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Via Email

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Vice Chair Harpal Mann
Lee Guio, Commissioner
Jo Ann Lew, Commissioner
Scott Sakakihara, Commissioner
Kevin Finnerty, Alternate Commissioner
City of Union City
Planning Commission
c/o Anna Brown, City Clerk
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Carmela Campbell, Director
Economic and Community Development
City of Union City
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**Re: PLANNING COMMISSION AGENDA ITEM 5.B.1 (May 13, 2021)
Environmental Impact Report for the Station East Residential/Mixed Use
Project (SCH No. 2020039032); General Plan Amendment (AG-20-001);
Specific Plan Amendment (SP-20-001); Zoning Text Amendment (AT-20-
002); Zoning Map Amendment (A-20-001); Development Agreement (DA-20-
001); and Tentative Tract Map (TTM-20-001)**

Dear Chairperson Gonzalez, Vice Chair Mann, Honorable Commissioners, Ms. Brown, and 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") and Final Environmental Impact Report ("FEIR) prepared for the Station East Residential/Mixed Use Project proposed by Integral Communities in Union City, California (SCH No. 2020039032) ("Project").

This comment supplements LIUNA's comment letter regarding the DEIR submitted to the Union City Economic & Community Development Department on December 21, 2020, incorporated by reference herein ("LIUNA's DEIR Comment"). LIUNA's DEIR Comment raised concerns as to the DEIR's analysis and conclusion related to indoor and outdoor air quality, cancer risks from emissions of formaldehyde and diesel particulate matter, impacts to special-status species of wildlife, and greenhouse gas emissions.

Although the FEIR contained responses to LIUNA's DEIR Comment, LIUNA maintains

that the EIR fails to comply with the California Environmental Quality Act (“CEQA”) and fails to adequately analyze and mitigate the Project’s significant environmental impacts.

LIUNA’s DEIR Comment included an analysis by indoor air quality expert, Francis Offerman, PIH, who concluded that the DEIR failed to discuss, disclose, or mitigate the Project’s significant cancer risks from indoor emissions of formaldehyde. Mr. Offermann reviewed the FEIR’s responses to LIUNA’s DEIR Comment. Mr. Offermann’s reply to the FEIR are attached hereto as Exhibit A. As discussed below, the EIR still fails to discuss, disclose, or mitigate the significant impacts raised by Mr. Offermann in LIUNA’s DEIR Comment.

Therefore, LIUNA requests that the Planning Commission refrain from recommending approval of the Project at this time and instead direct staff to address these shortcomings in a revised draft environmental impact report (“RDEIR”) subject to public review and comment prior to the Commission’s consideration of the Project. LIUNA retains its right to further supplement these comments in writing and/or orally to the Planning Commission or on appeal to the City Council.

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.

The lead agency must evaluate comments on the draft EIR and prepare written responses in the final EIR (“FEIR”). Pub. Res. Code § 21091(d). The FEIR must include a “detailed” written response to all “significant environmental issues” raised by commenters. As the court stated in *City of Long Beach v. LA USD* (2009) 176 Cal.App.4th 889, 904:

The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful.

The FEIR’s responses to comments must be detailed and must provide a reasoned, good faith analysis. CEQA Guidelines § 15088(c). Failure to provide a substantive response to comment render the EIR legally inadequate. *Rural Land Owners Assoc. v. City Council* (1983) 143 Cal.App.3d 1013, 1020.

The responses to comments on a draft EIR must state reasons for rejecting suggested mitigation measures and comments on significant environmental issues. “Conclusory statements unsupported by factual information” are not an adequate response. CEQA Guidelines §§ 15088(b), (c); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348. The need for a substantive, detailed response is particularly appropriate when comments have been raised by experts or other agencies. *Berkeley Keep Jets*, 91 Cal.App.4th at 1367; *People v. County of Kern* (1976) 62 Cal.App.3d 761. A reasoned analysis of the issue and references to supporting evidence are required for substantive comments raised. *Calif. Oak Found. v. Santa Clarita* (2005) 133 Cal.App.4th 1219.

III. THE DEIR AND FEIR FAIL TO DISCUSS, DISCLOSE, OR MITIGATE THE PROJECT'S SIGNIFICANT CANCER RISK FROM INDOOR AIR EMISSIONS OF FORMALDEHYDE.

LIUNA's DEIR Comment discussed the Project's significant cancer risks to future residents from indoor emissions of formaldehyde emissions. LIUNA's concerns regarding health risks posed by the Project's formaldehyde emissions are based on the expert analysis and opinions of industrial hygienist and engineer Francis Offermann, PE CIH. Mr. Offermann's comment on the DEIR identified a significant health risk posed by the Project's emissions of formaldehyde, a potent carcinogen and toxic air contaminant ("TAC"), from composite wood products typically used in home and apartment building construction containing formaldehyde-based glues which off-gas formaldehyde over a very long time period. Mr. Offermann calculated that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 120 per one million, *assuming* all materials used for the Project are compliant with the California Air Resources Board's formaldehyde airborne toxics control measure. Offerman DEIR Comment, p. 3. This cancer risk level is 12 times the BAAQMD's CEQA significance threshold for airborne cancer risk of 10 per million. Mr. Offermann also calculated that employees of the Project's commercial spaces are expected to have an increased cancer risk of 17.7 per million, also exceeding the 10 per million significance threshold. Offermann DEIR Comment., p. 4. Mr. Offermann further noted 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 DEIR Comment, pp. 10-12.

Despite the City's duty to investigate issues relating to a project's potential environmental impacts, the City and the EIR have, thus far, attempted to deny Mr. Offermann's expert analysis and refuse to consider with any informed expertise the likely impacts of indoor formaldehyde emissions posed by the Project to future residents. *See County Sanitation Dist. No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, 1597-98. ("[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts."). Rather than objectively study this serious health threat, staff attempted to critique Mr. Offermann's expert analysis without itself bringing any expertise to bear on the Project's formaldehyde emissions. *See FEIR*, p. 3-97.

Instead of calculating the Project's indoor formaldehyde emissions, the City asserts, without any evidence of expertise, that since the Project would comply with CALGreen, and in turn would comply with CARB's ATCMs, the Project would have a less than significant impact and no mitigation is required. *FEIR*, p. 3-97. Mr. Offermann has reviewed the City's comments and prepared a response which is attached as Exhibit A to these comments. As Mr. Offermann's response shows, the City's failed to adequately respond to Mr. Offermann's comments and fails to provide substantial evidence that the Project will not have significant indoor air quality impacts.

Mr. Offermann first notes that while utilization of composite wood materials that meet

the CARB Phase II ATCMs would reduce cancer risks, it would not reduce cancer risks below 10 per million. Ex. A, p. 2. Additionally, CARB's Phase II ATCM program is not the certified equivalent of CEQA. *Id.* In his November 28 comments, Mr. Offermann provided calculations that show the use of CARB Phase II ATCM certified composite wood products do not ensure a cancer risk of less than 10 per million. *See* November 28 Offermann Comment, Appendix A.

Importantly, Mr. Offermann notes that the 2019 CALGreen building code does not impose any additional restrictions than those contained in the CARB Phase II ATCM. *See* Ex. A, p. 3. Since the permissible formaldehyde emission rates for composite wood products in the 2019 CALGreen building code are identical to CARB's Phase II ATCM, Mr. Offermann concludes that it does not insure that the indoor air will have concentrations of formaldehyde that meet the OEHHA cancer risks that substantially exceed 10 per million. *Id.*

If the City were to abide by its duty to investigate this potentially significant health issue, Mr. Offermann describes in detail the methodology that the City could use to more precisely estimate the Project's formaldehyde emissions. Offermann DEIR Comment, pp. 5-10. He also identifies the availability of mitigation, including a measure to require that the Project "[u]se 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 (CARB, 2009)." *Id.*, p. 13. It is now up to the City to correct its EIR to sufficiently disclose and analyze this impact.

Nor do the City's efforts to critique Mr. Offermann's expert comments stand-in as a sufficient analysis in the EIR of this potentially significant environmental impact of the Project. Mr. Offermann's expert comments are substantial evidence that, based on the available data, and without the benefit of the City investigating or gathering any information on formaldehyde emissions from the Project, the Project may have significant health risks on future residents from its emissions of formaldehyde. Because this impact was not addressed in the EIR for the Project, the EIR is insufficient and inadequate under CEQA. *See Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 510 (2018).

IV. CONCLUSION

For the foregoing reasons and the reasons stated in LIUNA's DEIR Comment, LIUNA requests the Planning Commission decline to recommend approval of the Project and instead require preparation of a revised DEIR to adequately discuss, disclose, and mitigate the Project's significant impacts.

Sincerely,



Brian B. Flynn
Lozeau Drury LLP