Item # 1
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SUPPLEMENTAL # 1

LOZEAU DRURY LLP
T 510.836.4200
F 510.836.4205
1939 Harrison Street, Ste. 150
Oakland, CA 94612
www.lozeaudrury.com
paige@lozeaudrury.com

May 25, 2021 *Via E-mail*

Mohammad Habib - Chair
Malisha Kumar - Vice-Chair
Joseph Mueller
Wayne Tanda
Laura Gonzalez-Escoto
Liam Downey
Juan Miguel Munoz-Morris
Jennifer Carman, Community Services Director
Planning Commission
City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037
pcpubliccomment@morganhill.ca.gov
Planning_Commission@morganhill.ca.gov
jennifer.carman@morganhill.ca.gov

Re: Comments Regarding The Redwood Tech at 101 - SD2020-0011/SR2020-0029 Through SR2020-0033 (APNS 728-30-006 AND 728-30-009)

Dear Chair Habib, Vice-Chair Kumar, Commissioners Mueller, Tanda, Gonzalez-Escoto, Downey, Munoz-Morris, and Ms. Carman:

I am writing on behalf of the Laborers International Union of North America, Local Union 270 and its members living in the City of Morgan Hill ("LIUNA") regarding the proposed The Redwood Tech at 101 Project, SD2020-0011/SR2020-0029 Through SR2020-0033, a proposed industrial park consisting of five concrete tit-up buildings totaling about 501,000 square feet in to be constructed on four separate lots of about 29 acres at 1065 Half Road, on the north side of the intersection of Condit Road and Half Road (APN728-30-006 and 728-30-009) ("Project").

LIUNA is concerned that the City of Morgan Hill ("City") is proposing to approve the Project without adequate environmental review under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, *et seq*. The staff report improperly proposes to exclude the Project's uses from the CEQA analysis for the development, thus undermining the already truncated CEQA analysis. The staff report also suggests inaccurately that the 2035 General Plan programmatic environmental impact report ("General Plan EIR") addressed this site-specific Project sufficiently to rely upon 14 Cal. Admin. Code 15183 or without preparing a tiered environmental review. Staff's cursory analysis, prepared without the benefit of an initial

study reviewing the whole project's potential impacts, does not comply with CEQA's requirements and is inconsistent with the City's process for reviewing proposed vesting tentative parcel maps.

LIUNA respectfully requests that the Planning Commission not approve the Project until such time as the City has prepared an initial study followed by either a mitigated negative declaration ("MND") or an EIR for the Project prior to any approvals involving the Project.

I. LEGAL STANDARD

Once a program EIR has been prepared, "[s]ubsequent activities in the program must be examined in light of the program EIR to determine whether an additional environmental document must be prepared." 14 CCR ("CEQA Guidelines") § 15168(c). The first consideration is whether the activity proposed is covered by the PEIR. ***Id.*** If a later project is outside the scope of the program, then it is treated as a separate project and the PEIR may not be relied upon in further review. ***Sierra Club v. County of Sonoma*** (1992) 6 Cal.App.4th 1307. The second consideration is whether the "later activity would have effects that were not examined in the program EIR." CEQA Guidelines § 15168(c)(1). A PEIR may only serve "to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project." ***Sierra Nevada Conservation v. County of El Dorado*** ("***El Dorado***") (2012) 202 Cal.App.4th 1156. If the PEIR does not evaluate the environmental impacts of the project, a tiered EIR must be completed before the project is approved. ***Id.*** For these inquiries, the "fair argument test" applies. ***Sierra Club***, 6 Cal.App.4th 1307, 1318; ***See also Sierra Club v. County of San Diego*** (2014) 231 Cal.App.4th 1152, 1164 (**"**when a prior EIR has been prepared and certified for a program or plan, the question for a court reviewing an agency's decision not to use a tiered EIR for a later project 'is one of law, i.e., the sufficiency of the evidence to support a fair argument.'").

Under the fair argument test, a new EIR must be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." ***Sierra Club***, 6 Cal. App. 4th at 1316 (quotations omitted). When applying the fair argument test, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." ***Id***. at 1312. "[I]f there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence." ***Id***. at 1319.

In ***Friends of College of San Mateo Gardens*** the California Supreme Court explained the differing analyses that apply when a project EIR was originally approved and changes are being made to the project, and when a tiered program EIR was originally prepared and a subsequent project is proposed consistent with the program or plan:

> For project EIRs, of course, a subsequent or supplemental impact report is required in the event there are substantial changes to the project or its circumstances, or in the event of material new and previously unavailable information. (***Friends of Mammoth***, citing §

> 21166.) In contrast, when a tiered EIR has been prepared, review of a subsequent project proposal is more searching. **If the subsequent project is consistent with the program or plan for which the EIR was certified, then 'CEQA requires a lead agency to prepare an initial study to determine if the later project may cause significant environmental effects not examined in the first tier EIR.'** (*Ibid*. citing Pub. Resources Code, § 21094, subds. (a), (c).) 'If the subsequent project is not consistent with the program or plan, it is treated as a new project and must be fully analyzed in a project—or another tiered EIR if it may have a significant effect on the environment.' (*Friends of Mammoth*, at pp. 528–529, 98 Cal.Rptr.2d 334.)

Friends of Coll. of San Mateo Gardens v. San Mateo County Cmty. Coll. Dist. ("*San Mateo Gardens*") (2016) 1 Cal.5th 937, 960.

The City's General Plan EIR was prepared in accordance with CEQA's PEIR provisions and subsequent projects must undergo the tiered review process just described. *See* General Plan DEIR, p. 2-2. CEQA requires the City to prepare an initial study to determine if the Project *may* cause significant environmental effects not examined in the General Plan EIR. Pub. Res. Code § 21094. As discussed below, there is substantial evidence supporting a fair argument that the Project may result in a number of potential environmental impacts that were not previously analyzed in any of these EIRs. Accordingly, an initial study followed by an MND or EIR must be prepared for the Project.

II. ARGUMENT

A. The City Must Comply With CEQA for the Whole Project Prior to Issuing Any Approvals of the Project.

The CEQA analysis presented in the staff report is fundamentally flawed because it improperly recommends for the City to approve the Project prior to complying with CEQA for the whole project, *i.e.*, its foreseeable uses. Staff suggests that the City may make a CEQA determination and approve the proposed Design Permit and the Vesting Tentative Parcel Map separate from any future conditional use permits for the Project. Staff claims that "[n]o other approvals are required at this time." Packet Pg. 7. Staff further asserts that "[s]hould a future use on the site require a conditional use permit, that user will be responsible for conducting environmental review for the proposed use as required under CEQA." *Id*., p. 19. This two-tiered approach to the Project's CEQA review violates CEQA's prohibition on approving any aspect of a proposed project prior to completing the environmental review for the whole project required by CEQA. Moreover, it is inconsistent with the City's requirements for processing a proposed vested tentative map.

The proposed action items include both the Project's design permit and a vesting tentative parcel map. The City's Code sets forth the process and information required to process a vesting tentative parcel map application. The City's approval of a vesting tentative map provides the applicant with a vested right to proceed with the proposed development: "When the

city approves or conditionally approves a vesting tentative map, that approval shall confer a vested right to proceed with development in substantial compliance with the ordinances, policies and standards in effect on the date the city has determined that the application for approval of the vesting tentative map is complete pursuant to Section 65943 of the Government Code." Muni. Code §17.50.040(A). As a result, the City's Code requires additional information and considerations that the City must consider in making its discretionary decision whether or not to approve a proposed vesting tentative parcel map. In particular, the City is not authorized to defer or not address the proposed uses of the development proposed by the tentative map. Moreover, given the vesting implications of the City's decision, the decisionmakers must have access to an environmental review of the whole Project, including its uses and not just its building design or proposed number of parcels.

Particularly relevant here is the express requirement that, "[i]f a conditional use permit is required, such permit shall be processed ***prior or concurrently with the vesting tentative map.*** Muni. Code § 17.50.060(B)(2) (emphasis added). As described in the staff report, the Project includes 232,000 square feet of warehousing use. Packet Pg. 13. The Project site's zoning of Light Industrial requires a conditional use permit for "Warehousing and Distribution, Large." The ordinance does not specify a square footage above which warehousing is large. For parcel hubs, which are not authorized, a building over 75,000 square feet is large. Municipal Code, §18.26.020(A), Table 18.26-1. By that measure, or any commonsense measure, the proposed 232,000 square feet of warehousing is large. As a result, the conditional use permit necessary for the proposed warehousing use must be proposed and processed prior to or concurrently with the vesting tentative map. Muni. Code § 17.50.060(B)(2). By choosing to ignore the Project's uses, the staff report's CEQA recommendations are deficient as a matter of law, having failed to consider the potential environmental effects of the Project's warehousing and other uses, including impacts from additional truck trips on air quality and wildlife, additional vehicle miles traveled and transportation impacts as a result of the Project, operational and construction-related noise and health impacts on residents located adjacent to the south corner of the Project site, the impacts of Project design features, such as the large glass facades, on bird-life and other potential impacts. As a result, any CEQA determination by the City must consider the Project's contemplated uses now.

In addition, underscoring the need for staff to address the impacts of the anticipated uses, "'[d]evelopment' means ***the uses to which the land which is the subject of the map shall be put***, the buildings to be constructed on it and all alterations of the land and construction incident thereto." Muni. Code §17.08.055 (emphasis added). Thus, rather than defer any consideration of the Project's uses, the vesting tentative parcel map procedure requires the applicant to submit "[t]he height, size, location, preliminary or conceptual architectural plans and ***use of all buildings*** to be constructed within the subdivision…." Muni. Code §17.50.060(B)(4) (emphasis added). Relatedly, to qualify for approval of a vested tentative parcel map, the applicant must provide "[s]pecific information on the uses to which the proposed buildings will be put…." Muni. Code §17.50.060(B)(10). Thus, should the Planning Commission accept staff's invitation to put off addressing the Project's uses, any decision will be contrary to the City's ordinances.

In addition, CEQA forbids putting off environmental review of the whole project subsequent to approving any of its components. This is especially true for a decision to approve a vesting right in a development. The necessary CEQA document must be prepared and approved prior to any approval of a project subject to CEQA. "***Before granting any approval of a project subject to CEQA***, every lead agency or responsible agency shall consider a final EIR or negative declaration or another document authorized by these guidelines to be used in the place of an EIR or negative declaration." (14 CCR § 15004(a) [emphasis added].) "EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design …." (14 CCR § 15004(b).) Consistent with that goal:

> The environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively.

(14 CCR § 15004(c); *see also* PRC § 21003(a).) By attempting to defer addressing impacts from the Project's anticipated uses until the future, staff's proposals violate these fundamental tenets of CEQA.

B. CEQA Guidelines Section 15183 is Not Available for the Project.

The staff report proposes that the City rely on CEQA Guidelines § 15183 to claim that no CEQA review of the Project is required. Section 15183 provides that:

> CEQA mandates that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review, ***except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site***. This streamlines the review of such projects and reduces the need to prepare repetitive environmental studies.

CEQA Guidelines § 15183(a) (emphasis added). The situations requiring additional review are set forth in the provision:

> In approving a project meeting the requirements of this section, a public agency shall limit its examination of environmental effects to those which the agency determines, in an initial study or other analysis:
>
> (1) Are peculiar to the project or the parcel on which the project would be located,
>
> (2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan or community plan with which the project is consistent,

> (3) Are potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action, ***or***
> (4) Are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR.

CEQA Guidelines § 15193(b).

Here, it does not appear that the City made a determination as to whether there are environmental effects "peculiar to the project" or whether the other factors in § 15193(b) are met, as case law requires. *See Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1407. Nor does it appear that, in the alternative, the City found that the impacts of the Project "ha[ve] been addressed as a significant effect in the prior EIR, or can be substantially mitigated by the imposition of uniformly applied development policies or standards." CEQA Guidelines § 15183(c). Nor has the City explained why the Project otherwise meets the requirements of § 15183. Indeed, § 15183(j) specifically provides: "This section does not affect any requirement to analyze potentially significant offsite or cumulative impacts if those impacts were not adequately discussed in the prior EIR." It does not appear that the City has analyzed the impacts specific to this Project in the prior EIR. Rather, the City has discussed generally "research and development (R&D), warehouse, and industrial buildings." General Plan DEIR, 3-33. There is no mention in the General plan EIR of any proposed warehouse buildings at the proposed location. That the City may have generally discussed the effects of warehouse and distribution facilities does not make the specific Project on this site exempt from CEQA. A full CEQA analysis is required.

Indeed, under staff's proposed process, the City will fail to implement mitigations mandated by the General Plan 2035 EIR. For example, Mitigation Measure AQ-4a requires that:

> Applicants for future non-residential land uses within the City that: 1) have the potential to generate 100 or more diesel truck trips per day or have 40 or more trucks with operating diesel-powered TRUs, and 2) are within 1,000 feet of a sensitive land use (e.g., residential, schools, hospitals, nursing homes), as measured from the property line of the proposed Project to the property line of the nearest sensitive use, ***shall submit a health risk assessment (HRA) to the City of Morgan Hill prior to future discretionary Project approval***.

General Plan EIR, p. 1-9 (emphasis added). Several houses are located across the street from the Project's south corner that are within 1,000 feet of the Project site. The staff report makes no mention of this required mitigation measure or how granting a vested right to the Project would affect the City's enforcement of this measure.

The City may not rely on 14 Cal. Admin. Code § 15183 for the Project. Section 15183 does not relieve the City of reviewing environmental effects that "[w]ere not analyzed as

significant effects in a prior EIR on the zoning action, general plan or community plan with which the project is consistent." 14 Cal. Admin. Code § 15183(b)(2). Section 15183 also excludes exempting impacts that are "peculiar" to the Project. Peculiar is a term of art specifically defined by the regulation:

> An effect of a project on the environment shall not be considered peculiar to the project or the parcel for the purposes of this section if uniformly applied development policies or standards have been previously adopted by the city or county with a finding that the development policies or standards will substantially mitigate that environmental effect when applied to future projects, unless substantial new information shows that the policies or standards will not substantially mitigate the environmental effect.

14 Cal. Admin. Code § 15183(f). The General Plan EIR did not address the potential significant environmental impacts of bird strikes with new buildings to be constructed in Morgan Hill. Nor does the EIR address direct and cumulative off-site impacts on wildlife from collisions with additional truck and vehicle traffic associated with large warehousing projects. Nor can the City identify development standards or the findings identified by Section 15183 addressing these two categories of impacts that could make those impacts not peculiar to the Project. Other impacts peculiar to the proposed Project site include the health and noise impacts to the adjacent, off-site residents and impacts to wildlife likely present at the site, including burrowing owls and other sensitive species. None of these site-specific and off-site impacts were addressed in the General Plan EIR. The City should prepare an initial study and, based on that review, either an EIR or a mitigated negative declaration to address the Project's potential impacts.

C. CEQA Guidelines § 15162 Does Not Apply Because the Project Is Not Within the Scope of the Program EIR Prepared for the General Plan

The alternative suggestion in the staff report that the Project is within the scope of the program EIR prepared for the General Plan and the City should rely on CEQA Guidelines § 15162 also is incorrect. Packet Pg. 19. Once a program EIR has been prepared, "[s]ubsequent activities in the program must be examined in light of the program EIR to determine whether an additional environmental document must be prepared." CEQA Guidelines § 15168(c). The first consideration is whether the activity proposed is covered by the PEIR. *Id.* If a later project is outside the scope of the program, then it is treated as a separate project and the PEIR may not be relied upon in further review. *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307. The second consideration is whether the "later activity would have effects that were not examined in the program EIR." CEQA Guidelines § 15168(c)(1). A PEIR may only serve "to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project." *Sierra Nevada Conservation v. County of El Dorado* ("*El Dorado*") (2012) 202 Cal.App.4th 1156. If the PEIR does not evaluate the environmental impacts of the project, a tiered EIR must be completed before the project is approved. *Id.* For these inquiries, the "fair argument test" applies. *Sierra Club*, 6 Cal.App.4th 1307, 1318; *See also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164 (**"**when a prior EIR has been prepared and certified for a program or

plan, the question for a court reviewing an agency's decision not to use a tiered EIR for a later project 'is one of law, i.e., the sufficiency of the evidence to support a fair argument.'").

Under the fair argument test, a new EIR must be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." *Sierra Club*, 6 Cal.App.4th at 1316 (quotations omitted). When applying the fair argument test, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." *Id*. at 1312. "[I]f there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence." *Id*. at 1319.

In *Friends of College of San Mateo Gardens*, the California Supreme Court explained the differing analyses that apply when a project EIR was originally approved and changes are being made to the project, and when a tiered program EIR was originally prepared and a subsequent project is proposed consistent with the program or plan:

> For project EIRs, of course, a subsequent or supplemental impact report is required in the event there are substantial changes to the project or its circumstances, or in the event of material new and previously unavailable information. (*Friends of Mammoth*, citing § 21166.) In contrast, when a tiered EIR has been prepared, review of a subsequent project proposal is more searching. **If the subsequent project is consistent with the program or plan for which the EIR was certified, then 'CEQA requires a lead agency to prepare an initial study to determine if the later project may cause significant environmental effects not examined in the first tier EIR.'** (*Ibid*. citing Pub. Resources Code, § 21094, subds. (a), (c).) 'If the subsequent project is not consistent with the program or plan, it is treated as a new project and must be fully analyzed in a project—or another tiered EIR if it may have a significant effect on the environment.' (*Friends of Mammoth*, at pp. 528–529, 98 Cal.Rptr.2d 334.)

Friends of Coll. of San Mateo Gardens v. San Mateo County Cmty. Coll. Dist. (2016) 1 Cal.5th 937, 960.

The City's General Plan EIR were prepared in accordance with CEQA's PEIR provisions and subsequent projects must undergo the tiered review process just described. As the General Plan EIR states:

> [T]his EIR is a program-level EIR that analyzes the potential significant environmental effects of the adoption of the proposed Project. As a program EIR, it is not project-specific, and does not evaluate the impacts of individual projects that may be proposed under the General Plan. Such subsequent projects will require a separate environmental review, when applicable as required by CEQA, which could be in the form of a Negative Declaration, Mitigated Negative Declaration, or a Subsequent EIR, to secure the necessary development permits. Therefore, while

> subsequent environmental review may be tiered from this EIR, this EIR is not intended to address project-specific impacts of individual projects.

General Plan DEIR, p. 2-2. CEQA requires the City to prepare an initial study to determine if the Project *may* cause significant environmental effects not examined in the General Plan EIR. Pub. Res. Code § 21094. As discussed above, there are a number of effects that an initial study should address, including impacts to wildlife at the site, impacts of the Project from bird collisions with the expansive glass façade, off-site impacts to wildlife from collisions with the many vehicle trips that will be generated by a project of this size, off-site transportation impacts on GHG emissions from the Project's increases in vehicle miles travelled, and off-site health and noise impacts from construction and operation on nearby residents. Accordingly, an initial study followed by an MND or EIR must be prepared for the Project.

D. Contrary to the Applicant's Assertion, the Project is Discretionary and Subject to CEQA.

Ignoring its client's request for a vesting tentative parcel map, the applicant's attorneys argue that the Project is ministerial and thus not a "project" under CEQA. Counsel claims that the decision in *McCorkle Eastside Neighborhood Group. v. City of St. Helena* (2018) 31 Cal. App. 5th 80 ("*McCorkle*") is instructive. It is not. Unlike the *McCorkle* decision, the Redwood Tech at 101 project involves multiple discretionary decisions by the City. The City's review and any approval of the proposed vesting tentative parcel map is a discretionary decision. *See* Municipal Code §17.20.090 ("The planning commission may modify or delete any of the conditions of approval recommended in the community development department's report, except conditions required by city ordinance or by the city engineer, related to public health and safety or standards approved by the city engineer, or add additional requirements as a condition of its approval"). Even the City's design review is endowed with discretion to deny the Project in order to make the required finding that "[t]he proposed development will not be detrimental to the public health, safety, or welfare or materially injurious to the properties or improvements in the vicinity." Muni. Code §18.108.040(J)(5). *See also* §18.108.040(A) ("A design permit is a discretionary action …."). *McCorkle* involved the City of St. Helena's approval of demolition and design review permits for an in-fill housing development. No vesting tentative map was at issue in that case. Nor was there any potential need for any future CUP in that case. And the City's ordinances strictly limited the design permit review to the specified design criteria and did not encompass a finding such as is required in Morgan Hill, that the development "will not be detrimental to the public health, safety, or welfare or materially injurious to the properties or improvements in the vicinity." *See* 31 Cal.App.5th at 92–93.

The CUP required for the proposed warehousing uses also confirms that the Project is discretionary under CEQA. "Where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary and will be subject to the requirements of CEQA." 14 CCR § 15268(d); *POW*, 10 Cal.5th at 497; *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1139; *Friends of Westwood, Inc.*

v. City of Los Angeles (1987) 191 Cal.App.3d 259, 270-71.)Furthermore, "any doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization." *POW*, 10 Cal.5th at 497. Because both CEQA as well as the City's ordinance confirm that CEQA review must occur prior to any approvals for the project, whether ministerial or discretionary, even assuming the design review permit is ministerial, the City cannot proceed with that or any other approval until it has completed a legitimate CEQA review. Morgan Hill has discretion to address any potential impacts identified in a CEQA review as a result of its design review authority, its vesting tentative map approval authority, and the CUP authority. Accordingly, *McCorkle* has no bearing on the City's review of the Project pursuant to CEQA.

III. Conclusion

LIUNA respectfully requests that the Planning Commission not approve these components of the Project and instead instruct staff to prepare an initial study and either an MND or EIR to identify, analyze and mitigate the Project's adverse environmental impacts. Thank you for considering these comments.

Sincerely,

Michael R. Lozeau