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July 20, 2021

### VIA EMAIL AND ONLINE SUBMISSION ONLY

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### Via Online Submission:

<https://lf.cityofamericancanyon.org/Forms/PublicComment>

### **Re: Agenda Item No. 16: SDG Commerce 217 Warehouse Distribution Center Conditional Use Permit (File Number PL21-0006)**

Dear Mayor Garcia, City Council Members, Mr. He:

We write on behalf of the **American Canyon Residents for Responsible Development** (“Residents”) to provide comments on Agenda Item No. 16, the SDG Commerce 217 Warehouse Distribution Center Conditional Use Permit (File Number PL21-0006) (“Project”), including the Staff Report and the Attachment 15 JGM response letter (“Responses”) prepared in response to Residents’ April 29, 2021 comments on the Recirculated Initial Study and Mitigated Negative Declaration (“MND” or “Recirculated MND”) by the City of American Canyon (“City”).

The Agenda and Staff Report describe the Council’s proposed actions as consideration of the March 5, 2021 Appeal filed by the Laborers International Union of 5195-004acp

North America, Local 324 (File Number PL21-0006) (“LIUNA Appeal”), as well as to uphold the Planning Commission’s February 25, 2021 approval of the Project, consider and adopt the April 2021 Recirculated MND and July 2021 Mitigation Monitoring and Reporting Program (“MMRP”), and issue a Notice of Determination confirming final approval of the Project pursuant to the California Environmental Quality Act<sup>1</sup> (“CEQA”).<sup>2</sup> The City Council may consider the LIUNA Appeal. However, as explained below, *the City Council is not authorized to consider or adopt the Recirculated MND and MMRP at this time* because these documents post-date the Planning Commission’s February 2021 Project approvals and have never been considered or approved by the Planning Commission, as required by the City’s Municipal Code and CEQA.<sup>3</sup>

Additionally, based upon our review of the Staff Report and Responses,<sup>4 5 6</sup> we continue to conclude that the Recirculated MND still fails to comply with the requirements of CEQA. The City may not approve the Project until it prepares a legally adequate environmental impact report (“EIR”) and remands the Project for a further public hearing before the Planning Commission on any revised CEQA document.

## **I. THE CITY COUNCIL LACKS JURISDICTION TO CONSIDER THE RECIRCULATED MND AND MMRP AT THIS HEARING**

### **A. The City Council is Proceeding with Project Approval in Violation of its Municipal Code**

The City Council cannot take action on the Recirculated MND and MMRP at this hearing because these are new CEQA documents which were prepared after the Planning Commission hearing in February, and have not been considered or approved by the Commission.

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<sup>1</sup> Pub. Resources Code, §§ 21000 et seq.; 14 Cal. Code Regs. §§ 15000 et seq. (“CEQA Guidelines”).

<sup>2</sup> Agenda, Item 16; Staff Report, p. 1.

<sup>3</sup> See Amer. Canyon Muni Code §§ 19.40.030(A)(1); 19.42.020(B)(2), (D); Pub. Res. Code §§ 21082.1(c), 21151(c); 14 Cal. Code Regs. § 15074(b).

<sup>4</sup> We prepared these comments with environmental health and air quality expert Dr. James Clark, Ph.D., and acoustics expert Neil A. Shaw, FASA, FAES. See **Attachment A:** Letter from J. Clark re *Comments on SDG Commerce 217 Warehouse Distribution Center Conditional Use Permit (File Number PL21-0006)* (July 20, 2021) (“Clark Comments”).

<sup>5</sup> **Attachment B:** Letter from N. Shaw re *Comments on SDG Commerce 217 Warehouse Distribution Center Conditional Use Permit (File Number PL21-0006)* (July 20, 2021) (“Shaw Comments”).

<sup>6</sup> **Attachment C:** Letter from S. Cashen re *Comments on SDG Commerce 217 Warehouse Distribution Center Conditional Use Permit (File Number PL21-0006)* (July 20, 2021) (“Cashen Comments”).

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Under the City's Municipal Code, the Planning Commission is the decision maker for the Project's Conditional Use Permit ("CUP") and its CEQA document, not the City Council.<sup>7</sup> The City Council maintains appellate authority over the Project's permits, but does not have original jurisdiction to consider and approve a CUP or CEQA document that has not first been considered by the Planning Commission.<sup>8</sup> The City Council may act on the Project's permits and CEQA document if the approvals are appealed by a person aggrieved by the Planning Commission's decision.<sup>9</sup>

Under the City's Municipal Code, the City is required to receive a completed project application and complete environmental review pursuant to CEQA before holding a public hearing to vote on any approvals at the Planning Commission level.<sup>10</sup> In this case, the City prepared two CEQA documents for the Project – the original MND, released on December 18, 2020, and the Recirculated MND, released for public comment in April 2021.

The Planning Commission considered the original MND and public comments on the original MND at its February 25, 2021 hearing. In response to comments on the original MND, the City revised and recirculated the MND for a new 30-day public review period from April 1, 2021 to May 3, 2021.<sup>11</sup> Therefore, the Recirculated MND was not before the Planning Commission at the February 25, 2021 hearing, and environmental review for the Project was not completed at that time, since the City re-circulated the MND in April 2021. The LIUNA Appeal challenges the Planning Commission's February 25, 2021 approval of the CUP and original MND. Thus, the scope of the City Council's jurisdiction at this hearing is limited to the issues raised in the LIUNA Appeal and does not extend to the Recirculated MND.<sup>12</sup>

The Planning Commission's Conditional Use Permit ("CUP") approval from February 25, 2021 is also moot because it relied on an outdated MND that was superseded by the Recirculated MND.

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<sup>7</sup> See Amer. Canyon Muni Code §§ 19.40.030(A)(1); 19.42.020(B)(2), (D); Pub. Res. Code §§ 21082.1(c), 21151(c); 14 Cal. Code Regs. § 15074(b).

<sup>8</sup> Amer. Canyon Muni Code §§ 19.40.030(E) (appeal to City Council; Council jurisdiction limited to affirming, reversing, or modifying the Planning Commission decision); Pub. Res. Code 21151(c).

<sup>9</sup> *Id.*

<sup>10</sup> City of American Canyon Municipal Code section 19.40.030

<sup>11</sup> Staff Report, p. 1.

<sup>12</sup> Amer. Canyon Muni Code §§ 19.40.030(E).

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The City Council should remand the Project to the Planning Commission to conduct a public hearing on the Recirculated MND and MMRP, and to reconsider the CUP in light of the new evidence, new analysis, and revised mitigation measures included in the Recirculated MND.

**B. The City Council is Proceeding with Adopting the Recirculated MND and MMRP in Violation of CEQA**

CEQA requires the decision making body of the lead agency, in this case the Planning Commission, to “consider the proposed negative declaration or mitigated negative declaration together with any comments received during the public review process” before it can approve a project or its CEQA document.<sup>13</sup> In this case, the City Council cannot approve the Project or adopt the Recirculated MND unless and until the Planning Commission “finds on the basis of the whole record before it (including the initial study and any comments received), that there is no substantial evidence that the project will have a significant effect on the environment and that the negative declaration or mitigated negative declaration reflects the lead agency's independent judgment and analysis.”<sup>14</sup> The Planning Commission has not made those findings here because the Recirculated MND and MMRP had not yet been prepared when the Commission conducted its February 2021 hearing on the Project.

The Recirculated MND and MMRP were prepared and released for public comment over a month after the Planning Commission’s February 2021 Project approvals. The Planning Commission’s February 25, 2021 hearing considered an older version of the MND which was superseded by the Recirculated MND. To date, the Planning Commission has not conducted a hearing on the Recirculated MND and MMRP, as required by the Municipal Code,<sup>15</sup> and has not considered public comments filed on the Recirculated MND and MMRP, including the comments filed by Residents. No person has appealed the Recirculated MND and MMRP to the City Council because they were never considered by the Planning Commission. The City Council, therefore, lacks jurisdiction to act on the Recirculated MND, and cannot make the required CEQA findings that the Project’s decision-maker exercised independent judgment and considered the whole record on the Project prior to approval.<sup>16</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Amer. Canyon Muni Code § 19.40.030(C) (public hearing by Planning Commission); 14 CCR § 15202(b).

<sup>16</sup> *Id.*

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The City Council cannot uphold the Planning Commission's February decision to adopt the original MND and approve the CUP because the Planning Commission did not consider the "whole record", which includes the Recirculated MND and public comments received on the recirculated MND (including ours). The Recirculated MND must first be considered by the Planning Commission, and the CUP must be reconsidered by the Planning Commission in light of the Recirculated MND, before the City Council can act on the Recirculated MND or CUP.

## II. REBUTTAL TO CITY'S RESPONSE REGARDING REFERENCE DOCUMENTS

The City has still failed to provide access to all documents referenced and relied upon in the Recirculated MND, as required by CEQA. Instead, the City's Responses to Comments asserts that the outstanding reference documents are "not important in determining" the significance of the Project's impacts on land use.<sup>17</sup> The City is required to produce outstanding reference documents both under the Public Records Act and CEQA.

The City violated CEQA and improperly truncated the MND's public comment period by failing to make all documents referenced, incorporated by reference, and relied on in the MND available for public review during the public comment period.<sup>18</sup> As a result, Residents was unable to complete its review and analysis of the MND and its supporting evidence during the current public comment period. We therefore provide these preliminary comments on the responses to our comments on the MND and reserve our right to submit supplemental comments on the MND at a future date.

CEQA requires that all documents referenced, incorporated by reference, and relied upon in an MND be available for review and "readily accessible" during the entire comment period.<sup>19</sup> The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the CEQA review period invalidates the entire CEQA process and that such a failure must be remedied by permitting additional public comment.<sup>20</sup> It is also well settled that a CEQA document may not

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<sup>17</sup> City of American Canyon, Comments and Responses Addendum: Final Recirculated Draft Initial Study for the 217 Commerce Distribution Center Building Project, p. I-2.

<sup>18</sup> See PRC § 21092(b)(1); 14 C.C.R § 15072(g)(4).

<sup>19</sup> Pub. Resources Code §§ 21092(b)(1); 14 Cal. Code Regs. § 15072(g)(4).

<sup>20</sup> *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.  
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rely on hidden studies or documents that are not provided to the public.<sup>21</sup> By failing to make all documents and underlying data referenced in the MND “readily available” during the current comment period, the City is violating the procedural mandates of CEQA.<sup>22</sup>

On April 15, 2021, our office submitted two letters to the City, the first seeking immediate access to all MND reference documents pursuant to CEQA, and the second seeking immediate access to all public records referring or related to the Project pursuant to the California Public Record Act (“CPRA”).<sup>23</sup> We did not receive any response to the letters. On April 20, 2021, we followed up these letters with an email directed to Mr. He asking for an update on these document requests. On April 26, 2021, we filed a letter with the City again asking for immediate access to outstanding MND reference documents, and requesting an extension of the public comment period on the MND due to the City’s failure to provide timely access to the reference documents during the public comment period.<sup>24</sup> We received a response on May 12, 2021, but still have not been given access to all MND reference documents that are relevant to our review of the MND.

In particular, the City has failed to provide access to the following MND reference documents that have delayed Residents’ full analysis of issues addressed in this letter:

- Email from Jeff Ballantine, Contract Project Planner, City of American Canyon, to Richard Grassetti, GECO, August 8, 2018 regarding Commercial Recreation Land Use in the General Plan.

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<sup>21</sup> *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

<sup>22</sup> Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4).

<sup>23</sup> Letter to William He, City of American Canyon from Darien Key, Adams Broadwell Joseph & Cardozo, Request for Immediate Access to Public Records – SDG Commerce 217 Distribution Center Project (SCH Number 2020120302; Application PL20-0008) (Apr. 15, 2021.); Letter to William He, City of American Canyon from Darien Key, Adams Broadwell Joseph & Cardozo, Request for Immediate Access to Documents Referenced in the MND for SDG Commerce 217 Distribution Center Project (Application PL20-0008) (Apr. 15, 2021.)

<sup>24</sup> Letter to William He, City of American Canyon from Darien Key, Adams Broadwell Joseph & Cardozo, Request for Immediate Access to Public Records – SDG Commerce 217 Distribution Center Project (SCH Number 2020120302; Application PL20-0008) (Apr. 26, 2021.)

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The City refused to produce the document and decided that “the Ballentine email, while referenced in the MND, is not important in determining of impact significance or any potential land use conflict” and thus failed to provide said letter.<sup>25</sup> This directly contradicts what CEQA requires.

Without this critical information, our clients and other members of the public are unable to meaningfully review and comment on the MND and are deprived of the opportunity to review the supporting information for the MND. The City’s actions violate both CEQA and CPRA disclosure requirements and have resulted in a violation of Resident’s due process rights.

### **III. REBUTTAL TO CITY’S RESPONSE REGARDING AIR QUALITY**

Residents’ comments on the MND provided substantial evidence supporting a fair argument that the Project may have potentially significant air quality and public health impacts from criteria air pollutants and toxic air contaminants during Project construction and operation. Our comments also explained that the MND improperly omitted a quantitative health risk analysis (“HRA”) and impermissibly relied on a qualitative HRA performed for another Project.

The Staff Report attempts to remedy these errors by including a new quantitative HRA for the Project. However, Dr. Clark’s review of the new HRA demonstrates that the City failed to provide the underlying modeling files supporting its analysis, and that the new HRA omitted critical receptors and technical details which resulted in an underestimation of the Project’s health risk. As discussed below, the City still lacks substantial evidence to support its conclusion that the Project’s health risk will be less than significant, and substantial evidence still supports a fair argument that the Project’s health risk remains significant and unmitigated. The City must prepare an EIR to remedy these defects.

#### **A. The City Failed to Provide Access to the HRA’s Modeling Data**

The City claims to have addressed Residents’ comments about the MND’s omission of an HRA by performing a new HRA analyzing the Project’s construction and operational health risk.<sup>26</sup> What the City failed to mention is that the HRA

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<sup>25</sup> City Response to ABJC Comments, Page I-2.

<sup>26</sup> Responses, p. I-6.  
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underlying data was not made available to the public, and was not attached to the Staff Report. As Dr. Clark explains, critical tables underlying the City's EMFAC analysis are not included with the Staff Report. These tables serve as the basis for the City's analysis of the operational phase of the Project. They include the number of trucks, the amount of time they operate, the speed at which they are moving as well as the age of the vehicles. Without that information, neither Dr. Clark nor any members of the public can determine whether the City accurately calculated the emissions for Project-related truck trips and thus any resulting health risk.<sup>27</sup>

The new HRA, and all supporting modeling files, are new information intended to support the City's conclusion that the Project will not result in any unmitigated health risks. It is well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.<sup>28</sup> This information must be provided to the public and included in an EIR which is circulated for public review and comment.

The City's response that it performed an HRA is merely conclusory without said underlying data. The City cannot support the claim that TAC and PM emissions would not produce a risk above 10 in one million, without any supporting evidence. This hand waving does not meet the obligations that the City has under CEQA to quantify the impacts of the Project on the community. Furthermore, relying on this unsupported analysis to support the assertion that the SDG Commerce 217 Distribution Center project will not have a significant impact is patently false.

"Substantial evidence" required to support a fair argument is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."<sup>29</sup> Unfounded conclusions such as HRAs without providing the underlying data are not substantial evidence.<sup>30</sup> By contrast, Dr. Clark's MND comments provided substantial evidence to support a fair argument that there may

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<sup>27</sup> See Clark Comments p.3.

<sup>28</sup> *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

<sup>29</sup> CEQA Guidelines, § 15384, subd. (a).

<sup>30</sup> *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *City of Livermore v LAFCO* (1986) 184 Cal.App.3d 531, 542.

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be significant impacts to health resulting from toxic air containments. The Staff Report fails to rebut this evidence.

**B. The City's HRA is Impermissibly Narrow Thus Lacking Analytical Value and Failing to Provide Substantial Evidence.**

Only two risk scenarios are evaluated in the HRA: students at the Napa Junction Elementary School and residents at the closest residence. As Dr. Clark explains, the HRA fails to account for all the following:

1. The HRA does not specifically identify the receptors and the concentrations to which they are exposed in a meaningful manner. Normally isopleths of concentrations from AERMOD modeling are presented to assist in the verification of modeling results.
2. Workers on-site and nearby are ignored in the analysis. Concentrations of DPM will be higher due to the proximity of the worker(s) to the sources.
3. The analysis ignores an essential life stage in the HRA analysis. In the Tables presented at the end of the HRA, no line item for the 3<sup>rd</sup> trimester in utero, a necessary step in the OEHHA's Toxics Hot Spots analysis is excluded from the risk calculation(s);
4. No analysis is presented for teachers and staff at the Napa Junction Elementary School. Staff and teachers are generally assumed to be present on site for up to 25 years.
5. The description of the community health risk from background sources relies on data analyzed for data nearly 2 decades old. Data from 2004 to 2010 included in the Bay Area Air Quality Management District (BAAQMD) background analysis does not represent the current conditions in Napa County. Assuming that the background risk of 98 in one-million is the current level ignores all of the gains in air quality made in the BAAQMD has made over the last decade.
6. The HRA analysis assumes PM<sub>2.5</sub> generation rates lower in the first year of the model than in the subsequent years. This contradicts the logic of what will be occurring on site. The HRA claims to incorporate the construction phase and the operational phase. During the construction phase it was assumed in the CalEEMOD analysis that 17 acres of the site will be graded prior to the construction of the warehouse. Grading would generate the

largest fraction of PM<sub>2.5</sub> associated with activities on-site. The modeled concentrations in the HRA contradict defy the logic of the situation. The City must correct this error in the analysis.

7. In the HRA analysis of the existing residences, the unmitigated analysis assumes that the concentration of DPM to PM<sub>2.5</sub> is in a ratio of 1 to 2 (DPM are ½ the value of the PM<sub>2.5</sub> concentration). For the mitigated scenario, the ratio of DPM to PM<sub>2.5</sub> changes to 1 to 10 (DPM are 1/10<sup>th</sup> of the PM<sub>2.5</sub> concentrations). No explanation for the difference in the emission ratios is provided in the HRA.
8. The description of the work performed in the HRA document is not in the order in which the work must be performed. “The HRA was conducted following methodologies in OEHHA’s Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments.<sup>31</sup> This was accomplished by applying the estimated DPM concentrations at nearby sensitive receptors analyzed to the established cancer risk estimates and acceptable reference concentrations for non-cancer health effects. The USEPA’s AERMOD atmospheric dispersion model then calculates air concentrations (in micrograms per cubic meter, or µg/m<sup>3</sup>) of DPM and PM<sub>2.5</sub> at the nearby sensitive receptors.<sup>32</sup>

The City’s HRA contains so many flaws that, even without access to the modeling files, Dr. Clark is able to conclude that it fails to accurately analyze and disclose the full extent of the Project’s health risk. For the same reasons, the HRA does not provide the City with substantial evidence supporting the City’s conclusion that health risk impacts would be less than significant. Indeed, this HRA does not provide enough relevant information to draw nearly any inferences, let alone reasonable inferences, to accurately determine the Project’s health risk. There remains substantial evidence supporting a fair argument that the Project’s health risk may be significant and unmitigated. The City should prepare an EIR to rectify the inadequacies present here.

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<sup>31</sup> Office of Environmental Health Hazard Assessment, Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments, February 2015, [http://oehha.ca.gov/air/hot\\_spots/hotspots2015.html](http://oehha.ca.gov/air/hot_spots/hotspots2015.html)

<sup>32</sup> Clark Comments, pp. 6-7.  
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### **C. The City Failed to Provide Underlying Air Dispersion Model Data**

The Staff Report and HRA also fail to include the AERMOD input and output files (the air dispersion model used to distribute the pollutants). The City therefore lacks substantial evidence to support the conclusions in the HRA, and the City remains in violation of the procedural mandates of CEQA by relying on bare conclusory statements to support their conclusions.

## **IV. REBUTTAL TO CITY'S RESPONSE REGARDING BIOLOGICAL RESOURCES**

Residents' comments on the MND provided substantial evidence supporting a fair argument that the Project may have potentially significant biological resources impacts, and that the MND lacked substantial evidence to support its baseline and impact analyses for several species. The Staff Report fails to meaningfully respond to many of these comments.

### **A. The Staff Report Still Fails to Provide Adequate Information to Properly Determine Baseline Conditions for Several Species**

Mr. Cashen notes that the City's statement regarding special status raptors is "is misleading because most of the special-status species that have potential to occur at the site are associated with open habitat types; however, most of M&A's surveys were conducted during or before 2012 when the Project site contained a dense eucalyptus grove (i.e., before it was converted to the open habitat conditions that constitute the environmental baseline). Only three of the surveys that were conducted after 2012 were conducted during the avian breeding season. Furthermore, the statement that no special-status raptors were observed during M&A's numerous surveys conflicts with M&A's Biological Resources Analysis ("BRA"), which lists the white-tailed kite as one of the species observed on the Project site.<sup>33</sup><sup>34</sup>

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant

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<sup>33</sup> BRA, Table 2. *See also* BRA p. 8, which includes "fully protected" species in the definition of special-status species.

<sup>34</sup> Cashen Comments, p.1-2.  
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environmental impact.<sup>35</sup> CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.<sup>36</sup> Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that, “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”<sup>37</sup> The City failed to establish a proper baseline setting by not performing detection surveys.<sup>38</sup>

## **B. The City Failed to Perform Required Surveys to Detect Swainsons Hawk**

The City notes that it “six surveys were conducted on the 35 acres over the two survey periods; no nesting Swainson’s hawks were found onsite or within a half-mile radius.”<sup>39</sup> Mr. Cashen notes that this is the first time the City has claimed this.<sup>40</sup> According to the City’s Biological Resources Analysis (“BRA”), only “two surveys were conducted in 2019: one on December 19 and another on December 27.”<sup>41</sup> He further notes that “[n]either survey would have been capable of detecting Swainson’s hawks, which do not return to their nesting territories in California until March or April.”<sup>42</sup>

There is no evidence that protocol-level Swainson’s hawk surveys were ever conducted at the Project site. Indeed, the BRA cites the absence of survey results as the reason “it must be concluded that impacts to Swainson’s hawk from the proposed project would be potentially significant pursuant to CEQA.”<sup>43</sup> Thus, the

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<sup>35</sup> See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (March 15, 2010) 48 Cal.4th 310, 316.

<sup>36</sup> CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

<sup>37</sup> *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

<sup>38</sup> Cashen Letter, p. 1.

<sup>39</sup> MND p. 44.

<sup>40</sup> Cashen Letter, p. 1-2.

<sup>41</sup> BRA, p. 5.

<sup>42</sup> Swainson’s Hawk Technical Advisory Committee. 2000. Recommended Timing and Methodology for Swainson’s Hawk Nesting Surveys in California’s Central Valley.

<sup>43</sup> BRA, p. 35.

City's contention that there are no significant impacts lacks substantial evidence. Furthermore, Mr. Cashen explains that the City's own expert provides substantial evidence supporting a fair argument that there may be significant impacts to the Swainson Hawk. The City must prepare an EIR to disclose and mitigate these impacts.

### **C. The City Failed to Analyze Impacts to the Northern Harrier**

The City's failed to analyze the significance of the Project's permanent impacts on nesting habitat for the northern harrier. The City's response argues the analysis is not necessary because the northern harrier is not protected pursuant to either the State or Federal Endangered Species Acts. The fact that the northern harrier is not listed under either Endangered Species Act is irrelevant to the City's obligation under CEQA.<sup>44</sup> In this case, the City elected to use the thresholds of significance established in Appendix G of the State CEQA Guidelines. Therefore, the City must analyze whether the Project would:

Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies or regulations, or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service.<sup>45</sup>

The MND acknowledged the Project would adversely affect "marginal nesting habitat for the northern harrier," and that the northern harrier is a special-status species. However, the City failed to analyze the significance of the Project's impacts on northern harrier nesting habitat. These omissions are not corrected by the Staff Report. As Mr. Cashen previously stated in his MND comments: (a) one of the primary threats to northern harriers is the loss and degradation of nesting (and foraging) habitat; and (b) the mitigation incorporated into the MND does nothing to mitigate the Project's permanent impacts on northern harrier habitat. As a result, the issues raised in Comment A.18 remain unresolved. Thus, the City still failed to provide substantial evidence supporting its conclusions regarding the Northern Harrier, and substantial evidence supporting a fair argument still remains that the Project may have significant, unmitigated impacts to the Northern Harrier.

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<sup>44</sup> Cashen Letter, p. 2.

<sup>45</sup> See Recirculated MND, Section IV.  
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**D. The City Still Failed to Provide Substantial Evidence Supporting Its Conclusion that there Will be No Impacts to the Burrowing Owl.**

The City's Responses focused on dismissing the possibility of burrowing owls at the Project site even though the City's response conflicts with its own BRA, which reported presence of California ground squirrels and burrows at the Project site.<sup>46</sup> For example, although the City notes that the burrows "are of recent origin," the BRA explains that "[t]he mobility of the western burrowing owl enables the species to colonize the recent burrows."<sup>47</sup> In addition, the BRA concluded the Project site provides potential habitat for burrowing owls, and that surveys must be conducted to confirm or negate presence of the species at the site.<sup>48</sup> Thus, the conclusions in the BRA support Mr. Cashen's conclusions that the Project may adversely affect burrowing owls, and do not support the City's conclusion to the contrary.<sup>49</sup> As a result, the issues raised in Comment A.20 remain unresolved. Thus the City failed to provide any evidence supporting a fair argument that there will be no impacts to the Burrowing Owl.

**E. The City Failed to Properly Analyze the Cumulative Impacts from the Project**

Response to Comment A.22 fails to address the issues Mr. Cashen raised regarding cumulative impacts, including:

1. The MND fails to disclose or analyze cumulative impacts due to *all* past, present, and probable future projects in American Canyon.
2. The MND fails to provide an explanation for the geographic limitation. Moreover, the cumulative impacts analysis is fundamentally flawed because the City applied two different geographical scales to its analysis.
3. The MND misrepresents the functions of the Wetlands Open Space, Napa River Bay Trail, Clark Ranch and the Napa Plant Site Restoration Project as habitat.

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<sup>46</sup> BRA, p. 13 and Table 2; Cashen Comments, p.3-4.

<sup>47</sup> BRA, p. 13.

<sup>48</sup> BRA, p. 14.

<sup>49</sup> MND, p. 42.

4. The City's determination that the proposed mitigation would offset cumulative impacts to less-than-significant levels is not supported by evidence.

Mr. Cashen commented that the City's determination regarding the significance of cumulative impacts to biological resources is vague and not supported by evidence. The City provided the following response: "development of this approximately 10-acre property that abuts eucalyptus groves and warehouses does not constitute a cumulatively considerable contribution to overall cumulative impacts to biological resources in American Canyon." This conclusory statement is not supported by actual evidence or analysis. Furthermore, it conflicts with the City's General Plan EIR, which concluded:

The General Plan Policies regarding biological resources provide protection to certain sensitive resources such as wetlands, coastal saltmarshes, oak woodlands and individual plant species. - The plan does allow, however, for the loss of many acres of natural open space that support numerous wildlife species as well as many introduced species and cattle grazing. Significant, unavoidable adverse impacts from implementation of the proposed Plan include the diminishment of habitat for wildlife and plants, and a substantial effect on sensitive, rare or in fact endangered animals (see Table 9-1 in the General Plan Background Report), notwithstanding the infill nature of many of the subareas.<sup>50</sup>

Thus, as Mr. Cashen explains, the General Plan concluded that development in American Canyon would have significant, unavoidable adverse impacts on habitat for the species listed in General Plan Table 9-1, which include the western pond turtle, black-shouldered kite (now called white-tailed kite), northern harrier, and burrowing owl.<sup>51</sup>

A project's contribution to a significant cumulative impact can be rendered less than cumulatively considerable when the project is required to implement or fund its "fair share" of a mitigation measure designed to alleviate the cumulative impact. In this case, none of the biological resource mitigation measures incorporated in the MND are designed to alleviate the cumulative impact: they are all specific to the proposed Project. Furthermore, although the MND requires compensatory mitigation if burrowing owls are detected onsite, it does not require

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<sup>50</sup> Envicom Corporation. 1994. American Canyon General Plan, Final Environmental Impact Report. Appendix D: Technical Background Report.

<sup>51</sup> *Ibid*, Table 9-1.

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compensatory mitigation for permanent impacts to habitat of any other special-status species that are detected onsite. The Staff Report and Responses to Comments fail to remedy this omission. As a result, the City's determination that the proposed mitigation would reduce impacts to a less-than-significant level in both the project and cumulative contexts is not supported by evidence.<sup>52</sup> Thus the City failed to provide any evidence supporting a fair argument that there will be no cumulative impacts to biological resources.

**F. The City's Burrowing Owl Mitigation does not Reduce Impacts to Less than Significant Levels.**

Mr. Cashen notes that Mitigation Measure BIO-1 is vague and defers critical components (e.g., success criteria) of the burrowing owl mitigation strategy. The City provided the following response to this issue:

The details of the Relocation Plan and Exclusion Plan would be developed at the point such a plan is necessary, and would be submitted to the CDFW for their review, comment and ultimately, approval. Typically, success criteria and other details are not discussed in the CEQA review document but rather in the mitigation plan or permit application submitted to the agency with jurisdiction over the resource in question. Should mitigation for burrowing owl be necessary, the CDFW would review the proposed mitigation plan(s)(e.g., exclusion plan, etc.) and provide comment at that time. Any such plan would undergo robust vetting by the CDFW prior to their approval.<sup>53</sup>

The City's response is inconsistent with CEQA Guidelines, which prohibit deferred mitigation unless there is a legitimate reason why the lead agency cannot develop the specific mitigation measure(s) at the time of the project's environmental review, and the mitigation measure meets one of the following basic conditions:<sup>54</sup>

1. The agency must commit itself to the mitigation by identifying and adopting one or more mitigation measures for the identified significant effect. The mitigation measure must also set out clear performance standards (or success criteria) for what the future mitigation must achieve.

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<sup>52</sup> MND, Response to Comment A.22.

<sup>53</sup> MND, Response to Comment A.23.

<sup>54</sup> Cashen Comments, p. 5.

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2. Alternatively, the agency must provide a menu of feasible mitigation options from which the applicant or lead agency can choose in order to achieve the stated performance standards.<sup>55</sup>

Mitigation Measure BIO-1 fails to satisfy either of these basic conditions because there are no performance standards for what BIO-1 must achieve, nor has the City demonstrated that there would be feasible options for mitigating the impacts should burrowing owls occur at the Project site. As explained in my previous comments, the presence of nesting burrowing owls at the Project site would be extremely significant from a biological perspective, and elimination of the nesting habitat would have a significant and unmitigable impact.<sup>56</sup>

The City's deferral of success criteria for Mitigation Measure BIO-1 is compounded by its failure to ensure the mitigation is fully enforceable. Contrary to what the City suggests in its response, Mitigation Measure BIO-1 does not require CDFW's approval of the Relocation Plan and Exclusion Plan. Even if this was an oversight, the CDFW does not have authority to impose and enforce mitigation measures for the Project because there is no nexus, (i.e., CEQA does not grant an agency powers independent of the powers granted to the agency by other laws).<sup>57</sup> Under CEQA, the lead agency is responsible for identifying the specific mitigation (or suite of options) that would be implemented to reduce impacts to less than significant levels.<sup>58</sup> For these reasons, Mitigation Measure BIO-1 does not ensure impacts to burrowing owls are reduced to less-than-significant levels.<sup>59</sup> Thus the City failed to provide substantial evidence supporting a fair argument that the Mitigation Measures will reduce impacts to insignificant levels.

#### **G. The City's Swanson Hawk Mitigation does not Reduce Impacts to Less than Significant Levels.**

Mr. Cashen notes that response to Comment A.24 makes several arguments in an attempt to justify the City's conclusion that mitigation for the Project's impact on Swainson's hawk foraging habitat is not warranted.

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<sup>55</sup> See Association of Environmental Professionals. 2020 Feb 10. CEQA Portal Topic Paper: Mitigation Measures. 11 pp. Available at: <<https://ceqaportal.org/tp/CEQA%20Mitigation%202020.pdf>>.

<sup>56</sup> Cashen Comments, p. 5.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> Cashen Comments, p. 5.

The first argument is that the Swainson's hawk population in California has experienced "widespread nesting recovery," and thus, it is no longer necessary to implement the compensatory mitigation guidelines described in CDFW's 1994 Staff Report. The Swainson's hawk was listed as a threatened species in 1983 due to the loss of habitat and decreased population numbers across the state. Habitat loss remains a significant threat to the species. Indeed, CDFW's most recent status review (2016) states: "[i]f current trends in habitat conversion of compatible agriculture to urban development continue, the Swainson's Hawk population will likely experience reduced foraging opportunities, which may result in a further reduction in the species' range, distribution, and abundance."<sup>60</sup>

Although there is evidence that the Swainson's hawk population has increased since the species was listed, the City's response misrepresents the extent of the recovery. CDFW (2021) states the following:<sup>61</sup>

The surveys previously mentioned do not provide enough data to form a trend line. The Breeding Bird Survey (BBS) has long-term dataset that can be used to assess general population trends. According to the BBS Swainson's hawk data for California shows that between 1979 to the 2005 there may have been an increase in the population. This trend alone should not be solely relied upon for accurate trend data. Factors that may affect BBS trend data include an increased interest in the Swainson's hawk. Even while considering increase population estimates since the species was listed, the amount of increase is still far below the original population estimate of just over 17,000 Swainson's hawks statewide.<sup>62</sup>

The City's second argument is that "mitigation prescriptions developed 21 years ago are outdated today."<sup>63</sup> The rationale for this argument is convoluted, but appears to be that the State of California is unable to delist the species because "the Swainson's hawk was never federally listed, and as the State of California does not have a recovery plan for the Swainson's hawk there is no guideline for what constitutes recovery."<sup>64</sup> CDFW conducted a status review of the species 2016 pursuant to the California Endangered Species Act ("CESA"). Based on that

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<sup>60</sup> California Department of Fish and Wildlife. 2016. Status Review: Swainson's Hawk (*Buteo swainsoni*) in California. p. 9; Cashen Comments, p. 6.

<sup>61</sup> Cashen Comments, p. 6.

<sup>62</sup> California Department of Fish and Wildlife. 2021. Swainson's Hawks in California [online]. Available at: <<https://wildlife.ca.gov/Conservation/Birds/Swainson-Hawks>>. (Accessed July 19, 2021).

<sup>63</sup> MND, p. I-20.

<sup>64</sup> *Ibid.*

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review, CDFW recommended that the Swainson's hawk retain threatened status under CESA. According to the status review, the CDFW recommended retention of the threatened status based on the following:<sup>65</sup>

- On-going cumulative loss of foraging habitats throughout California.
- Significantly reduced abundance throughout much of the breeding range compared to historic estimates.
- An overall reduction in the hawk's breeding range in California.<sup>66</sup>

Mr. Cashen explains that the mitigation prescriptions established in CDFW's 1994 Staff Report address these three threats. As a result, the mitigation prescriptions remain relevant despite the fact that they were developed many years ago.<sup>67</sup>

The City's third argument is that CDFW's mitigation guidelines are limited to Swainson's hawks in the Central Valley and do not apply to Napa County where "it is clear the Swainson's hawk population is expanding." This argument ignores the fact that the Swainson's hawk is listed as a threatened species throughout the entire state. Recovery of the statewide population requires addressing the threat of habitat loss not only in areas where the population is depleted, but also in areas where the population is stable or increasing. CDFW's mitigation guidelines address the threat of habitat loss by requiring compensatory mitigation for all new development projects that adversely modify nesting or foraging habitat within 10 miles of an active nest. The mitigation guidelines focused on Swainson's hawks in the Central Valley because that is where the majority of the hawks nested, and where the threats of habitat loss were greatest, when the guidelines were written in 1994. However, that does not mean that the guidelines are irrelevant to Swainson's hawks that now nest in other areas that are experiencing substantial conversion of habitat (e.g., Napa County).

Finally, the City argues that "there are well over 2,000 acres of open space preserves in the immediate area for Swainson's hawks to forage/nest in."<sup>68</sup> The 2,000 acres of open space preserves referenced in the City's argument *are not* in the

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<sup>65</sup> Cashen Comments, p. 6.

<sup>66</sup> California Department of Fish and Wildlife. 2016. Status Review: Swainson's Hawk (*Buteo swainsoni*) in California. pp. 3 and 4.

<sup>67</sup> Cashen Comments, p. 6.

<sup>68</sup> MND, p. I-20.  
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“immediate area” of the Swainson’s hawks that nest north of American Canyon.<sup>69</sup> In fact, the nest sites are located closer to the Project site than they are to most of the preserves. Nevertheless, the MND provides no evidence that habitat at the preserves would be sufficient to maintain the local Swainson’s hawk population given the cumulative impacts development scenario in American Canyon and Napa County. Thus, the City failed to provide substantial evidence supporting a fair argument that the Mitigation Measures will reduce impacts to insignificant levels.

#### **H. The City’s Mitigation Measures are Insufficient to Reduce Significant Impacts to Insignificant Levels**

The City failed to rectify the issues Mr. Cashen raised in Comments A.25 and A.26. The City’s response states: “[b]iological monitoring is an adaptive process and the biologist would modify the frequency of the monitoring activity as necessary to ensure the success of the nesting attempt.”

First, there are no success standards, or monitoring and reporting requirements, for Mitigation Measures BIO-3 and BIO-4. Although the City’s response suggests the biologist would modify the frequency of monitoring activities as necessary to ensure the success of the nesting attempt, there is no mechanism in place that requires more frequent monitoring should it be warranted. Consequently, there are no assurances that the biologist would indeed modify the frequency of monitoring activities as necessary to ensure success of the nesting attempt. Furthermore, even if the biologist recommends more frequent monitoring, the Project developer is unlikely to implement (and pay for) the additional monitoring unless it is mandated in the adopted CEQA document.<sup>70</sup>

Second, the City assumes the biologist would be able to detect adverse behavioral changes and terminate the activity causing the changes before any impacts to nesting birds occur. This assumption is not realistic unless the biologist continuously monitors the birds while construction is occurring (i.e., potentially up to 11 hours a day).<sup>71</sup> Even if the biologist continuously monitors the birds, it is unrealistic to assume that the biologist would be able to detect and rectify adverse behavioral changes before a significant impact occurs. For example, a loud noise

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<sup>69</sup> California Natural Diversity Database. 2021. RareFind 5 [Internet]. California Department of Fish and Wildlife [July 6, 2021].

<sup>70</sup> Cashen Comments, p. 7.

<sup>71</sup> MND, p. 13.  
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caused by construction activity can cause a sudden departure from the nest, which may damage eggs, trample young, or expel eggs or young. Even temporary departures from the nest (due to human disturbance) can cause overheating, chilling, or desiccation of eggs or young, predation on eggs or young, or missed feedings. These scenarios may not be evident to the biologist until after “take” has occurred, and they would not be mitigated by the actions proposed in BIO-3 and BIO-4.

Third, the Project is anticipated to have approximately 5 concrete night pours for the building slab, 4 for the large concrete paving, and 6 for the tilt-up walls. The MND fails to explain how the biologist would monitor nesting birds to assess their reaction to nighttime construction activities. Even if night vision equipment is used, effectively monitoring the birds would be extremely difficult due to the limited field of view of night vision equipment.

For these reasons, Mr. Cashen maintains the conclusion that Mitigation Measures BIO-3 and BIO-4 do not ensure significant impacts to nesting birds are avoided. Thus the City failed to provide substantial evidence supporting a fair argument that the Mitigation Measures will reduce impacts to insignificant levels.

## **V. REBUTTAL TO CITY’S RESPONSE REGARDING NOISE**

### **A. The City Failed to Address the Canyon Effect Created by Traffic and the Northern Wall**

The Responses dismisses Mr. Shaw’s comments on canyon noise effect by addressing the distance between buildings, and without addressing a principal issue raised in his comments, which is that noise reflected from passing trucks will create this effect. Mr. Shaw explains that the distance between the buildings is not relevant to the canyon noise impact identified in his MND comments, because, as the trucks approach, they will need to pass by the structure to the north on the way in and out of the facility in close proximity. He explains that this traffic will cause the canyon effect since there will be reflections from both the building to the truck and vice versa. Mr. Shaw concludes that the canyon effect could be even stronger when the trucks pull up to the north to back into the loading docks. These reflections will add to the noise from the trucks proper since the truck and the building will be parallel to each other.<sup>72</sup> Mr. Shaw therefore concludes that canyon

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<sup>72</sup> Shaw Comments, p. 1.  
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noise effect from trucks is a potentially significant impact which is not addressed or mitigated in the MND, and which is ignored by the City's Responses.

The Response next states that dense row of Eucalyptus trees will receive any reflected noise. The Eucalyptus row appears to be the line of trees by Site 1 in the photo on page 10 of the initial study Noise Appendix. However, Mr. Shaw explains that the City lacks substantial evidence for this conclusion, because studies have shown there is no additional attenuation from a limited depth of vegetation.<sup>73</sup>

Furthermore, the Responses provide no calculations that show the projected levels from the "distance, vegetation and proposed intensity of Project operations" will not be perceptible. There is therefore no supporting data or calculations to back up the City's claim that "no canyon effect" was observed.<sup>74</sup>

Thus, without any supporting data or calculations from the City to support their contentions, Mr. Shaw concludes that noise levels from the canyon effect could remain significant and unmitigated, based on the evidence provided in the MND. Thus the City failed to provide substantial evidence supporting a fair argument that there will be no impacts stemming from noise due to a canyon effect.

#### **B. The City Failed to Address Noise Resulting From Truck and Employee Automobile Traffic**

The traffic increase from the proposed project is 367 trailer truck trips per day. This is a substantial increase over existing traffic noise levels since currently there is no significant traffic past the entry to the warehouse now located to the north of the proposed project. The Responses state that a doubling of traffic volumes would result in increased noise levels of a minimum of 3-5 dB. The increase in traffic volume from the Project's 369 daily truck trips and additional worker vehicle trips would more than double existing traffic surrounding the Project site (from a few existing vehicles to 367+ vehicles/day). Mr. Shaw concludes that this increase is substantial, and will result in significant increases in ambient noise levels that the MND fails to disclose and mitigate.<sup>75</sup>

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<sup>73</sup> Shaw Comments, p. 1.

<sup>74</sup> Shaw Comments, p. 1.

<sup>75</sup> Shaw Comments, p. 1.

The next response states that truck unloading will occur within the warehouse is not responsive to my comment since truck activities from pulling into the site, maneuvering the trailers to back up to the docks, and the trucks pulling away are the activities that generate noise outside the warehouse.<sup>76</sup> However, neither the MND's noise study nor the Responses provide calculations to warrant the study's statement that "Operational noise generated by the project would be less than significant." There are also no calculations regarding truck noise from starting, traveling, or noise from air brakes. Thus, the City lacks supporting evidence for its conclusion that operational noise will be less than significant.<sup>77</sup>

Furthermore, the City's response seems to indicate there will be significant automobile traffic "the majority of peak hour traffic is expected to be employee automobile trips, which would likely be imperceptible at the nearest sensitive receptor to the east." So, in addition to the 367 trucks there will be more than at peak hours 367 automobile trips. The City failed to provide any calculations or data analyzing the combined noise impacts from trailer trucks and employee trips outside the warehouse, nor the amount of employee automobile trips.

Thus, without any supporting data or calculations from the City to support its conclusions regarding noise, the City lacks substantial evidence to support the adoption of the MND. By contrast, Mr. Shaw provides substantial evidence demonstrating that noise levels from the trailer trucks and employee automobile trips could be significant and unmitigated, based on the evidence provided in the MND. Thus the City failed to provide substantial evidence supporting a fair argument that there will be no impacts stemming from noise due truck and employee automobile traffic.

### **C. The City Failed to Address Noise Stemming From Night Time Concrete Pours**

The City provides no supporting data or calculations to back up the claim that "nighttime pouring activities would be well below the 60-dB nighttime noise limit."<sup>78</sup>

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<sup>76</sup> Shaw Comments, p. 2.

<sup>77</sup> Shaw Comments, p. 2.

<sup>78</sup> Shaw Comments, p. 2.

The City relies on another project, the SDG 330 Project located to the south of the Project site, to prevent noise from reaching the sensitive receptors and only provides what it believes noise would be at a 1,000 ft. The City relies on the proposition that “concrete pouring activities including concrete trucks [would be] approximately 53 dB Lmax at the nearest receptor approximately 1,000 feet” but then fails to explain how per its calculations how this number was calculated. The City provides no supporting data or calculations of how they came to 53 dB Lmax. Given their reliance on vegetation as a noise barrier their calculations likely include a reduction due to the Eucalyptus trees which is improper.<sup>79</sup>

Thus, without any supporting data or calculations from the City to support their contentions, Mr. Shaw concludes that noise levels from the nighttime pours could be significant and unmitigated, based on the evidence provided in the MND. Thus the City failed to provide substantial evidence demonstrating that there will be no impacts stemming from noise due to a night time concrete pour, and Mr. Shaw’s comments provide substantial evidence supporting a fair argument that impacts remain significant and unmitigated

## **VI. REBUTTAL TO CITY’S RESPONSE REGARDING TRANSPORTATION**

The City failed to respond substantively to the issue we raised under Transportation that the MND assumes implausible mitigation for the Project’s significant VMT impacts. The City argues that the extension of the bike path will make the route more desirable and that under either bike commute distance number (3.8 miles or 5.2) the VMT would be reduced to insignificant levels.

As Mr. Smith explained, both the high and low estimates in the MND are generated by a theoretical formula estimating the number of commuters who would be induced to travel by bike, instead of auto, as the result of a bikeway of certain length. The MND’s low estimate reflects only the commuters induced to travel by bike solely by the 800 feet of paved path the Project proposes to provide. The high estimate credits the Project with the commute attractiveness of the entire 1.85 mile bikeway that has already existed for a number of years to the south of the 800 feet of bikeway the Project will pave.<sup>80</sup> Mr. Smith concluded that averaging between an estimate that just reflects the length of bikeway the Project will pave and one that

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<sup>79</sup> Shaw Comments, p. 2.

<sup>80</sup> Smith Letter, pp. 3-4.

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credits the Project with the entire 1.85 miles of bikeway that already existed is not supported by substantial evidence and is simply not reasonable.<sup>81</sup>

Mr. Smith further explained that the MND's high VMT-reduction estimate reflects a limited localized study by an Oregon research cooperative that found the average commute bike trip length was 5.2 miles, whereas the low estimate reflects a national study by the American Association of State Highway and Transportation Officials (AASHTO) that found the average bike commute trip length was 3.8 miles.<sup>82</sup> Mr. Smith opined that splitting differences is, in essence, placing equal credence on a limited local study as on one with a national data base. This assumption is unsupported. The MND also discloses by footnote that it assumes the bike commuters would do so 5 days per week for 47 weeks per year.<sup>83</sup> This is in essence every single work day per year, discounting vacation, sick leave and holidays. It leaves no allowance for days of substantial rain or when rain is forecast to fall before quitting time, days of high winds, very cold days or extreme summer heatwaves, or days where the commuter intends to make a trip at lunch hour or immediately after work for which travel by bike may be unsuitable.<sup>84</sup>

Finally, the MND's notion that the Project is "filling a gap" in the area bikeway network is an exaggeration. Mr. Smith identified aerial photo evidence which shows that a bikeable path has existed on the alignment of Commerce Boulevard at the supposed gap since the mid-1990s, if not before.<sup>85</sup> The aerial photos provide substantial evidence demonstrating that the Project's bike path is a minor addition to existing bike access, and is therefore not likely to produce significantly higher VMT reductions than currently provided by the existing bike lanes. Mr. Smith concludes that the Project is not supplying a missing link, it is just improving the pavement.<sup>86</sup>

It is unreasonable for the MND to assume that the Project's significant VMT impacts will be mitigated by simply paving a few hundred feet of bikeway. The Project cannot be approved under an MND.<sup>87</sup> An EIR must be prepared to

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<sup>81</sup> Smith Letter, pp. 3-4.

<sup>82</sup> Smith Letter, pp. 3-4; citing MND p. 701.

<sup>83</sup> MND, Appendix F, p. 256, FN 2.

<sup>84</sup> Smith Letter, pp. 3-4.

<sup>85</sup> Smith Letter, pp. 3-4.

<sup>86</sup> Smith Letter, pp. 3-4.

<sup>87</sup> Smith Letter, pp. 3-4.

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incorporate additional mitigation to reduce the Project's VMT impacts to less than significant levels.

## VII. CONCLUSION

We urge the City Council to fulfill its responsibilities under CEQA by remanding the Project to staff to prepare a legally adequate EIR for the Project. Thank you for your attention to these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darien Key", is placed over a light gray rectangular background.

Darien Key

DKK:acp

Attachments

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