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***Via Email***

February 12, 2021

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City of Milpitas  
Planning Department  
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**Re: Comment on Draft Environmental Impact Report, 1000 Gibraltar Drive Project (SCH No. 2020069024)**

Dear Ms. Thompson:

This letter is submitted on behalf of the **Laborers International Union of North America, Local Union No. 270** and its members living and/or working in or around the City of Milpitas (“LIUNA”) regarding the Draft Environmental Impact Report (“DEIR”) prepared for the 1000 Gibraltar Drive Project (SCH No. 2020069024) (the “Project”). After reviewing the DEIR, we conclude that the DEIR fails as an informational document and fails to impose all feasible mitigation measures to reduce the Project’s impacts. LIUNA requests that the City of Milpitas (“City”) address these shortcomings in a revised draft environmental impact report (“RDEIR”) and recirculate the RDEIR prior to considering approvals for the Project.

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**I. PROJECT DESCRIPTION**

The Project proposes to demolish all existing on-site buildings, comprised of 397,009 square feet, parking lots, and associated improvements, and construct a 491,040-square foot tilt-up concrete industrial building with two supporting offices at the northwest and southeast corners and surface parking on all sides of the building and a proposed FAR of .38. Approximately 485,130 square feet of warehouse and 4,910 square feet of office space is proposed.

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**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

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CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

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*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 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; CEQA Guidelines § 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.

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The EIR is the very heart of CEQA “and the integrity of the process is dependent on the adequacy of the EIR.” *Berkeley Jets*, 91 Cal. App. 4th 1109, 1355. CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. Pub. Res. Code § 21100(b)(1); Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354. The EIR must not only identify the impacts, but must also provide “information about how adverse the impacts will be.” *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831. 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*, 221 Cal.App.3d 692, 732. “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*, 103 Cal.App.4th 98, 109.

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 (emphasis added) (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.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

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 University of California* (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.’” 6 Cal.5th at 516, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197. “The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency’s factual conclusions.” 6 Cal.5th at 516. Whether a discussion of a potential impact is sufficient “presents a mixed question of law and fact. As such, it is generally subject to independent review. However, underlying factual determinations—including, for example, an agency’s decision as to which methodologies to employ for analyzing an environmental effect—may warrant deference.” *Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 516. 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

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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.

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

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

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

### III. DISCUSSION

#### A. The City Unduly Restrains the Project's Alternatives and Their Implementation and Fails to Adopt the Environmentally Superior Alternative.

An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. CEQA Guidelines § 15125.6. The analysis of project alternatives must contain a quantitative assessment of the impacts of the alternatives. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733-73.

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An overly narrow definition of project objectives renders the alternatives analysis inadequate. To narrowly define the primary "objective" of the proposed project itself constitutes a violation of CEQA since such a restrictive formulation would improperly foreclose consideration of alternatives. See, *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, holding that when project objectives are defined too narrowly an EIR's treatment of analysis may also be inadequate. As a leading treatise on CEQA compliance cautions, "[t]he case law makes clear that...overly narrow objectives may unduly circumscribe the agency's consideration of project alternatives." Remy, Thomas, Moose & Manley, *Guide to CEQA* (Solano Books, 2007), p. 589.

CEQA prohibits a project sponsor from limiting its ability to implement the project in a way that precludes it from implementing reasonable alternatives to the project. See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736 (alternatives may not be artificially limited

by applicant's prior contractual commitments that would prevent sponsor from implementing reasonable alternative).

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*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 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; CEQA Guidelines § 15092(b)(2)(A) & (B). A "feasible" alternative is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. Pub. Res. Code § 21061.1; CEQA Guidelines § 15364.

The lead agency is required to select the environmentally preferable alternative unless it is infeasible. As explained by the Supreme Court, an environmentally superior alternative may not be rejected simply because it is more expensive or less profitable:

The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.

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*Citizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1180-81; *see also, Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322.

In addition, an environmentally superior alternative may not be rejected because it does not meet all of the Project's objectives. Inconsistency with only some of the Project Objectives is not necessarily an appropriate basis to eliminate impact-reducing project alternatives from analysis in an EIR. CEQA Guidelines § 15126.6(c), (f); *see also Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.

The objectives identified in the DEIR essentially limit the alternatives to the proposed project. The objectives include the project having to be a logistics center and to satisfy the demand for a logistics center. DEIR, p. III-26. As a result, no other use consistent with the General Plan and the current zoning is considered. The objectives to "redevelop and maximize the buildout potential" and to "[c]onstruct an infill development of up to approximately 500,000 square feet" unduly prohibit consideration of a more modest sized project, one that does not require demolition of the existing facility, or a different industrial use with less air quality, greenhouse gas ("GHG"), and transportation impacts. *Id. See* Milpitas Code of Ordinances, § XI-10-7.02.

The DEIR prepared for the Project only considers a no project alternative and an alternative with a 25 percent reduction in building area compared to the proposed Project. DEIR, pp. VI-5, VI-10.



The DEIR fails to formulate or consider alternatives that would reduce the significant air quality and GHG emissions and transportation impacts to less than significant levels. Additionally, the City failed to adopt the environmentally superior alternative that would reduce some of the Project's impacts. The DEIR states that the alternative with a 25 percent reduction in building area, the environmentally superior alternative, was not selected because it "would not meet all of the Project's objectives." DEIR, p. VI-14. This justification is insufficient and does not constitute substantial evidence that the alternative that would reduce the Project's impacts is infeasible. Without any such evidence, the City would abuse its discretion by approving a project with significant impacts that could be lessened or avoided by adopting a project alternative.

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**B. The DEIR Fails to Establish an Accurate Baseline for Sensitive Biological Resources and Fails to Adequately Analyze the Project's Impacts on Biological Resources.**

Expert biologist Shawn Smallwood, Ph.D. has reviewed the DEIR and supporting documents prepared for the Project and visited the Project site on February 3, 2021. Based on his observations of the site and review of the DEIR, Dr. Smallwood points out numerous shortcomings in the City's baseline assessment of the presence of species at the site, failure to evaluate impacts that will result from the Project, and instances where the DEIR's assertions are insufficient or not supported by substantial evidence. *See Exhibit A.*

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**1. The DEIR provides an inadequately baseline and fails to adequately analyze the Project's impacts on biological resources.**

As Dr. Smallwood points out, the City did not perform any biological resource surveys at the site of the proposed Project and did not review available databases or information sources on the occurrence histories and occurrence likelihoods of special-status species of wildlife in the area. *Id.* at 8. Instead, the City simply assumed that special-status species cannot occur in an environment transformed by urban, commercial and industrial development. *See Initial Study*, pp. 27-28. However, as Dr. Smallwood asserts, this is incorrect.

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Dr. Smallwood visited the Project site on February 3, 2021 and observed at least 30 species of birds at the site, and 32 total species of vertebrate wildlife within two hours. Ex. A, pp. 1-2. Dr. Smallwood also reviewed eBird and iNaturalist for occurrence records of special-status species of vertebrate wildlife in the project area, which turned up 49 special-status species that could use the site for staging, stopover, flyover, foraging, cover, roosting or breeding. *See id.* at 8-9. Dr. Smallwood observed a Cooper's hawk hunting two Eastern gray squirrels on the Project site, mew gulls and California gulls kittling over the site and using it for lift in thermals generated by the vegetated areas, turkey vultures soaring upward in the site's thermals, numerous other bird species, and evidence of foraging on site, as well as the start of the breeding season. *Id.* at 1-2. The Project site also includes an abundance of various cavities and substrates, which bats roost on or within. *Id.* at 8. However, the City has not taken a look into the potential bat roosts on the site. In failing to establish an adequate baseline of biological resources, the DEIR fails to adequately analyze the Project's impacts to biological resources.



**2. The DEIR fails to address the impacts on wildlife from additional traffic generated by the Project.**

According to the DEIR, the Project will generate an average daily trip rate of 2,926 cars and vans and 377 heavy duty trucks. DEIR at IV.E-27. Yet the DEIR provides no analysis of the impacts on wildlife that will be caused by an increase in traffic on the roadways servicing the Project.

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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Across North America traffic impacts have taken devastating tolls on wildlife (Forman et al. 2003). 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.

Ex. A, p. 12. Dr. Smallwood estimated that the front-end, blunt-force mortality as a result of the Project's traffic would be 82,302 birds annually. *Id.* at 13. An RDEIR is required to analyze and mitigate this potentially significant impact on wildlife.

**3. The DEIR fails to address the Project's impacts on wildlife resulting from bird strikes.**

Dr. Smallwood indicates that the Project, as proposed, will result in significant impacts on birds colliding with the Project's clear glass windows. Ex. A, p. 14. Specifically, Dr. Smallwood predicts "62 bird deaths per year" due to the Project. *Id.* The Project's plans show ample use of windows on portions of the building's facades. Based on the DEIR's depictions of the Project, Dr. Smallwood estimates that the Project would use at least 844.8 square meters of glass on the building's facades. *Id.* Despite emerging scientific literature about window collisions as one of the largest sources of avian mortality worldwide, the City and the DEIR do not assess this potential impact.

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In order to mitigate these potential impacts, Dr. Smallwood recommends adherence to available guidelines on building design intended to minimize collision hazards to birds, such as those by the American Bird Conservancy ("ABC"). *Id.* at 15. ABC recommends: (1) minimizing use of glass; (2) placing glass behind some type of screening (grilles, shutters, exterior shades); (3) using glass with inherent properties to reduce collisions, such as patterns, window films, decals or tape; and (4) turning off lights during migration seasons. *Id.* An RDEIR is required to analyze and mitigate this potentially significant impact.

**4. The DEIR fails to adequately analyze the Project's impacts on wildlife movement.**

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The DEIR states that “[b]ecause the Project site is within a developed urban area, there are no major wildlife movement corridors that pass through or are adjacent to the site.” DEIR, p. IV.A-7. However, the protected and non-protected trees on the Project site provide nesting substrate to birds. Ex. A, p. 8. The proposed removal of 88 protected trees on the Project site would contribute to an ongoing trend of declining birds in North America. *Id.* As Dr. Smallwood discusses, a recent study documented a 29% decline in overall bird abundances across North America over the last 48 years, driven primarily to habitat loss and habitat fragmentation. *Id.* In removing the 88 protected trees, Dr. Smallwood estimates that the lost capacity of both breeders and annual fledgling production would total 32,320 birds over the first century of the Project’s construction, resulting in a significant impact. *Id.* at 11.

Dr. Smallwood also notes that the DEIR’s conclusion that no major wildlife movement corridors pass through or are adjacent to the site is based on a false CEQA standard. The primary phrase of the CEQA standard on wildlife movement goes to wildlife movement regardless of whether movement is channeled by a corridor. *Id.* “A site such as the proposed project site is critically important for wildlife movement because it composes an increasingly diminishing patch of open space within a growing expanse of anthropogenic uses, forcing more species of birds to use the site for stopover and staging during migration, dispersal, and home range patrol.” *Id.* The proposed Project would cut birds and bats off from stopover, staging and roosting opportunities, forcing them to travel even farther between remaining stopover areas along migration routes, interfering with wildlife movement in the region. *Id.* With the removal of trees and the development of the Project, the site would no longer allow the existing movement of species through the site while hunting and foraging, such as the Cooper’s hawk or other species observed at the Project site by Dr. Smallwood.

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**C. The DEIR Relies on Unsubstantiated Input Parameters to Estimate Project Emissions and Thus Failed to Adequately Analyze the Project’s Air Quality Impacts.**

The DEIR relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.2 (“CalEEMod”). This model relies on recommended default values for site-specific information related to a number of factors. The model is used to generate a project’s construction and operational emissions. Environmental consulting firm 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. *See* Exhibit B. This results in an underestimation of the Project’s emissions. The EIR must be revised to disclose the full extent of the Project’s air quality and greenhouse gas impacts.

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**1. The DEIR relies on an incorrect land use type.**

The Project includes a tilt-up concrete creative industrial building. As such, the model should have modeled the proposed industrial space as “General Light Industry” yet the CalEEMod output files demonstrates that the models include the proposed industrial land use space as “Refrigerated Warehouse-Retail.” *See* DEIR Appendix F, pp. 4, 45. By incorrectly modeling the proposed industrial land use space as warehouse space, the model may

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underestimate the Project's construction-related and operational emissions and should not be relied upon to determine the Project's significance. Ex. B, p. 5.

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**2. The DEIR fails to include all required demolition.**

The DEIR states that the proposed Project includes the demolition of all existing on-site buildings representing 397,009 square feet, parking lots, and associated improvements. DEIR, p. III-14. The air model calculates a default number of hauling trips based on the amount of demolition material input into the model. Ex. B, p. 6. However, the CalEEMod output files only include 989 demolition hauling trips, whereas if 397,009 square feet of demolition would require 1,724 trips. *Id.* The failure to include the total amount of required demolition results in the underestimation of emissions associated with fugitive dust, site removal, and exhaust from hauling trucks traveling to and from the site and therefore should not be relied on to determine the significance of the Project's air quality impacts.

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**3. The DEIR makes unsubstantiated changes to off-road construction equipment unit amounts and usage hours.**

The CalEEMod output files demonstrate the default off-road construction amounts and usage hours were altered in the Project's models. *See* DEIR Appendix F, pp. 7-9, 48-50. The justification provided for these changes is: "Update to project-specific information." *Id.* at pp. 5, 46. Additionally, the DEIR includes three construction assumptions, including construction schedule and equipment, material movement, and demolition. *See* DEIR, p. IV.B-20, Table IV.B-5. However, SWAPE states these justifications are insufficient for three reasons.

First, while the DEIR states that the default construction schedule and the list of off-road construction equipment were modified according to the information provided by the Project Applicant, the DEIR fails to mention the revised number of construction equipment pieces or justify the specific changes. Ex. B, p. 9.

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Second, the DEIR's claim that the daily hours of operation for each piece of equipment were modified to equal the corresponding total hours of operation for the equipment in each construction phase similarly fails to mention the revised off-road construction equipment usage hours or justify the specific changes. *Id.*

Third, the source provided for the construction assumptions is Appendix F, or the CalEEMod output files themselves. However, the Project documents should substantiate the changes included in the CalEEMod, not vice versa. *Id.*

By including these unsubstantiated changes to the default number of construction equipment pieces and hours, the models may underestimate the Project's construction-related emissions and should not be relied upon to determine the significance of the Project's air quality impacts.

**4. The DEIR underestimates operational vehicle trip rates.**

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According to the DEIR, the Project is expected to generate 3,303 average daily vehicle trips throughout operation. *See* DEIR Appendix G, p. 31. However, only 3,261.64 average weekday trips, 987.70 average Saturday trips, and 578.69 average Sunday trips are included in the models. Ex. B, p. 10. The average weekday, Saturday, and Sunday vehicle trip numbers are therefore underestimated by 41, 2,315, and 2,724 trips, respectively. *Id.* As such, the trip rates inputted into the model are underestimated and inconsistent with the information provided in the DEIR and should not be relied upon to determine Project significance.

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**5. The DEIR makes unsubstantiated changes to operational vehicle fleet mix.**

Review of the CalEEMod output files demonstrates that the models include several changes to the default operational vehicle fleet mix percentages. *See* DEIR Appendix F, pp. 6-7, 47-48. The operational fleet mix for “General Office Building” is assumed to consist of 50% light-duty auto (“LDA”) and 50% light-duty trucks (“LDT1” and “LDT2”); the operational fleet mix for “Parking Lot” is assumed to consist of 20% LDA, 20% LDT1 and LDT2, 20% medium-duty trucks (“MDV”), and 40% light heavy-duty trucks (“LHD1” and “LHD2”); and the operational fleet mix for “Refrigeration Warehouse-Rail” is assumed to consist of 85% medium heavy-duty trucks (“MHD”) and 15% heavy heavy-duty trucks (“HHD”). The justification provided for these changes is: “Fleet mix for commute trips, vans, and truck trips were based on another similar warehouse project.” DEIR Appendix F, pp. 5, 46. This is inadequate for several reasons as described. *See* Ex. B, p. 13. By including unsubstantiated changes to the default operational vehicle fleet mix percentages, the model may underestimate the Project’s mobile-source operational emissions and should not be relied upon to determine the Project’s significance.

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**6. The DEIR makes unsubstantiated changes to operational vehicle emission factors.**

Review of the CalEEMod output files demonstrates that the mitigated 2023 model includes several changes to the default operational vehicle emission factors. *See* DEIR Appendix F, pp. 50-53. The justification provided for these changes is: “Emission Factor updated for 2010+ model year MHD and HHD trucks.” *Id.* at 46. However, these changes are unjustified for two reasons. First, the justification fails to provide a source for the purported 2010+ model year MHD and HHD emission factors. Ex. B, p. 13. Second, the DEIR and associated documents fail to mention vehicle emission factors or justify the changes whatsoever. *Id.* at 13-14. Therefore, the model may underestimate the Project’s mobile-source operational emissions and should not be relied upon to determine the Project’s significance.

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**7. The DEIR makes unsubstantiated changes to wastewater treatment system percentages.**

Review of the CalEEMod output files demonstrates that the models include several changes to the default wastewater treatment system percentages. *See* DEIR Appendix F, pp. 10,

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54. The model assumes the Project's wastewater would be treated 100% aerobically and the justification provided for the changes is: "Water treatment in this area does not include septic tank or lagoons." *Id.* at 5, 46. However, this justification is incorrect for two reasons. First, the DEIR fails to provide a source or substantiate the claim that wastewater treatment does not include septic tanks or lagoons. Ex. B, p. 14. Second, review of the City's website demonstrates that wastewater is treated at the City of San Jose wastewater treatment facility. *Id.* However, the City of San Jose's website demonstrates that anaerobic digestion in septic tanks is part of the wastewater treatment process. *Id.* at 14-15. As such, the model is incorrect in assuming that 100% of the Project's wastewater would be treated aerobically and the models may underestimate the Project's greenhouse gas emissions and should not be relied on to determine the Project's significance.

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**D. The Project Will Have a Significant Impact on Human Health.**

**1. The DEIR lacks substantial evidence to support its finding that the Project's emissions will not cause a significant health impact.**

The DEIR incorrectly concludes that the Project will have a less-than-significant health risk impact. *See* DEIR, p. IV.B-30. Specifically, the DEIR states, "the Project's emissions of DPM and PM<sub>2.5</sub> during construction and operation would have a less-than-significant cumulative impact on nearby sensitive receptors; therefore, no mitigation measures are required." *Id.* at IV.B-29. However, as SWAPE explains, the DEIR's analysis of the Project's health risk impacts, as well as the subsequent less-than-significant impact conclusion, is incorrect for two reasons. Ex. B, p. 18.

First, the DEIR indicates that the Project's exhaust PM<sub>10</sub> emissions were assumed to be diesel particulate matter ("DPM"), but the exhaust PM<sub>10</sub> emission rate utilized in the Project's health risk assessment ("HRA")) does not match the exhaust PM<sub>10</sub> value reported by the Project's CalEEMod output files. *Id.* Both the DEIR and the "Health Risk Assessment Parameters and Results" section of Appendix F fail to explain how the exhaust PM<sub>10</sub> was calculated otherwise. *Id.*

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Second, the DEIR's claim that the Project's health risk impacts would be less than significant because the Project's estimated cancer risk would not exceed the Bay Area Air Quality Management District ("BAAQMD") threshold of 100 in one million for cumulative sources is incorrect. *Id.* The BAAQMD provides both an individual project cancer risk threshold of 10 in one million and cumulative threshold "for all local sources" of 100 in one million. As such, the Project's construction-related and operational cancer risks should have been summed and compared to the BAAQMD threshold of 10 in one million for individual projects. *Id.* By incorrectly comparing the Project's cancer risk to the BAAQMD threshold of 100 in one million for all local sources, the DEIR fails to adequately evaluate the Project's potential health risk impacts. *Id.*

With the above inaccuracies, the DEIR's conclusion that the Project will not result in a significant impact on human health is not supported by substantial evidence.

**2. SWAPE conducted a screening-level health risk assessment that indicates a significant health risk impact.**

SWAPE prepared a screening-level HRA to evaluate potential impacts from Project construction and operation. SWAPE used AERSCREEN, the leading screening-level air quality dispersion model. Ex. B, p. 18. SWAPE used a sensitive receptor distance of 225 meters to represent the maximally exposed individual and analyzed impacts to individuals at different stages of life based on OEHHA and BAAQMD guidance utilizing age sensitivity factors. *Id.* at 19-21.

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SWAPE found that the excess cancer risk for children and infants over the course of Project construction and operation are approximately 27 and 29 in one million, respectively. *Id.* at 21. Moreover, the excess lifetime cancer risk over the course of a residential lifetime is approximately 60 in one million. *Id.* The risks to children, infants, and lifetime residents all exceed the BAAQMD's threshold of 10 in one million. SWAPE's analysis constitutes substantial evidence that the Project may have a significant health impact as a result of diesel particulate emissions. The City must prepare a revised EIR with an HRA which makes a reasonable effort to connect the Project's air quality emissions and the potential health risks posed to nearby receptors in order to evaluate the Project's health risk impact and to include suitable mitigation measures.

**E. The DEIR's Discussion of the Project's GHG Impacts is Insufficient and Not Supported by Substantial Evidence.**

SWAPE's review of the EIR's discussion of the Project's GHG emissions has identified a number of flaws in the EIR's analysis. These include concerns stemming from the unsubstantiated inputs to the air modeling. Ex. B, p. 23. Second, the DEIR relies on an incorrect quantitative GHG threshold. *Id.* The DEIR relies on the "Interim 2030 GHG Threshold" of 2.9 MT CO<sub>2</sub>e/SP/year. DEIR, p. IV.C-19. However, instead of calculating its own threshold, the DEIR should have relied on the AEP's "2030 Land Use Efficiency Threshold" of 2.6 MT CO<sub>2</sub>e/SP/year, which is widely utilized by projects within the BAAQMD. Ex. B, p. 23.

Third, although the DEIR concludes that the Project's GHG emissions will be significant and unavoidable, SWAPE points out a long list of mitigation measures that were not considered or required by the EIR. *See id.* at 28-35. An agency may adopt a statement of overriding considerations only *after* it has imposed all feasible mitigation measures to reduce a project's impact to less than significant levels. CEQA Guidelines §§ 15126.4, 15091. CEQA prohibits agencies from approving projects with significant environmental impacts when feasible mitigation measures can substantially lessen or avoid such impacts. Pub. Res. Code § 21002. As explained in CEQA Guidelines section 15092(b)(2), an agency is prohibited from approving a project unless it has "[e]liminated or substantially lessened all significant effects on the environment where feasible." The City cannot proceed with adopting a statement of overriding considerations for the Project without first identifying and discussing all of the feasible mitigation measures to address the Project's GHG impacts. Prior to approving the Project, the

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EIR should be revised to discuss and incorporate all feasible mitigation measures reducing its GHG impacts, including the measures identified by SWAPE. The DEIR's failure to consider other alternative industrial uses that might reduce the GHG impacts also leaves the City in a position precluding its adequate consideration of ways to avoid these significant impacts.

Fourth, the DEIR incorrectly relies on the City's Climate Action Plan ("CAP"). Ex. B, p. 25. The DEIR states that with mitigation measures consistent with the CAP, the Project would have a less-than-significant impact related to conflict with the applicable plan, policy, and regulations. *See* DEIR, p. IV.C-25. However, as SWAPE points out, the City's CAP is not qualified beyond 2020. Ex. B, p. 26. The City's CAP is outdated and inapplicable to the Project. *Id.*

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Cont.

Lastly, the DEIR relies on the Project's consistency with CARB's 2017 Scoping Plan in order to determine the significance of the Project's GHG impact yet fails to consider the performance-based standards under the applicable CARB 2017 Scoping Plan. *See id.* at 26-27. The Project exceeds the CARB 2017 Scoping Plan performance-based daily VMT per capita projects and therefore conflicts with the CARB 2017 Scoping Plan and SB 375. As such, the DEIR's claim that the proposed Project would not conflict with the CARB 2017 Scoping Plan is incorrect and unsubstantiated.

#### IV. CONCLUSION

For the foregoing reasons, LIUNA believes that the 1000 Gibraltar Project DEIR is wholly inadequate. LIUNA urges the City to prepare an RDEIR that conforms with CEQA, as described above.

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Sincerely,



Paige Fennie  
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