Via E-mail

June 14, 2021

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Sue Harrison, Commissioner
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Re: Comments Regarding Proposed Commercial Street Hotels Project at 247 and 295 Commercial Street (File # 21-0628) – June 14, 2021 Planning Commission Meeting, Agenda Item No. 2

Dear Chair Howard, Vice-Chair Simons, Commissioners Harrison, Howe, Olevson, Rheaume and Weiss, and Ms. Hom:

I am writing on behalf of the Laborers International Union of North America, Local Union 270 and its members living in the City of Sunnyvale ("LIUNA"), regarding the Commercial Street Hotels Project ("Project"). The Project proposes to construct two new six-story hotel buildings totaling 274 hotel rooms, an underground parking garage, and related site improvements on a 1.5 acre site located at 247 and 295 Commercial Street (APNs: 205-34-006 and 205-34-013) by applicant DOA Developments in the City of Sunnyvale ("City").

LIUNA is concerned that the City is proposing to approve the Project without environmental review under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, *et seq*., based on the assertion that the Project is eligible for a Class 32 In-fill Exemption.

Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH has conducted a review of the Project and the documents provided to the Planning Commission and prepared expert comments on the Project's indoor air emissions and associated health risks. Mr. Offermann concludes it is likely that the Project will expose future employees of the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is a leading

expert on indoor air quality and has published extensively on the topic. Mr. Offermann's expert comments and curriculum vitae are attached as Exhibit A.

Environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE") has reviewed the Project and its location on a site listed on the Cortese list. SWAPE's expert comments, as well as the curriculum vitae of SWAPE's consultants are attached hereto as Exhibit B.

Ecologist Shawn Smallwood, Ph.D. also reviewed the Project and Project documents. Dr. Smallwood concludes that the Project site does have value as habitat for endangered, rare or threatened species. Additionally, Dr. Smallwood concludes that the Project may pose significant impacts to biological resources due to collisions with the Projects windows. Dr. Smallwood's expert comments and curriculum vitae are attached as Exhibit C.

LIUNA's review of the Project, with the assistance of these experts, has found that the Project will have significant effects relating to air quality, the Project site is included on the Cortese list and the site has value as habitat for endangered, rare or threatened species, all of which preclude the City's use of the Class 32 In-fill development exemption for the Project. LIUNA respectfully requests that the Commission not approve the Project and instead direct staff to prepare a mitigated negative declaration ("MND") or an environmental impact report ("EIR") for the Project prior to approval in compliance with CEQA.

I. PROJECT DESCRIPTION

The applicant, DOA Developments, is requesting that the Planning Commission review and approve a Use Permit for two new six-story hotel buildings totaling 274 hotel rooms, an underground parking garage with 219 spaces with a parking adjustment to allow valet parking and mechanical parking, and installation of related site improvements, as well as a Tentative Map to allow a lot merger and subdivision for condominium purposes. The Project site is located at 247 and 295 Commercial Street (APNs: 205-34-006 and 205-34-013). The City is proposing to approve the Project using a Class 32 Categorical Exemption under CEQA.

II. LEGAL STANDARD

CEQA mandates that "the long-term protection of the environment . . . shall be the guiding criterion in public decisions" throughout California. PRC § 21001(d). A "project" is "the whole of an action" directly undertaken, supported, or authorized by a public agency "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." PRC § 21065; CEQA Guidelines, 14 CCR § 15378(a). For this reason, CEQA is concerned with an action's ultimate "impact on the environment." *Bozung v. LAFCO* (1975) 13 Cal.3d 263,

283. CEQA requires environmental factors to be considered at the "earliest possible stage . . . before [the project] gains irreversible momentum," *Id*. 13 Cal.3d at 277, "at a point in the planning process where genuine flexibility remains." *Sundstrom v. Mendocino County* (1988) 202 Cal.App.3d 296, 307.

To achieve its objectives of environmental protection, CEQA has a three-tiered structure. 14 CCR § 15002(k); *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1185-86 *("Hollywoodland")*. First, if a project falls into an exempt category, or it can be seen with certainty that the activity in question will not have a significant effect on the environment, no further agency evaluation is required. *Id*. Second, if there is a possibility the project will have a significant effect on the environment, the agency must perform an initial threshold study. *Id*.; 14 CCR § 15063(a). If the study indicates that there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment the agency may issue a negative declaration. *Id*., 14 CCR §§ 15063(b)(2), 15070. Finally, if the project will have a significant effect on the environment, an environmental impact report ("EIR") is required. *Id*. Here, since the City proposes to exempt the Project from CEQA entirely, we are at the first step of the CEQA process.

A. CEQA Exemptions.

CEQA identifies certain classes of projects which are exempt from the provisions of CEQA. These are called categorical exemptions. 14 CCR §§ 15300, 15354. "Exemptions to CEQA are narrowly construed and "'[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.'" *Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 125.

The determination as to the appropriate scope of a categorical exemption is a question of law subject to independent, *i.e.* de novo, review. *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist*., (2006) 139 Cal.App.4th 1356, 1375 ("[Q]uestions of interpretation or application of the requirements of CEQA are matters of law. (Citations.) Thus, for example, interpreting the scope of a CEQA exemption presents 'a question of law, subject to de novo review by this court.' (Citations).")

The City asserts the Project is categorically exempt from the requirements of CEQA as an "in-fill" project (Class 32). In order to utilize a Class 32 In-Fill Exemption, the City must have substantial evidence that, among other findings, "[t]he project site has no value as habitat for endangered, rare or threatened species" or where "[a]pproval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality." 14 CCR §§ 15332(c), (d). These factual determinations required to be made in order for the City to invoke the Class 32 In-Fill Exemption must be supported by substantial evidence in the record. *Banker's Hill,*

Hillcrest, Park W. Cmty. Pres. Grp. v. City of San Diego (2006) 139 Cal.App.4th 249, 267-69.

Substantial evidence evident in the record and provided by LIUNA's experts demonstrates that the City cannot make the findings that are prerequisite to utilizing a Class 32 In-Fill Exemption. As a result, the City should prepare an MND or EIR to analyze the Project's impacts on air quality, health risks to construction workers and future employees, and sensitive wildlife, and the MND or draft EIR should be circulated for public review and comment in accordance with CEQA.

III. ANALYSIS

A. The Project Site's Presence on the Cortese List Precludes Use of a Categorical Exemption.

The Project may not be exempted from CEQA review because it is on the State of California's Cortese List of highly contaminated sites. This exception to the use of any categorical exemption is unequivocal:

> "[a] categorical exemption shall not be used for a project located on a site which is ***included on any list*** compiled pursuant to Section 65962.5 of the Government Code [Cortese List]."

14 CCR §15300.2(e) (emphasis added). The CEQA itself provides:

> No project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code [Cortese List] shall be exempted from this division pursuant to subdivision (a)[categorical exemptions]."

PRC § 21084(c)). "The provisions in Government Code Section 65962.5 are commonly referred to as the 'Cortese List'" The GeoTracker list is one of the lists in the Cortese List. https://calepa.ca.gov/SiteCleanup/CorteseList/. The Project site is included on the Cortese list. https://geotracker.waterboards.ca.gov/profile_report?global_id=T10000007798. *See* SWAPE Comments, Exhibit B.

As a result, the Class 32 In-Fill exemption is not available for the Project.

There is no caveat included in this exception for sites that have purportedly been closed or cleaned up. If the site is on the Cortese list, a Class 32 exemption is not available. Nevertheless, it also is worth noting that any past efforts to remediate the site only had industrial uses in mind – not a hotel with an underground parking garage. And, as Attachment 4 to the staff report notes, high levels of metals, VOC soil vapors and likely contaminated groundwater remain present at the site, underscoring the wisdom of

the Cortese list exception to CEQA's categorical exemptions. Staff Report, Att. 4, p. 12. It is imperative that the City properly evaluate through an MND or EIR the potential impacts that may result from the Project's disturbance of the existing toxic contaminants at the site and the health risks that would result to construction workers and future employees of the hotel.

B. The Project Will Have Significant Air Quality Impacts, Precluding Reliance on the Categorical Exemption.

In addition to the toxic threats posed by the Project's disturbance of contaminated soils and groundwater at the site, the Project also will introduce toxic air contaminants to air inside the Project that poses significant risks to future employees of the hotel. Formaldehyde is a known human carcinogen and listed by the State of California as a Toxic Air Contaminant ("TAC"). The Bay Area Air Quality Management District ("BAAQMD") has established a significance threshold of health risks for carcinogenic TACs of 10 in a million. *See* Rincon Consultants, Air Quality Study, p. 12 (June 2021). The City's proposed exemption fails to acknowledge the significant indoor air emissions that will result from the Project.

Mr. Offermann explains that many composite wood products typically used indoors contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. Ex. A, pp. 2-3. He explains, "The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." *Id*.

Mr. Offermann calculates that future employees of the Project will be exposed to a cancer risk from formaldehyde of approximately 17.7 per million, assuming all materials are compliant with the California Air Resources Board's formaldehyde airborne toxics control measure. *Id*. at 4. This exceeds BAAQMD's CEQA significance thresholds for airborne cancer risk of 10 per million. *Id*. Mr. Offermann stresses that his calculations account for the fact that wood products for the project would be compliant with the most recent CARB standards. *Id*. at 4-5.

Mr. Offermann concludes that these significant environmental impacts must be analyzed, and mitigation measures should be imposed to reduce employees' formaldehyde exposure. *Id*. He prescribes a methodology for calculating the Project's formaldehyde emissions in order to do a more project-specific health risk assessment. *Id*. at 5-11. Mr. Offermann also suggests several feasible mitigation measures, such as requiring the use of composite wood products manufactured with CARB approved no-added formaldehyde (NAF) resins, which are readily available. *Id*. at 11-13.

When a Project exceeds a duly adopted CEQA significance threshold, as here,

this alone establishes substantial evidence that the project will have a significant adverse environmental impact. Indeed, in many instances, such air quality thresholds are the only criteria reviewed and treated as dispositive in evaluating the significance of a project's air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies Air District's "published CEQA quantitative criteria" and "threshold level of cumulative significance"); see also *Communities for a Better Envt. v. California Res. Agency* (2002) 103 Cal.App.4th 98, 110-11 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant").

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. People, and in particular the hotel employees, will be using the Project once it is built and begins emitting formaldehyde. Once built, the Project will begin to emit formaldehyde at levels that pose significant direct and cumulative health risks. Mr. Offermann's expert analysis demonstrates that the City cannot make the requisite finding needed to rely on the Class 32 exemption that "the project would not result in any significant effects relating to … air quality…." 14 CCR § 15332(d).

C. The Project Site Has Value as Habitat for Endangered, Rare or Threatened Species.

The existing Project site is composed of two industrial buildings, totaling approximately 9,720 square feet, with several trees dispersed on the site. Despite the initial appearance of the site, Dr. Smallwood notes that it does provide habitat that is important to many species, including rare, threatened or endangered species. Ex. C, p. 2.

Habitat is defined by a species' use of the environment and the gaseous atmosphere is a medium of life that is an essential aspect of habitat for species of flora and fauna. *Id*. Many species of flora and fauna morphologically adapted to living in that part of the atmosphere referred to as the aerosphere. *See id*. Birds' and bats' wings are specifically adapted to particular uses of the atmosphere: short powerful wings for speed, long slender wings for glide, and broad wings for maneuverability, for example. *Id*. Additionally, the atmosphere is such an important element of habitat to wildlife that some birds sleep while in flight, and bats and owls hunt in it, even at night. *Id*. "The aerosphere is an essential element of habitat for a vast number of wildlife species." *Id*.

At least one million birds pass through the South Bay annually and at least 40 special-status species of birds are known to the Project area. *Id*. at 3. Of those 40 special status bird species, at least 20 are species of special concern ("SSC"), endangered, or threatened. Threatened and endangered species include Swainson's hawks, Least Bell's vireos, Willow flycatchers, and tricolored blackbirds. *Id*. at 5-6. The California Department of Fish and Wildlife explains that wildlife designated as species of

special concern are addressed under CEQA when evaluating impacts to rare species. https://wildlife.ca.gov/Conservation/SSC#394871319-how-are-sscs-addressed-under-the-california-environmental-quality-act. Dr. Smallwood identifies 12 species of special concern near the Project site including species that have been documented to collide with windows such as Grasshopper sparrows, Summer tanagers, Yellow-breasted chats, Yellow warblers, San Francisco common yellowthroats, and Purple martins. *Id*. at 5-6. The analogous category of wildlife on the federal level is the US Fish & Wildlife Service's designation of Bird Species of Conservation Concern ("BCC"). These rare BCC species present in and around the Project site which have been documented in window collisions include Peregrine falcons, Costa's hummingbirds, Allen's hummingbirds, and Oak titmouses. *Id*. The Project site is not only located within the Pacific Flyway but is also located nearby to numerous parks and green spaces that birds use the aerosphere to travel between. The existing buildings at the Project site appear to be both single stories, whereas the proposed Project's two buildings will be six stories with an additional roof level. The Project site's aerosphere therefore provides valuable habitat for endangered, rare or threatened species, which will be removed by the development of the Project.

Dr. Smallwood also highlighted his work that has focused on impacts to wildlife caused by insertions of human structures into the aerosphere, most of which are inserted without a thought of their potential impacts to volant wildlife – animals that fly. *Id*. at 2. Some of these impacts include habitat loss, energy costs of having to navigate around the structure, increased predation risk from predators using the structures as hunting perches or foraging screens, and collision mortality. *Id*. Specifically, birds are vulnerable to the transparency of buildings' windows, to the reflectance of vegetation and other birds in many windows, to the false perception of cavity space of some windows, and to confusion caused by interior lighting issues from windows at night. *Id*. at 3. Window collisions are the second or third largest source of human-caused bird mortality, and a high rate of bird-window collisions has been measured in the Bay Area. *Id*. Of the 22 SSC, BCC or listed species identified by Dr. Smallwood as known to the Project area, 7 of these species have been documented as window collision fatalities and are therefore susceptible to new structural glass installations. *Id*.

Dr. Smallwood indicates that the Project, as proposed, will result in significant impacts to birds colliding with the Project's clear glass windows. *Id*. at 7. Specifically, Dr. Smallwood predicts "108 bird deaths per year" due to the Project. *Id*. The Project's plans show ample use of windows on portions of the buildings' facades. Based on the Project's Site and Architectural Plans, Dr. Smallwood estimates that the Project would use at least 1,477 square meters of glass of the buildings' facades. *Id*. Despite emerging scientific literature about window collisions as one of the largest sources of avian mortality worldwide, the City fails to assess this impact.

Dr. Smallwood also notes that the depictions of the Project's facades are not entirely consistent with the standards identified in the City's own Bird-Safe Guidelines.

Id. at 4. Under Option 2 of the City's Bird Safe Building Design Guidelines, the first standard is to "[a]void large expanse of glass near open areas, especially when tall landscaping is immediately adjacent to the glass walls." City of Sunnyvale, Bird Safe Building Design Guidelines, p. BS 1. However, the Project site and the Project plans depict large glass windows that would reflect tall vegetation in adjacent landscaping. Ex. C, p. 4. The fifth standard is to "[r]educe glass at top of a building, especially when incorporating a green roof into the design." City of Sunnyvale, Bird Safe Building Design Guidelines, p. BS 1. However, the Project's top floor contains windows on all sides of the buildings, in the same amount as the lower floors, despite both buildings containing green roofs. Additionally, when reviewing the effectiveness of the City's Bird Safe Design Guidelines, the report to City Council specifically highlighted that special attention should be paid to projects that include a green roof since it is an area that "tend[s] to be more likely environments for birds and provide the greatest threats to birds near buildings with a lot of glass," as well as "[c]areful building design when a green roof is included to ensure there is no reflective glass facades since the birds will be attracted to the green roof." City of Sunnyvale File # 16-0706. There is no evidence in the Project's Site and Architectural Plans that this has been done.

The Project's site's aerosphere provides value as habitat for endangered, rare or threatened species, precluding the City from exempting the Project pursuant to the CEQA In-fill exemption. The City should instead prepare either an MND or EIR to analyze and mitigate the Project's potentially significant impacts to birds.

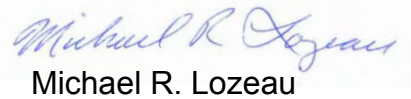
IV. The Project's Cumulative Impacts on Wildlife Preclude the Use of the Class 32 In-Fill Exemption.

The Class 32 exemption also cannot be used when a project will have cumulative impacts: "Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant." 14 CCR § 15300.2(b). The expert comments discussed above point out the Project's significant contributions to ongoing cumulative impacts of similar types of tall buildings on sensitive bird species. For these reasons as well, the Class 32 exemption is inapplicable to the Project.

V. Conclusion

LIUNA respectfully requests that the City withdraw the CEQA Exemption and prepare either an MND or EIR to analyze and mitigate the Project's adverse environmental impacts. Thank you for considering these comments.

Sincerely,



Michael R. Lozeau