After reviewing the DEIR, together with our consultants, it is clear that the document fails to comply with the California Environmental Quality Act ("CEQA"), and fails to adequately analyze and mitigate the Project's significant environmental impacts.

Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, has conducted a review of the Project, the EIR and relevant appendices regarding the Project's indoor air emissions. Mr. Offerman concludes that it is likely that the Project will expose future residents of the Project as well as employees of the commercial spaces to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. This impact has not been addressed in the DEIR. Mr. Offermann is one of the world's leading experts on indoor air quality and has published extensively on the topic. Mr. Offerman's expert comments and CV are attached hereto as Exhibit A.

Ecologist Shawn Smallwood, Ph.D also reviewed the Project and DEIR, and visited the Project site to make observations about biological resources. Dr. Smallwood concluded that the Project will have significant impacts on biological resources that have not been adequately analyzed or mitigated. Dr. Smallwood's comments and CV are attached hereto as Exhibit B.

In addition, environmental consulting firm Soil/Water/Air Protection Enterprise

(“SWAPE”) has reviewed the Project and the DEIR, and concludes that the Project will have significant air quality and greenhouse gas impacts that are not disclosed. SWAPE’s expert comments, as well as the CVs of the SWAPE’s consultants are attached hereto as Exhibit C.

A revised EIR should be prepared prior to Project approval to analyze all impacts and require implementation of all feasible mitigation measures, as described more fully below.

I. PROJECT DESCRIPTION

The Project is a mixed-use development on a 26.5-acre site located between 7th Street and the Niles subdivision Union Pacific Railroad (“UPRR”) tracks in the city of Union City. The Project proposes development of up to 1.8 million square feet, including up to 974 new residential units (apartments, condominiums, and townhome style condominiums) and approximately 30,800 square feet of commercial space. The Project site would include 11 planning areas with 33 residential buildings and one community building. Most of the new buildings would be between three and five stories tall. The Project would include three community parks, one tot lot, and one outdoor amphitheater throughout the site. The Project would include 1,791 parking spaces for vehicles, and 458 parking spaces for bicycles.

The site is currently occupied by existing vacant industrial uses, surface parking lots, asphalt or concrete storage lots, a roadway, railroad spur improvements, and vacant unpaved areas, including agricultural, annual grassland, landscaped, and ruderal areas. The Project includes demolition of the existing buildings and parking lots.

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances). See, e.g., Pub. Res. Code § 21100.) The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1). “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“Berkeley Jets”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); see also, *Berkeley Jets*, *supra*, 91 Cal. App. 4th at pp. 1344, 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub. Res. Code § 21081; 14 Cal.Code Regs. § 15092(b)(2)(A) & (B). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” *Berkeley Jets*, 91 Cal. App. 4th at p. 1355 (quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12). As the court stated in *Berkeley Jets*, “A prejudicial abuse of discretion occurs ‘if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.’” *Id.* More recently, the California Supreme Court has emphasized that:

When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted], and (2) makes a reasonable effort to substantively connect a project's air quality impacts to likely health consequences.

Sierra Club v. Cty. of Fresno (2018) 6 Cal.5th 502, 510 (2018) (citing *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 405). “Whether or not the alleged inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document.” *Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 516. Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, “a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including ‘detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” *Id.* (citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197). As the Court emphasized:

[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

Sierra Club v. Cty. of Fresno, 6 Cal.5th at 514.

III. ANALYSIS

A. THERE IS SUBSTANTIAL EVIDENCE THAT THE PROJECT WILL HAVE SIGNIFICANT INDOOR AIR QUALITY IMPACTS.

Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, has conducted a review of the proposed Project and relevant documents regarding the Project’s indoor air emissions. Indoor Environmental Engineering Comments (November 28, 2020) (Exhibit A). Mr. Offermann concludes that it is likely that the Project will expose residents of the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is a leading expert on indoor air quality and has published extensively on the topic. *See* attached CV.

Mr. Offermann explains that many composite wood products used in modern apartment home 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, p. 3.

Formaldehyde is a known human carcinogen and a toxic air contaminant (“TAC”). Mr. Offermann states that there is a fair argument that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 120 per million, assuming all materials are compliant with the California Air Resources Board’s formaldehyde airborne toxics control measure. *Id.*, p. 3. This is 12 times the Bay Area Air Quality Management District’s (“BAAQMD”) CEQA significance threshold for airborne cancer risk for TACs of 10 new cases of cancer per million people. Mr. Offermann concludes that these significant environmental impacts must be analyzed in the EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id.*, p. 4-5.

In addition, employees of the Project’s commercial spaces are expected to have significant exposure to formaldehyde from building materials and furnishings commonly found in offices. Offermann, p. 4. Mr. Offermann calculates that employees are expected to have an increased cancer risk of 17.7 per million, which exceeds the 10 per million threshold of significance. *Id.*

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Mr. Offermann also notes that the high cancer risk that may be posed by the Project's indoor air emissions likely will be exacerbated by the additional cancer risk that exists as a result of the Project's location near roadways with moderate to high traffic (i.e. Decoto Road, Cheeves Way, Station Way, Mission Boulevard, etc.) and the high levels of PM 2.5 already present in the ambient air. Offermann, pp. 9-11. The San Francisco Bay Area Air Basin is already in State and Federal non-attainment for PM 2.5. *Id.* at 11. No analysis has been conducted of the significant cumulative health impacts that will result to future residents of the Project.

Mr. Offermann identifies mitigation measures that are available to reduce these significant health risks, including the preferred mitigation measure that would require the applicant use only composite wood materials (e.g. hardwood plywood, medium density fiberboard, particleboard) for all interior finish systems that are made with CARB approved no-added formaldehyde (NAF) resins or ultra-low emitting formaldehyde (ULEF) resins in the buildings' interiors. *Id.* at 11-13. Proposed mitigation also includes the installation of air filters and outdoor air ventilation. *Id.*

The City has a duty to investigate issues relating to a project's potential environmental impacts, especially those issues raised by an expert's comments. *See Cty. Sanitation Dist. No. 2 v. Cty. of Kern*, (2005) 127 Cal.App.4th 1544, 1597-98 ("under CEQA, the lead agency bears a burden to investigate potential environmental impacts"). In addition to assessing the Project's potential health impacts to residents, Mr. Offermann identifies the investigatory path that the City should be following in developing an EIR to more precisely evaluate the Projects' future formaldehyde emissions and establishing mitigation measures that reduce the cancer risk below the BAAQMD level. *Id.*, pp. 5-10. Such an analysis would be similar in form to the air quality modeling and traffic modeling typically conducted as part of a CEQA review.

The failure to address the project's formaldehyde emissions is contrary to the California Supreme Court's decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA*"). At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. *CBIA*, 62 Cal.4th at 800-801. However, to the extent a project may exacerbate existing adverse environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801 ("CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present"). In so holding, the Court expressly held that CEQA's statutory language required lead agencies to disclose and analyze "impacts on **a project's users or residents** that arise **from the project's effects** on the environment." *Id.* at 800 (emphasis added).

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. Future residents and employees will be users of the Project. Currently, there is presumably little if any formaldehyde emissions at the site. Once the project is built, emissions will begin at levels that pose significant health risks. Rather than excusing the City from addressing the impacts of

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carcinogens emitted into the indoor air from the project, the Supreme Court in *CBIA* expressly finds that this type of effect by the project on the environment and a “project’s users and residents” must be addressed in the CEQA process.

The Supreme Court’s reasoning is well-grounded in CEQA’s statutory language. CEQA expressly includes a project’s effects on human beings as an effect on the environment that must be addressed in an environmental review. “Section 21083(b)(3)’s express language, for example, requires a finding of a ‘significant effect on the environment’ (§ 21083(b)) whenever the ‘environmental effects of a project will cause substantial adverse effects *on human beings*, either directly or indirectly.” *CBIA*, 62 Cal.4th at 800 (emphasis in original). Likewise, “the Legislature has made clear—in declarations accompanying CEQA’s enactment—that public health and safety are of great importance in the statutory scheme.” *Id.*, citing e.g., §§ 21000, subs. (b), (c), (d), (g), 21001, subs. (b), (d). It goes without saying that the hundreds of future residents of the Project are human beings and the health and safety of those individuals is as important to CEQA’s safeguards as nearby residents currently living and working near the project site.

Mr. Offermann’s expert comments constitute substantial evidence of a fair argument of a significant environmental impact to future users of the project, but this potentially significant impact is not analyzed in the EIR. A revised EIR must be prepared to disclose and mitigate those impacts.

B. THE PROJECT WILL HAVE SIGNIFICANT IMPACTS ON BIOLOGICAL RESOURCES THAT THE DEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE.

1. The EIR fails to establish a baseline for special status species at the Project site.

Establishing an accurate baseline is the sine qua non to adequately analyzing and mitigating the significant environmental impacts of the Project. (*See* CEQA Guidelines, § 15125(a); *Save Our Peninsula*, 87 Cal.App.4th at 121-123.) Unfortunately, the EIR’s failure to investigate and identify the occurrences of sensitive biological resources at the Project site results in a skewed baseline. Such a skewed baseline ultimately “mislead(s) the public” by engendering inaccurate analyses of environmental impacts, mitigation measures and cumulative impacts for biological resources. (*See San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 656; *Woodward Park Homeowners*, 150 Cal.App.4th at 708-711.)

Not a single survey was conducted to determine the presence or absence of special status species. Dr. Smallwood points out the absence of any detection level surveys that would provide actual evidence of the presence or absence of species at the Project site. Smallwood, p. 11. Based on his expert opinion and his observations at the Project site, there has been no effort to detect whether or not numerous sensitive species are in harm’s way from the Project. “Without detection surveys, absence determinations are unfounded and the DEIR insufficiently

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informative.” *Id.* Without any surveys of the site for special status speices, the EIR has not established a baseline supported by substantial evidence.

Aside from the lack of surveys for special status species, Dr. Smallwood concludes that the biological analysis conducted as part of the EIR is incomplete and inadequate for a number of other reasons. First, the EIR made no use of eBird, iNaturalist, or any resources other than the California Natural Diversity Data Base in making its determinations regarding species’ likely use of the Project Site. *Id.* at 6. These data bases are regularly used by experts to inform them of sightings of wildlife in a particular area. Dr. Smallwood did check these databases and included a list of the special status species of vertebrate wildlife seen and reported in the Project area. *Id.* The list includes 52 special-status species of birds and 9 species of bats for 61 special-status species of wildlife. *Id.* The EIR only addresses 11 of these species, which amounts to only 18% of the species that have been sighted and reported near the Project site. In addition, the City concluded that 2 have no potential to occur, even though there are records of them occurring very close to the Project site. *Id.* Based on these facts, Dr. Smallwood concluded that the City’s “assessment of species occurrence likelihoods is grossly deficient. The EIR should be revised.” *Id.*

Second, for those species that the City did evaluate for potential to occur, the conclusions reached are not supported by substantial evidence. For example, the EIR concludes that, because of the disturbed nature of the site, special status species are “not anticipated to occur, with the exception of roosting bats, and migratory nesting birds.” DEIR, 4.2-15. It also concludes that because nesting habitat is unavailable, “golden eagle, peregrine falcon, northern harrier, and tricolored blackbird would not be affected.” *Id.* But Dr. Smallwood explains that this justification for dismissing the occurrence likelihood of these species is unfounded. He explains, “Special-status species have often been detected in disturbed environments; after all, just about every place on Earth has been disturbed by anthropogenic activity to some level. If special-status species did not make use of disturbed environments, how could they persist?” Smallwood, p. 6.

Moreover, the City’s claim that lack of nesting habitat makes unlikely to occurrence of special status species fails to acknowledge foraging habitat. Smallwood, p. 10. Dr. Smallwood explains, “All of a species’ habitat is of critical importance to the species regardless of where breeding sites are located. After all, no matter where a species breeds, the species cannot breed successfully without having found safe stop-over habitat during migration and sufficient forage preceding and during the breeding season.” *Id.*

Dr. Smallwood visited the site on December 5, 2020. Smallwood, p. 1. In total, Dr. Smallwood observed 21 species during his brief site visit. *Id.* at 1-5. In fact, just after arriving at the Project site, Dr. Smallwood observed a peregrine falcon, which is listed as an endangered species under the California Endangered Species Act. *Id.* at 1. Photograph 1, below is the Peregrine falcon observed by Dr. Smallwood. *Id.* at 2. His findings demonstrate the inadequacy of the supposed analysis that was done in support of the EIR.

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Photo 1. Peregrine falcon, a California Endangered species, on a transmission tower on the west side of the project site, 5 December 2020. Photograph taken by Shawn Smallwood.



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By failing to conduct any surveys and disregarding the absence of key species from the project site, ignoring numerous other species likely to be present, the EIR fails to establish and otherwise skews the entire biological resources baseline for the Project. This entire section should be redone, starting with properly timed, truly focused, detection surveys of the entire site and a complete list of special status bird species that may be adversely affected by the Project.

2. The DEIR's conclusion that the Project will not impact wildlife movement is not supported by substantial evidence.

The DEIR improperly dismisses the Project's potential on wildlife movement because the site is "not within or adjacent to any known regional wildlife movement corridors" and "no natural corridors connect to the site." EIR, 2.4-20. This conclusion is based on the improper assumption that interference with wildlife movement depends on whether it occurs within a movement corridor.

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In looking only for impacts to wildlife corridors, the City relies on a false CEQA standard. A project will have a significant biological impact if it would "[i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites." CEQA Guidelines, App. G. As Dr. Smallwood explains:

A site such as the proposed project site is critically important for wildlife movement because it composes an increasingly diminishing expanse of open space within a growing expanse of anthropogenic uses, forcing more species of volant wildlife to use the site as

stopover and staging habitat during migration, dispersal, and home range patrol (Warnock 2010, Taylor et al. 2011, Runge et al. 2014). The project would cut wildlife off from stopover and staging habitat, forcing volant wildlife to travel even farther between remaining patches of stopover habitat

Smallwood, p. 13.

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Moreover, even if the DEIR could rely on the presence of a movement corridor as the determining factor, the DEIR's conclusion would still be wrong because the Project site is located within the most prominent migratory route of western North America, known as the Pacific Flyway. Smallwood, p. 12. "Millions of birds migrate along the Pacific Flyway, many of them right over and across the project site." *Id.*

Because of its reliance on a false CEQA standard for determining impacts on wildlife movement, the EIR contains no evidence to support the conclusion that the Project will not have a significant impact on wildlife movement. In contrast, Dr. Smallwood determined that the Project will interfere with wildlife movement in the region. *Id.* at 13.

3. The Project will have a significant impact on wildlife from vehicle collisions because of increased traffic generated by the Project.

Dr. Smallwood is clear: "the project-generated traffic would cause substantial, significant impacts to wildlife." Smallwood, p. 14. According to the DEIR, the Project will generate an average of 8,080 new daily vehicle trips. DEIR, 4.14-28. Yet neither the DEIR does not analyze the impacts on wildlife that will be caused by this massive increase in traffic on roadways servicing the Project. Vehicle collisions have the potential to impact dozens of special-status species that occur at or near the Project site. "This type of impact extends far beyond the structural footprint of the project, affecting species that more often occur elsewhere than at the project site." Smallwood, p. 13.

Vehicle collisions with special-status species is not a minor issue, but rather results in the death of millions of species each year. Dr. Smallwood explains:

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In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally.

In a recent study of traffic-caused wildlife mortality, investigators found 1,275 carcasses of 49 species of mammals, birds, amphibians and reptiles over 15 months of searches along a 2.5 mile stretch of Vasco Road in Contra Costa County, California (Mendelsohn et al. 2009). Using carcass detection trials performed on land immediately adjacent to the traffic mortality study (Brown et al. 2016) to adjust the found fatalities for the proportion of fatalities not found due to scavenger removal and searcher error, the estimated traffic-caused fatalities was 12,187. This fatality estimate translates to a rate of 3,900 wild

animals per mile per year. In terms comparable to the national estimates, the estimates from the Mendelsohn et al. (2009) study would translate to 243,740 animals killed per 100 km of road per year, or 29 times that of Loss et al.'s (2014) upper bound estimate and 68 times the Canadian estimate. An analysis is needed of whether increased traffic generated by the project would similarly result in local impacts on wildlife.

Smallwood, p. 13.

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Based on a number of studies, and the 8,080 new daily trips caused by the Project, Dr. Smallwood predicts that approximately 208 birds will be killed by front-end blunt force collision with Project-related vehicles each year. *Id.* at 14. Many more deaths and injuries to vertebrate wildlife will also be caused by crushing under tires, broadside impacts to flying birds, and turbulence-induced injuries and deaths above, to the side, and in the wake of traveling trucks. *Id.*

Dr. Smallwood's expert comments constitute substantial evidence that the Project may have a significant impact on biological resources as a result of vehicle collisions stemming from Project-generated traffic. Since this impact was not analyzed in the EIR, a revised EIR is required to analyze and mitigate this significant impact.

4. The EIR fails to analyze the Project's impact on lost breeding capacity.

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The DEIR does not analyze the lost breeding capacity of birds that would result from the removal of 68 existing trees. Smallwood, p. 12. While habitat loss results in the immediate decline in birds and other animals, it also results in a permeant loss of productive capacity. *Id.*, Dr. Smallwood cites two studies show that total bird nesting densities were between 32.8 and 35.8 nests per acre, for an average of 34.3 nests per acre. *Id.* Given that the Project site supports 68 trees, but no wetlands and only small patches of grasslands, Dr. Smallwood estimates the site's breeding capacity at a third of what was reported in the two cited studies, or about 11.4 nest sites per acre. *Id.*

When multiplied by the Project's 26.5 acres of habitat that would be lost, Dr. Smallwood predicts a loss of 302 bird nests per year. *Id.* This loss would repeat each year. *Id.* Based on an average of 2.9 fledglings per nest, the Project would prevent generating 876 new birds per year. *Id.* Dr. Smallwood concludes that this loss would be substantial and would qualify as a significant impact that was not addressed in the EIR. An revised EIR is required to fully analyze the Project's impact on lost breeding capacity, and to mitigate that impact.

5. The Project will have a significant impact on birds from window collisions, which the EIR fails to address.

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According to Dr. Smallwood, the Project will have a significant impact on birds as a result of window collisions. The City has not analyzed or mitigated these potential impacts to special-species birds.

The DEIR does not include any figures on how much glass would be used on the

Project's building facades, which is important in analyzing impacts to wildlife from window collisions. Renderings of the Project that are available only include a portions of the Project. Of the renderings that were available, glass windows is a prominent feature. Smallwood, p. 15. However, since the renderings only gave a partial picture of the extent of glass use, Dr. Smallwood relied on an average extent of glass per square foot of mixed-use floorspace at Bay Area projects, as described in their CEQA review documents. *Id.* Using this average, Dr. Smallwood calculated that the Project would use at least 26,119 square meters of glass on the building facades. *Id.* "This glass would kill many birds." *Id.*

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Dr. Smallwood reviewed a number of studies in order to calculate the number of bird collisions that would occur annually as a result of the Project. Smallwood, p. 15-16. According to his calculations, each m² of glass would result in 0.077 bird deaths per year. *Id.* Based on the estimated 26,119 m² of glass windows and the 0.077 bird deaths per m² of glass windows, Dr. Smallwood estimates that the project could result in 1,909 bird deaths per year. *Id.* This death rate would continue every year until the structure were either renovated to reduce bird collisions, or until the buildings were demolished. *Id.* at 16. Dr. Smallwood points out that "The vast majority of these deaths would be of birds protected under the Migratory Bird Treaty Act and under the recently revised California Fish and Game Code section 3513, thus causing significant unmitigated impacts." *Id.* These bird deaths constitute a significant impact that must be analyzed *Id.*

6. The DEIR fails to analyze the impacts of house cats on wildlife.

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The residential component of the Project will likely introduce house cats to the Project site, yet the EIR does not address this issue. Smallwood, p. 16. Dr. Smallwood explains that house cats are one of the largest sources of avian mortality in North America. *Id.* In addition, cats contribute to downstream loading of *Toxoplasma gondii*, which is a "parasite that can infect virtually all warm-blooded animals, but the only known definitive hosts are cats." *Id.* The DEIR must analyze this potentially significant impact.

7. The DEIR's analysis of the Project's cumulative impacts on biological resources violates CEQA.

The EIR concludes that the Project would not result in cumulatively significant impacts to biological resources. DEIR, 4.2-22. This conclusion is based on improper reasoning, and an analysis that is not in compliance with CEQA.

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The EIR must discuss cumulative impacts, and mitigate significant cumulative impacts. 14 CCR § 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if "the possible effects of a project are individually limited but cumulatively considerable. . . . 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable

probable future projects whose impacts might compound or interrelate with those of the project at hand.

While acknowledging Project-related biological impacts, the EIR's analysis of fails to analyze the Project's potentially significant cumulative biological impacts. Instead, the DEIR concludes, without evidence, that:

With implementation of Mitigation Measures BIO-1a, BIO-1b, and BIO-C, the project's contribution to cumulative biological resources impacts would be less than cumulatively considerable. Therefore, the cumulative impact would be *less than significant with mitigation*.

DEIR, 4.2-22.

This cumulative impact analysis is based on flawed logic. The conclusion that the Project will have no cumulative impact because each individual impact has been reduced to a less-than-significant level relies on the exact argument CEQA's cumulative impact analysis is meant to protect against. Dr. Smallwood points out that: This conclusion implies that cumulative impacts are merely residual impacts of mitigation that was incompletely effective. If cumulative effects were indeed merely residual impacts of inadequate mitigation, then CEQA would require an inadequate mitigation analysis instead of a cumulative impacts analysis. ." Smallwood, p. 16. The entire purpose of the cumulative impact analysis is to prevent the situation where mitigation occurs to address project-specific impacts, without looking at the bigger picture. This argument, applied over and over again, has resulted in major environmental damage, and is a major reason why CEQA was enacted. As the court stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

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

A new cumulative impacts analysis is needed for the Project that complies with CEQA's requirement to look at the Project's environmental impact, combined with the impacts of other past, current, and probable future projects. A revised EIR must be prepared to fully analyze the Project's cumulative impacts.

8. The DEIR's mitigation measures for biological resources are inadequate.

Dr. Smallwood points out that numerous mitigation measures meant to reduce impacts to biological resources are inadequate. First, Mitigation Measure BIO-1a proposes preconstruction surveys for burrowing owls as a measure to mitigate impacts on burrowing owls. However, "doing so without first performing detection surveys would be inconsistent with CDFW's (2012) survey guidelines." Smallwood, p. 16. Detection surveys are needed to inform decisions about

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project impacts and appropriate mitigation measures. *Id.* “Without detection surveys, an absence determination following a preconstruction survey would lack foundation and would risk unmitigated harm to burrowing owls.” *Id.* Therefore, without more, preconstruction surveys are not adequate to mitigate impacts on burrowing owls to a less than significant level. This same reasoning applies to Mitigation measure Bio-1b, which calls for preconstruction bat surveys and nesting bird surveys. *Id.* at 17. Detection surveys should be conducted now, which then form the basis of impact determinations and mitigation measures.

Moreover, while preconstruction surveys do need to be performed, preconstruction surveys are not intended to reduce project impacts, let alone reduce them to less than significant levels. Preconstruction surveys do nothing to replace the ecological space lost by Project construction that wildlife uses for breeding, foraging, and stopovers. Without a discussion of how the Project’s significant impacts will be mitigated beyond just conducting take-avoidance preconstruction surveys, the Project’s biological impacts have not been mitigated.

C. THE DEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE AIR QUALITY IMPACTS.

1. The DEIR relies on an unsubstantiated input parameters to estimate project emissions.

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To calculate the Project’s expected emissions during operation and construction, the EIR Relies on the California Emissions Estimator Model Version CalEEMod.2016.3.2 (“CalEEMod”). This model relies on recommended default values for on-site specific information related to a number of factors. SWAPE reviewed the Project’s CalEEMod output files and found that the values input into the model were unsubstantiated or inconsistent with information provided in the DEIR. SWAPE explains each of these in its letter. *See* SWAPE pp. 1-This results in an underestimation of the Project’s emissions. As a result, the Project may have a significant air quality impacts and an EIR is required to properly analyze these potential impacts.

2. There is substantial evidence that the Project may have a significant air quality impact.

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SWAPE prepared an updated version of the CalEEMod model using the corrected input parameters. SWAPE, p. 11. The updated model indicates that the Project’s Phase 1 construction-related emissions of ROG/VOC and NOx exceed the Bay Area Air Quality Management District’s (“BAAQMD”) threshold of significance. *Id.* SWAPE determined ROG emissions would be 927.6 lbs/day and NOx emissions would be 80.63 lbs/day, both of which exceed the 54 lbs/day threshold of significance. *Id.* at 12. Similarly, the Project’s Phase 2 construction-related emissions of ROG/VOC will be 374.35 lbs/day, which also exceeds the 54 lbs/day threshold. *Id.* Project operations will also emit pollutants at levels that exceed the BAAQMD’s threshold of significance. For both Phase 1 and complete operation, emissions of ROG/VOC, NOx, PM10, and PM2.5 will all exceed the threshold of significance. *Id.* The EIR must be revised to disclose and mitigate these significant impacts.

3. There is substantial evidence that the Project may have a significant health risk impact.

The DEIR concluded that the Project would result in a less-than-significant health risk impact from diesel particulate matter emissions. SWAPE explains that this determination is incorrect. First, the Health Risk Assessment (“HRA”) prepared by the City relied on the unsubstantiated an inaccurate input parameters discussed by SWAPE.

Second, the DEIR’s HRA fails to analyze the cancer risk posed to existing, off-site receptors as a result of Project operation. SWAPE, p. 14. Instead, the HRA conducted by the City includes only an analysis for on-site receptors as a result of a stationary source. This method was incorrect. SWAPE explains that this is incorrect because it fails to account for the 8,080 daily vehicle trips generated by Project operation, which will result in additional exhaust, which would cause exposure to nearby sensitive receptors to emissions (p. 4.14-28). *Id.* “By failing to prepare an HRA for Project operation, the FEIR is inconsistent with recommendations set forth by the Office of Environmental Health and Hazard Assessment’s (“OEHHA”) most recent *Risk Assessment Guidelines: Guidance Manual for Preparation of Health Risk Assessments*, as relied upon by the FEIR (p. 4.1-20)” SWAPE, p. 14.

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SWAPE conducted a screening-level HRA in order to demonstrate the potential risk posed by Project construction and operation to nearby sensitive receptors. SWAPE, pp. 15-18. SWAPE’s HRA corrected the errors in the CalEEMod model described above. Based on the HRA, SWAPE concludes that the Project’s construction and operational diesel particulate matter emissions may result in a significant health risk impacts that was not analyzed or mitigated in the EIR. *Id.*

According to the HRA, the Project will result in an excess cancer risk to children of 22 in one million. SWAPE, p. 17. The excess cancer risk over the course of a residential lifetime (30 years) would be 35.04 in one million. *Id.* Both exceed the BAAQMD threshold of significance of 10 excess cancers per one million people. Accordingly, each of these risks is a significant impact that must be analyzed in the EIR.

D. CONTRARY TO THE EIR’S CONCLUSION, THE PROJECT WILL HAVE A SIGNIFICANT GREENHOUSE GAS IMPACT.

1. The IS/MND’s GHG analysis violates CEQA.

The DEIR’s justifications and conclusion that the Project’s GHG impacts are less-than-significant violate CEQA for a number of reasons. The EIR first improperly concludes that the Project will not have a significant greenhouse gas (“GHG”) impact because the Project will be consistent with AB 32, SB32, SB 375, EO-S-3005, EO B-55-18, Plan Bay Area, Title 24, California’s SLCP Reduction Strategy, LCFS, and the City’s own General Plan. EIR (collectively, “GHG laws and policies”). The EIR’s

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reasoning is flawed because none of these GHG laws and policies meet the criteria for an officially adopted GHG reduction program, commonly referred to as a Climate Action Plan (“CAP”), for use as a threshold of significance for GHG emissions. SWAPE, p. 19.

As CEQA Guideline section 15064.4(b)(3) makes clear, a qualified CAP “must be adopted by the relevant public agency through a public review process,” and, as explained by CEQA Guideline section 15183.5(b)(1), the CAP should include:

- (1) **Inventory:** Quantify GHG emissions, both existing and projected over a specified time period, resulting from activities (e.g., projects) within a defined geographic area (e.g., lead agency jurisdiction);
- (2) **Establish GHG Reduction Goal:** Establish a level, based on substantial evidence, below which the contribution to GHG emissions from activities covered by the plan would not be cumulatively considerable;
- (3) **Analyze Project Types:** Identify and analyze the GHG emissions resulting from specific actions or categories of actions anticipated within the geographic area;
- (4) **Craft Performance Based Mitigation Measures:** Specify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level;
- (5) **Monitoring:** Establish a mechanism to monitor the CAP progress toward achieving said level and to require amendment if the plan is not achieving specified levels; and

As SWAPE explains, “[c]ollectiveley, the above-listed features tie qualitative measures to quantitative results, which in turn become binding via proper monitoring and enforcement by the jurisdiction—all resulting in real GHG reductions for the jurisdiction as a whole, and substantial evidence demonstrating that a project’s incremental contribution is not cumulatively considerable.” *Id.* at 20. None of the GHG laws and policies referenced in the EIR meet these requirements. As a result, compliance with the GHG laws and policies does not, on its own, demonstrate that the Project will not have a significant GHG impact. *Id.*

The City also relies on the Project’s consistency with the City’s CAP in order to find the Project’s GHG impact to be less than significant. EIR, 4.6-23 to 24. But this justification also fails because, although it is a valid CAP under CEQA, the City’s CAP does not address post-2020 emissions. EIR, 4.6-24. Since the Project will not be operational until after 2020, the CAP has no bearing on the significance of the Project’s emissions beyond 2020. *Id.* at 20-21.

2. The Project will have a significant GHG impact.

The DEIR estimates that the Project would generate approximately 12,205 MT CO₂e/year. EIR, 4.6-19, Table 4.6-4. However, after quantifying the Project’s annual GHG emissions, the EIR never compares the estimated emissions to a quantitative threshold of

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significance. Instead, the EIR relies on the City's outdated CAP and the GHG laws and regulations discussed above.

The EIR's GHG analysis cites to AEP's *Beyond Newhall and 2020: A Field Guide to New CEQA Greenhouse Gas Thresholds and Climate Action Plan Targets for California*. This document includes a "2030 Land Use Efficiency Threshold" of 2.6 MT CO₂e/SP/year for project with a horizon year beyond 2020. *Id.* at 21. The AEP guidance explains:

Once the state has a full plan for 2030 (which is expected in 2017), and then a project with a horizon between 2021 and 2030 should be evaluated based on a threshold using the 2030 target. A more conservative approach would be to apply a 2030 threshold based on SB 32 for any project with a horizon between 2021 and 2030 regardless of the status of the Scoping Plan Update.

When compared to this threshold, even relying on the EIR's own unsubstantiated input parameters, the Project would result in a significant GHG impact. SWAPE, p. 22. SWAPE divided the Project's total GHG emissions of 12,205 MT CO₂e/year by a service population of 2,520 people (2,445 residents and 75 employees), which amounts to 4.84 MT CO₂e/SP/year. *Id.*

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cont

DEIR Service Population Efficiency	
Project Phase	Proposed Project (MT CO ₂ e/year)
Total	12,205
Service Population	2,520
Service Population Efficiency	4.84
Threshold	2.6
Exceed?	Yes

This exceeds the recommended 2030 Land Use Efficiency Threshold" of 2.6 MT CO₂e/SP/year. As a result, SWAPE concludes that the Project will have a significant GHG impact. This impact must be disclosed, analyzed, and mitigated in a revised EIR. SWAPE's comments include a number of feasible mitigation measures that could reduce the Project's GHG emissions that should be considered.

IV. CONCLUSION

For the foregoing reasons, LIUNA requests the City decline to recommend approval of the Project and instead require preparation of a revised EIR that conforms with CEQA, as described above.

Sincerely,



Rebecca L. Davis