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VIA E-MAIL & e-Comment (April 17, 2020, Planning Commission Hearing)

April 16, 2020

San Diego County Planning Commission
COC Conference Center Hearing Room
5520 Overland Ave.
San Diego, CA 92123
Attn: Ann Jimenez, Planning Commission Secretary
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Mark Slovick, Project Manager
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RE: Agenda Item No. 1 - Otay Ranch Village 14 and Planning Area 16/19 and Addendum to Final EIR, SCH No. 2016121042

Dear Honorable Planning Commissioners, Ms. Jimenez and Mr. Slovick,

On behalf of the Southwest Regional Council of Carpenters (Collectively "**Commenter**" or "**Carpenters**"), my Office is submitting these comments on the County of San Diego's ("**County**" or "**Lead Agency**") Planning Commission's Agenda Item No. 1 for the Otay Ranch Village 14 and Planning Area 16/19 and Addendum to the Final Environmental Impact Report ("**Final EIR**" or "**FEIR**") (SCH No. 2016121042) ("**Project**").

The Carpenters is a labor union representing 50,000 union carpenters in six states, including in southern California, and has a keen interest in well-ordered land use planning and addressing the environmental impacts of development projects.

Commenter expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens*

for Local Control v. Bakersfield (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

Commenter expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

Commenter incorporates by reference all comments raising issues regarding the EIR submitted prior to certification of the EIR for the Project. *Citizens for Clean Energy v City of Woodland* (2014) 225 CA4th 173, 191 (finding that any party who has objected to the Project's environmental documentation may assert any issue timely raised by other parties).

Moreover, Commenter requests that the Lead Agency provide notice for any and all notices referring or related to the Project issued under the California Environmental Quality Act ("**CEQA**"), Cal Public Resources Code ("**PRC**") § 21000 *et seq*, and the California Planning and Zoning Law ("**Planning and Zoning Law**"), Cal. Gov't Code §§ 65000–65010. California Public Resources Code Sections 21092.2, and 21167(f) and Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency's governing body.

I. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

A. Background Concerning the California Environmental Quality Act

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 California Code of Regulations ("**CCR**" or "**CEQA Guidelines**") § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.' [Citation.]" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.

App. 4th 1344, 1354 (*"Berkeley Jets")*; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. CEQA Guidelines § 15002(a)(2) and (3). *See also, Berkeley Jets,* 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400. The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to "identify ways that environmental damage can be avoided or significantly reduced." CEQA Guidelines § 15002(a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any significant unavoidable effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081. CEQA Guidelines § 15092(b)(2)(A–B).

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position.' A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Jets*, 91 Cal.App.4th 1344, 1355 (emphasis added) (quoting *Laurel Heights,* 47 Cal.3d at 391, 409 fn. 12). Drawing this line and determining whether the EIR complies with CEQA's information disclosure requirements presents a question of law subject to independent review by the courts. (*Sierra Club v. Cnty. of Fresno* (2018) 6 Cal. 5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102, 131.) As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at 1355:

> A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.

The preparation and circulation of an EIR are more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. For the EIR to serve these goals, it must present information so that the foreseeable impacts of pursuing

the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. *Communities for a Better Environment v. Richmond* (2010) 184 Cal. App. 4th 70, 80 (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449–450).

B. The EIR Fails to Describe the PPA Adequately

It is well-established that "[a]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193. "A curtailed, enigmatic, or unstable project description draws a red herring across the path of public input." *Id.* at p. 198.

The Project's description has been curtailed, enigmatic, and unstable throughout the environmental review process, including the Addendum. The Addendum for the Proposed Project Amendment ("**PPA**") describes a project completely different from the Project analyzed in the Final EIR, or even tiered off of the earlier programmatic EIR. In fact, not only has the footprint of the Project changed significantly to include land not previously included in the Final EIR's impacts analyses but the Project has increased in size, by 147 dwelling units to a total of 1,266 units, which is a 13% increase from the previously Approved Project's 1,119 dwelling units. (Addendum, p. 6.)

The PPA however, calls for developing hundreds of acres of the previously unanalyzed and currently state-owned Rancho Jamul Ecological Preserve, which the California Department of Fish and Wildlife ("CDFW") acquired with public funding to permanently protect and preserve sensitive and endangered habitat and species, in addition to other natural and cultural resources.

Moreover, while the Addendum claims that a version of the PPA was previously analyzed as the Land Exchange Alternative in the Final EIR, such claim is unsupported. The Final EIR's Alternatives analysis did not provide *legally sufficient details* to explain whether the modified Project footprint and the proposed land exchange, as adopted by the PPA, were previously analyzed.

The failure to maintain a stable project description is a failure to proceed in the manner required by law subject to *de novo* review. *Washoe Meadows Community v. Department of Parks and Recreation* (2017) 17 Cal.App.5th 277, 286 ("When it is alleged a

DEIR is inadequate to 'apprise all interested parties of the true scope of the project,' the issue is one of law, and no deference is given to the agency's determination.")

C. The Addendum is Inadequate Because a Supplemental or Subsequent EIR is Required for the PPA

CEQA Guidelines provide that an agency must prepare an addendum to a prior EIR when changes or additions to the EIR are necessary. Still, none of the conditions in CEQA Guidelines § 15162 triggering preparation of a subsequent EIR have occurred. CEQA Guidelines §§ 15162, 15164. The lead agency's explanation for its decision not to prepare a subsequent EIR pursuant to CEQA Guidelines section 15162 should be included in an addendum and must be supported by substantial evidence. CEQA Guidelines § 15162(e). In short, the use of an addendum is a way to make minor corrections to an EIR without recirculating the EIR for further review. But even so, the use of addenda is neither codified nor approved by case law as a recent case approving the use of addenda (though under different circumstances), *Save our Heritage v. City of San Diego* (2018) 28 Cal.App.5th 656, 667, is currently pending review by the California Supreme Court.

A subsequent or supplemental EIR ("SEIR") is required where:

> (1) Substantial changes are proposed in the project which will require significant revisions of the previous EIR…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 concerning the circumstances under which the project is undertaken which will require significant revisions of the previous EIR…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…, 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;

Public Resources Code § 21166; CEQA Guidelines § 15162

Under the above-stated standard, the County was required to prepare an SEIR because the PPA was a substantial change with the Project involving both new significant environmental effects and a substantial increase in the severity of the previously identified significant effects. CEQA Guidelines § 15162(a). Not only does the PPA propose 147 additional dwelling units, which is a 13% increase from the previously Approved Project's 1,119 dwelling units, but the Project will also have a completely different footprint using State-owned conservation land. (Addendum, p. 6.)

Moreover, the County was required to prepare an SEIR because the circumstances under which the Approve Project was modified, which was through a unique, Dispute Resolution Agreement ("DRA"), to which the public was not a part of. The PPA was borne out of the DRA with the County, the Project Owner/Applicant, the U.S. Fish and Wildlife Service ("USFWS"), and CDFW. The DRA resulted in the PPA with an entirely different Project footprint that utilizes different land that was not previously analyzed in the Final EIR.

The Addendum acknowledges that the PPA will have more severe impacts than the Approved Project. With the increase in the number of the Project's dwelling units along with the entirely new Project site, which is part of the Rancho Jamul Ecological Preserve, there is substantial evidence that the Project will have a substantial increase in impacts across many disciplines, including transportation, air quality, greenhouse gas emissions, and energy impacts, then as previously disclosed in the Final EIR. And the Addendum fails to analyze, disclose and mitigate the PPA's impacts adequately. As a result, the County erred by failing to prepare an SEIR for the PPA, which substantially changed the Approved Project.

II. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE STATE PLANNING AND ZONING LAW

A. Background Concerning the State Planning & Zoning Law

California's Planning & Zoning Law, Cal. Government Code § 65000 *et seq* ("**Planning & Zoning Law**") requires California cities and counties to adopt a comprehensive, long-term general plan governing development. *Napa Citizens for Honest Gov. v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 352, citing Gov. Code §§ 65030, 65300. The general plan sits at the top of the land use planning hierarchy (*see DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773), and serves as a

"constitution" or "charter" for all future development. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.

General plan consistency is "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." *See Debottari v. Norco City Council* (1985) 171 Cal.App.3d 1204, 1213.

State law mandates two levels of consistency. First, a general plan must be internally or "horizontally" consistent: its elements must "comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." See Gov. Code § 65300.5; *Sierra Club v. Bd. of Supervisors* (1981) 126 Cal.App.3d 698, 704. A general plan amendment thus may not be internally inconsistent, nor may it cause the general plan as a whole to become internally inconsistent. *See DeVita*, 9 Cal.4th at 796 fn. 12.

Also, the Planning & Zoning Law requires "vertical" consistency, meaning that zoning ordinances and other land-use decisions also must be consistent with the general plan. See Gov. Code § 65860(a)(2) [land uses authorized by zoning ordinance must be "compatible with the objectives, policies, general land uses, and programs specified in the [general] plan."]; *see also Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184. A zoning ordinance that conflicts with the general plan or impedes the achievement of its policies is invalid and cannot be given effect. *See Lesher*, 52 Cal.3d at 544.

Finally, the Planning & Zoning Law requires that all subordinate land-use decisions, including conditional use permits, be consistent with the general plan. See Gov. Code § 65860(a)(2); *Neighborhood Action Group*, 156 Cal.App.3d at 1184.

A project cannot be found consistent with a general plan if it conflicts with a general plan policy that is "fundamental, mandatory, and clear," regardless of whether it is consistent with other general plan policies. *See Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 782-83; *Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1341-42 ("*FUTURE*"). Moreover, even in the absence of such direct conflict, an ordinance or development project may not be approved if it interferes with or frustrates the general plan's policies and objectives. *See Napa Citizens*, 91 Cal.App.4th at 378-79; *see also Lesher*, 52 Cal.3d at 544 (zoning ordinance restricting development conflicted with growth-oriented policies of the general plan).

B. The Project is Inconsistent with the San Diego General Plan

The County of San Diego's General Plan Housing Element's policy H 1.9 "require[s] developers to provide an affordable housing component when requesting a General Plan amendment for a large-scale residential project when this is legally permissible." General Plan, Housing Element, p. 6-13. However, the PPA does not require any affordable housing, and as a result, the PPA is inconsistent with the General Plan.

The Planning Commission Hearing Report dated March 20, 2020, erroneously states that the PPA is not a General Plan Amendment and does not require a specific affordable housing requirement. However, the agenda for the Planning Commission's April 17, 2020, hearing acknowledges that the PPA involves the approval of a General Plan Amendment. Planning Commission Agenda, p. 2.

Therefore, the PPA is inconsistent with the General Plan.

C. The PPA is Inconsistent with the San Diego Multiple Species Conservation Program (MSCP) and the MSCP County Subarea Plan

With the PPA, the County is seeking to amend the MSCP County Subarea Plan to extend take authorization to those areas of PV2 and PV3. But as the County admits, the PPA in and of itself violates the County's obligations under the adopted MSCP and Subarea Plan.

The MSCP is the result of many years of intense planning by public agencies, private conservationists, and developers.[1] It was intended to:

> …provide[] for large, connected preserve areas that address several species at the habitat level rather than species-by-species or area-by-area. This creates a more efficient and effective preserve system as well as better protection for the rare, threatened, and endangered species in the region. Mitigation from development and local, state, and federal funding protect land that has been set aside for preservation. This preservation may take the form of an open space or conservation easement that dedicates the land in perpetuity, or actual purchase of fee title by a public agency or environmental land trust.

Id.

[1] https://www.sandiegocounty.gov/content/sdc/pds/mscp/sc/overview.html#planoverview

Moreover, section 5.4.2 of the MSCP County Subarea Plan provides examples of when adjustments to the Subarea Plan Preserve may be desirable, which include: 1) when new biological information is obtained through site-specific studies; 2) unforeseen engineering design opportunities or constraints may be identified during the siting or design of projects that require modification of the preserve boundary; and/or 3) a landowner may request that a portion of all of his property be included within the preserve boundary.[2] None of the circumstances warranting an amendment exists here, and as a result, the PPA is inconsistent with the MSCP County Subarea Plan.

III. CONCLUSION

Commenter requests that the County prepare and circulate an SEIR to address the concerns mentioned above. If the County has any questions or concerns, feel free to contact my Office.

Sincerely,

Mitchell M. Tsai
Attorneys for Southwest Regional
Council of Carpenters

[2] https://www.sandiegocounty.gov/content/dam/sdc/pds/mscp/docs/SCMSCP/FinalMSCPProgramPlan.pdf