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January 23, 2023

*Via E-mail*

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**Re: Golden Land Warehouse Project, City Council of the City of Rialto, Regular Meeting of January 24, 2023, Agenda Item TAB 1; Conditional Development Permit (CDP) No. 2021-0047; Precise Plan of Design (PPD) No. 2021-0061 (APN: 1133-081-01 & 1133-081-02) (City File No. 23-022)**

Dear Mayor Robertson, Mayor Pro Tem Scott, and Honorable Members of the City Council:

I am writing on behalf of **Supporters Alliance for Environmental Responsibility (“SAFER”)**, whose members live or work in the City of Rialto (“City”), regarding the City Council’s review of Conditional Development (“CDP”) Permit No. 2021-0047; Precise Plan of Design No. 2021-0061; and the proposed adoption of a California Environmental Quality Act (“CEQA”) Class 32 Categorical In-Fill Exemption (“Exemption”), related to the development of an approximately 62,248 square-foot industrial building proposed for the southwest corner of Locust Avenue and Stonehurst Drive in the City of Rialto, California (the “Project”).

The City cannot rely on a Class 32 exemption because the Project does not meet the required terms of the exemption under Section 15332 of the CEQA Guidelines. In order to be eligible for such an exemption, a Project must be “consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.” (14 CCR § 15332(a).) Additionally, a Project is not eligible for exemption unless a lead agency presents substantial evidence showing that “[a]pproval of the project would

not result in any significant effects relating to traffic, noise, air quality, or water quality.” (14 CCR § 15332(d) [emph. added]).

SAFER presented written comments to the Rialto Planning Commission, prior to its November 9, 2022 meeting, at which the Planning Commission voted to recommend approval of the exemption. However, SAFER remains concerned that the proposed exemption violates state law and that the City’s environmental review of the Project is legally inadequate.

SAFER’s comments are informed by the independent review of air quality experts Matt Hagemann, P.G., C.Hg. and Paul E. Rosenfeld, Ph.D., of the environmental consulting firm, Soil/Water/Air Protection Enterprise (“SWAPE”); and wildlife biologist Shawn Smallwood, PhD. The CVs and expert comments of SWAPE and Dr. Smallwood are attached as **Exhibit A** and **Exhibit B**, respectively. A copy of SAFER’s November 9, 2022 letter to the Rialto Planning Commission is attached as **Exhibit C** and is adopted in its entirety by this letter.

### LEGAL STANDARD

As the California Supreme Court has held, “[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.” (*Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-20 [citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88]; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505). “Significant environmental effect” is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” (Pub. Res. Code (“PRC”) § 21068; see also, 14 CCR § 15382). An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” (*No Oil, Inc.*, 13 Cal.3d at 83). “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Communities for a Better Env’t v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 109).

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). 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 EIR is required. (*Id.*).

Certain classes of projects are exempt from the provisions of CEQA if the project comes within a statutory or categorical exemption set forth in the CEQA Guidelines or another statute. (Pub. Res. Code §§ 21080(b), 21080.01-21080.35, 20184(a); 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.’ [Citations].” (*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, or 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].”]).

In order to be eligible for a Class 32 exemption, a lead agency must demonstrate that a proposed Project site has “**no value, as habitat for endangered, rare or threatened species,**” and that development of the Project will “**not result in any significant effects relating to traffic, noise, air quality, or water quality.**” (14 CCR § 15332; *emph. added.*) Additionally, the California Supreme Court has ruled, substantial evidence showing that a Project *will have* a significant adverse environmental impact makes a Project ineligible for exemption because the presence of such impacts constitutes “unusual circumstances” which fall outside the narrow, intended scope of CEQA exemptions (*Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1105 (“*Berkeley Hillside*”).

The court distinguishes this scenario from one in which the evidence presented merely indicates that a Project *may* have a significant impact on the environment. “[E]vidence that [a] project *will* have a significant effect does tend to prove that some circumstance of the project is unusual.” (*Berkeley Hillside*, at 1105.) Therefore, “a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes ‘a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.’ ([CEQA] Guidelines, § 15300.2, subd. (c).)” (*Id.*)

The courts have recently reiterated this analysis, explaining that “Categorical exemptions are subject to exceptions. (See [CEQA] Guidelines, § 15300.2.) **Among other things, a ‘categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.’** (*Id.*, subd. (c).)” (*Saint Ignatius Neighborhood Ass’n v. City etc. of San Francisco* (2022) 85 Cal.App.5th 1063.)

The proposed Project involves unusual circumstances because substantial evidence demonstrates that it will result in significant environmental impacts, including adverse impacts to air quality and biological resources. Therefore, the proposed exemption is unlawful and violates CEQA. To comply with state law, the City must deny the exemption and direct staff to prepare

an initial study to determine the appropriate level of environmental review, whether a mitigated negative declaration or an environmental impact report.

## ENVIRONMENTAL IMPACTS

### **I. The City has Failed to Present Any Evidence Showing that the Project Will Not Have Significant Air Quality Impacts.**

The CEQA Guidelines provide that a Class 32 exemption is not permitted unless “Approval of the project **would not result in any significant effects** relating to traffic, noise, air quality, or water quality.” (14 CCR § 15332(d) [emph. added]). However, the City has failed to prepare any quantified analysis of the Project’s likely air quality impacts.

The City must conduct an appropriate analysis and provide substantial evidence to support its conclusory statements and findings that the Project will not have adverse air quality impacts. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [agency findings must be supported by substantial evidence in the record].) Where an agency makes findings not supported by substantial evidence, an abuse of discretion is established. (*Id.*)

In addition, “CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record.” (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1378–79 [quotations omitted].) Indeed, “[d]eficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” (*Id.*; see also *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 197 [holding that city’s failure to undertake adequate environmental analysis further supported fair argument that project would have significant impacts].)

SWAPE reviewed the Staff Report prepared for the Project and found that it failed to “quantitatively evaluate the air quality and health risk impacts associated with Project construction and operation whatsoever.” As a result, the City lacks any evidence to support findings that approval of the project would not result in significant air quality impacts, precluding reliance on the Class 32 exemption, and the City has failed to meet its burden to investigate the Project’s environmental impacts.

Based on the foregoing, the City must prepare an Initial Study to determine the appropriate level of CEQA review—be it a mitigated negative declaration (“MND”) or an environmental impact report (“EIR”)—and conduct the necessary environmental review of the Project pursuant to CEQA.

### **II. There is Substantial Evidence that the Project Will Produce Significant Air Quality and Related Health Impacts.**

The Staff Report concludes that the Project would not have any significant air quality impacts. However, this view is entirely conclusory and is not supported by evidence. In contrast, SWAPE reviewed the project and modeled its likely emissions, using project-specific values with the air modeling tool, CalEEMod. Notably, SWAPE found that the Project staff report and other supporting documents “fail[] to mention or evaluate the potential health risk impacts posed by Project-generated toxic air contaminant (“TAC”) emissions whatsoever.” (Ex. A., p. 3.) This is a significant oversight.

First, “by failing to prepare a quantified construction and operational health risk analysis (“HRA”), the Project is inconsistent with CEQA’s requirement to make ‘a reasonable effort to substantively connect a project’s air quality impacts to likely health consequences.’” (*Id.*, citing *Sierra Club, et al., v. County of Fresno* (2018) 6 Cal.5th 502, 510.) Importantly, SWAPE observes, “This poses a problem, as construction of the proposed Project will produce emissions of diesel particulate matter (“DPM”) through the exhaust stacks of construction equipment throughout the entire construction duration.” (*Id.*, p. 4.) DPM is a known human carcinogen which causes significant health risks, particularly to sensitive receptors.

Next, SWAPE adds, “the ‘Golden Land Warehouse Scoping Agreement,’ prepared by integrated Engineering Group and included as an attachment to the Agenda, indicates that operation of the Project is anticipated to generate 179 daily vehicle trips, which would produce additional exhaust emissions and continue to expose nearby, existing sensitive receptors to DPM emissions (p. 2, Table 2). However, the Agenda fails to evaluate the TAC emissions associated with Project construction and operation or indicate the concentrations at which such pollutants would trigger adverse health effects. Thus, without making a reasonable effort to connect the Project’s TAC emissions to the potential health risks posed to nearby receptors, the Agenda is inconsistent with CEQA’s requirement to correlate Project-generated emissions with potential adverse impacts on human health.” (*Id.*)

The proposed exemption also fails to comply with applicable guidance from the California Department of Justice, which recommends that lead agencies prepare a quantitative HRA for all warehouse projects. (*Id.*) The City has prepared no analysis whatsoever of the Project’s likely health impacts. Therefore, “a full CEQA analysis should be prepared to include an analysis of health risk impacts posed to nearby sensitive receptors from Project-generated DPM emissions.” (*Id.*, pp. 4-5.)

Notably, current guidance by the Office of Environmental Health Hazard Assessment (“OEHHA”), the agency responsible for setting statewide standards to measure health risks under CEQA, recommends that a quantified HRA be prepared to evaluate potential cancer risks for any short-term construction project lasting more than two months, and for the lifetime of any long-term project lasting more than six months. OEHHA guidance also recommends that an exposure duration of 30 years should be used to estimate the individual cancer risk affecting the maximally exposed individual resident (“MEIR”) near a proposed Project site. (*Id.*) A project’s creation of health risks for impacted MEIRs must be further evaluated according to various sensitive receptors’ age and pregnancy status. (*Id.*, p. 9.) Again, a future CEQA analysis must

include a quantified HRA and adequately evaluate the Project's future health risks in accordance with applicable guidance.

The exemption is additionally improper because it “fails to compare the Project’s excess cancer risk to the [South Coast Air Quality Management District’s] specific numeric threshold of 10 in one million.” (*Id.*, p. 5.) Therefore, “in accordance with the most relevant guidance, an assessment of the health risk posed to nearby, existing receptors as a result of Project construction and operation should be conducted.” (*Id.*) The California Supreme Court has emphasized the importance of air district significance thresholds in providing substantial evidence of a significant adverse environmental impact under CEQA. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 [“As the [South Coast Air Quality Management] District’s established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact.”].)

**a) Independent Analysis Demonstrates Clear Risk of a Significant Health Impact to Sensitive Receptors.**

In the absence of any quantitative analysis prepared by the City, SWAPE prepared an estimate of the Project’s future construction- and operation-related emissions utilizing CalEEMod.2020.4.0, as well as the Project-specific information provided in the staff report. (Ex. A., p. 5.) SWAPE further relied upon a screening-level risk assessment using AERSCREEN, a modeling tool which is recommended by both OEHHA and the California Air Pollution Control Officers Association (“CAPCOA”) for the development of Level 2 Health Risk Screening Assessments (“Level 2 HRSA”). According to SWAPE, “A Level 2 HRSA utilizes a limited amount of site-specific information to generate maximum reasonable downwind concentrations of air contaminants to which nearby sensitive receptors may be exposed. If an unacceptable air quality hazard is determined to be possible using AERSCREEN, a more refined modeling approach is required prior to approval of the Project.” (*Id.*, p. 5.)

Following this recommended approach for modeling a Project’s future health risks, SWAPE presented substantial evidence showing that Project construction and operations would result in excess cancer risks for pregnant individuals during the third trimester of pregnancy, as well as for infants, children, and adults when those individuals are maximally exposed to Project-related emissions, or located approximately 100 meters from the Project site. (*Id.*, pp. 6-9.) The resulting cancer risks to pregnant individuals, infants, children under age 16, and adults under 30 would therefore be, respectively, 2.38, 31.2, 14.8, and 1.64 per million. (*Id.*, p. 9.) The excess cancer risk over the course of a residential lifetime (30 years) is approximately 50.1 per million. (*Id.*)

Therefore, the cancer risk levels affecting maximally exposed sensitive receptors who are 0-16 years old, or who are exposed to the project over a “lifetime” of 30 or more years, are above the SCAQMD significance threshold of 10 per million. (*Id.*, p. 9.) Since expert evidence demonstrates that the Project will exceed the SCAQMD’s CEQA significance threshold, there is

substantial evidence that an “unstudied, potentially significant environmental effect[]” exists. (See, *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 958.)

Even so, SWAPE explains, this analysis is based on a “screening-level HRA, which is known to be conservative, and which may not fully capture the extent of a Project’s future health impacts. Therefore, SWAPE concludes that the “screening-level HRA demonstrates that construction and operation of the Project could result in a potentially significant health risk impact,” and as such, “a revised EIR should be prepared to include a refined health risk analysis which adequately and accurately evaluates health risk impacts associated with both Project construction and operation.” (*Id.*, p. 10.)

### **III. The City Failed to Consider the Project Site’s “Baseline” Air Pollution Conditions and the Project’s Cumulative Air Quality Impacts.**

CEQA requires lead agencies to consider a project’s **environmental “baseline”**—measured at the time of environmental review and prior to project development—to determine the extent of a Project’s likely future environmental impacts, including cumulative impacts. (CEQA Guidelines § 15063(d)(2).) The CEQA “baseline” is the set of environmental conditions against which to compare a project’s anticipated impacts. (*CBE v. SCAQMD*, 48 Cal.4th at 321.) CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency’s environmental review under CEQA:

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

(See *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-25 (“*Save Our Peninsula*”).) As the court of appeal has explained, “the impacts of the project must be measured against the ‘real conditions on the ground,’” and not against hypothetical permitted levels. (*Id.* at 121-23.)

However, the City has failed to prepare *any* analysis or assessment of the Project site’s baseline air quality conditions. In contrast, SWAPE reviewed the Project and “determined that the development of the proposed Project would result in disproportionate health risk impacts on community members living, working, and going to school within the immediate area of the Project site.” (Ex. A., p. 10). Importantly, according to the SCAQMD, “Those living within a half mile of warehouses are more likely to include communities of color, have health impacts such as higher rates of asthma and heart attacks, and [face] a greater environmental burden.” (*Id.*)

The site’s baseline air quality conditions related to the areas’ existing industrial pollution burden are *essential* to the City’s consideration of the Project’s potential future air quality

impacts, particularly as it pertains to the Project's likely effect on existing sensitive receptors. In addition, CEQA requires consideration of a Project's **cumulative impacts** when determining whether its future environmental impacts may be considered significant. Here, the courts have explained:

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Communities for a Better Environment v. Cal. Resources Agency* ("CBE v. CRA"), (2002) 103 Cal.App.4th 98, 117.

To this end, the California Department of Justice urges local agencies performing CEQA review of warehouse projects to fully analyze "all reasonably foreseeable project impacts, including cumulative impacts." (California Department of Justice, *Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act*, p. 6, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/warehouse-best-practices.pdf>.) Furthermore, the guidance adds, "When analyzing cumulative impacts," agencies should thoroughly consider "the project's incremental impact in combination with past, present, and reasonably foreseeable future projects, **even if the project's individual impacts alone do not exceed the applicable significance thresholds.**" (*Id.*, emph. added.)

Therefore, a legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines § 15355(b).

Importantly, in *Kings County Farm Bureau v. City of Hanford*, (1990) 221 Cal.App.3d 692, 718, the court concluded that an EIR violated CEQA because it failed to adequately consider a Project's cumulative air quality impacts. Here, the court wrote: "The EIR's analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project's impact. In simple terms, the EIR reasons the air is already bad, so even though emissions from the project will make it worse, the impact is insignificant." The court forcefully rejected this analysis, observing that: "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but **whether any additional amount of precursor emissions should be considered significant** in light of the serious nature of the ozone problems in this air basin." (*Id.*, emph. added.)

#### **IV. Substantial Evidence Shows that the Project's Cumulative Air Quality Impacts Will Disproportionately Burden the Health of Impacted Area Residents.**

Based on the foregoing, it is essential that the City prepare a detailed cumulative impacts analysis prior to considering approval of the proposed Project. However, the City prepared no



such analysis in proposing the exemption. Therefore, SWAPE conducted a review of the Project site and the existing pollution burden in the surrounding community. This review provides substantial evidence that the Project, if approved, *will* have a significant impact on air quality and the health of impacted residents. Because the project will have a significant air quality impact, it is ineligible for CEQA exemption.

First, SCAQMD research has found that, among 2.4 million Southern California residents who live within one half-mile radius of at least one warehouse, impacted communities are disproportionately Black and Latino and experience elevated rates of asthma, heart disease, and other serious health ailments. (*Id.*) A similar study found that “neighborhoods with lower household income levels and higher percentages of minorities are expected to have higher probabilities of containing warehousing facilities.” (*Id.*, pp. 10-11.) Finally, a report authored by the Inland Empire-based People’s Collective for Environmental Justice and researchers at the University of Redlands found that “more warehouse projects are being approved and constructed in low-income communities of color and serving as a massive source of pollution by attracting thousands of polluting truck trips daily. Diesel trucks emit dangerous levels of nitrogen oxide and particulate matter that cause devastating health impacts including asthma, chronic obstructive pulmonary disease (COPD), cancer, and premature death.” (*Id.*, p. 11.)

Despite these significant health risks, the Inland Empire region continues to build an estimated 10 to 25 million square feet of new industrial space each year. (*Id.*) For example, upon reviewing site-specific data for the proposed Project from CalEnviroScreen 4.0—the California Environmental Protection Agency’s statewide screening tool which maps census tracts according to environmental burden and socioeconomic vulnerability—SWAPE found that the Project’s census tract registers in the 80th percentile of most polluted census tracts in California. (*Id.*) Similarly, data from the SCAQMD’s MATES V data visualization tool shows that Project site’s surrounding area residents face an existing cancer risk among the 71st percentile of the South Coast Air Basin residents across Southern California (*Id.*, p. 12)

These disproportionate health burdens are due in large part to heavy industrial and warehousing activities in the surrounding area. For instance, in April 2022, the American Lung Association ranked San Bernadino County as having the worst for ozone pollution in the nation. (*Id.*, p. 13) Similarly, the Los Angeles Times reported that, in 2020, San Bernardino County violated federal health standards for ozone pollution, or “smog,” on 130 days. Downtown Los Angeles, by contrast, had only 22 ozone violation days in 2020. (*Id.*) According to studies by the U.S. Environmental Protection Agency and researchers at Stanford University, the health impacts of smog pollution are especially severe for children (*Id.*, pp. 13-14.)

Importantly, SWAPE found that the Wilmer Amina Carter High School is located 0.44 miles from the Project site. According to SWAPE, “This poses a significant threat because, as outlined above, children are a vulnerable population that are more susceptible to the damaging side effects of air pollution. As such, the Project would have detrimental short-term and long-term health impacts on local children if approved.” (*Id.*, pp. 14-15.)



(Google Earth image via SWAPE, Ex. A., p. 15.)

In conclusion, SWAPE wrote that “[a]n EIR should be prepared to evaluate the disproportionate impacts of the proposed warehouse on the community adjacent to the Project, including an analysis of the impact on children and people of color who live and attend school in the surrounding area. Finally, in order to evaluate the cumulative air quality impact from the several warehouse projects proposed or built in a one-mile radius of the Project site, the EIR should prepare a cumulative health risk assessment (“HRA”) to quantify the adverse health outcome from the effects of exposure to multiple warehouses in the immediate area in conjunction with the poor ambient air quality in the Project’s census tract.” (Ex. A., p. 15.)

**V. The City Failed to Disclose or Evaluate the Potential Presence of Hazardous Materials on the Project Site.**

The City failed to disclose or evaluate the potential presence of hazardous materials on the Project site in proposing the exemption. However, SWAPE’s review of Google Maps Street View images from April 2022 (see below) demonstrate that “debris consisting of foil piles and trash had been disposed of at the Project site.” (Ex. A., p. 1.)



(Google Maps image via SWAPE, Ex. A., p. 1.)

Accordingly, SWAPE writes, “A Phase I Environmental Site Assessment is necessary for inclusion in a full CEQA analysis to evaluate the debris and trash prior to Project approval. The preparation of a Phase I ESA is often undertaken in the preparation of project approval documents to identify and disclose hazardous waste issues that may present impacts to the public, workers, or the environment, and which may require further investigation, including environmental sampling and cleanup. The debris and trash in the photo above may contain hazardous materials that would pose a risk to workers involved in earthwork necessary for site preparation.” (Ex. A., p. 2.)

This is an additional significant environmental and health risk which the City has failed to address. According to SWAPE, “A Phase I ESA, completed by a licensed environmental professional, is necessary for inclusion in a full CEQA analysis to identify recognized environmental conditions, if any, at the proposed Project site. If past land uses include RECs [recognized environmental conditions], a Phase II [ESA] should be conducted to sample for residual concentrations of contaminants in soil. Any contamination that is identified above regulatory screening levels, including California Department of Toxic Substances Control Soil Screening Levels<sup>2</sup>, should be further evaluated and cleaned up, if necessary, in coordination with the Regional Water Quality Control Board and the California Department of Toxic Substances Control.” (*Id.*, pp. 2-3).

## **VI. Substantial Evidence Shows that the Project Will Have Significant Adverse Impacts to Biological Resources.**

In order to be eligible for a Class 32 exemption, a lead agency must demonstrate that a proposed Project site has “**no value, as habitat for endangered, rare or threatened species.**” (14 CCR § 15332; *emph. added.*) Here, the City’s analysis regarding the site’s value as habitat for special-status species is not supported by substantial evidence. Dr. Shawn Smallwood, an independent ecologist, reviewed the proposed exemption and the 2019 biological resources study prepared by Jericho Systems, Inc., and found the study to be deeply inadequate.

Dr. Smallwood’s review relied upon a detailed report and photographs taken by his associate, Noriko Smallwood, a wildlife biologist, following a site visit she made to the proposed Project site on November 17, 2022. Based on this assessment, Dr. Smallwood identified

numerous Project impacts to biological resources which require mitigation under CEQA. Dr. Smallwood's comments are attached to this letter as Exhibit C.

During her site visit, Ms. Smallwood "detected 15 species of vertebrate wildlife" at or near the Project site, including three special-status species. (Ex. C., p. 2.) The special-status species which Ms. Smallwood detected include Cooper's hawk (*Accipiter cooperii*), Turkey vulture (*Cathartes aura*), and California gull (*Larus californicus*). (*Id.*, p. 3.) However, noting that windy conditions during the site visit likely limited visible wildlife activity, Dr. Smallwood wrote that Ms. Smallwood nevertheless "saw enough of the wildlife community during her brief survey to confirm that the site amply provides habitat values to wildlife, and that the airspace over the project site is used by many birds for foraging, home range patrol and migratory movement." (*Id.*, p. 2.)

Dr. Smallwood also reviewed the 2019 Jericho Systems study and found it to be deeply flawed and unsupported by substantial evidence. Notably, Dr. Smallwood wrote, the "essential steps" of characterizing the Project's environmental baseline, as required pursuant to CEQA Guidelines Section 15125, "remain incomplete and misleading" in the Jericho Systems study (*Id.*, p. 8.) For instance, the study "provides no details about how [its] determinations were made during the survey to link 'known habitat preferences' to what was seen of the project site during the survey." (*Id.*) Furthermore, "The habitat associations described by Jericho systems (2019) lack any citation to source, nor is there evidence provided that any of the habitat associations were derived from actual measurements of any of the species' use of the environment." (*Id.*)

In one instance, the study summarily concluded, without any supporting evidence, that "the Site is not suitable for use by raptors." (*Id.*, p. 9.) In contrast, Ms. Smallwood "clearly refuted Jericho Systems' (2019) conclusion, as a Cooper's hawk," a special-status bird species, "hunted the site (Photo 7). Noriko also saw turkey vultures at the site." (*Id.*, p. 10.) In addition, wildlife database eBird shows that "occurrence records exist of multiple species of raptors, including of northern harrier, red-shouldered hawk, Swainson's hawk, red-tailed hawk, burrowing owl, and American kestrel very close to the site (within 1.5 miles), and of osprey, white-tailed kite, golden eagle, sharp-shinned hawk, golden eagle, ferruginous hawk, barn owl, great horned owl, merlin, prairie falcon and peregrine falcon nearby the site (within 1.5 and 4 miles)." (*Id.*) Accordingly, Dr. Smallwood writes, "Jericho systems' (2019) conclusion is not credible." (*Id.*)





Cooper's hawk, a special-status bird species, photographed at the project site on November 17, 2022. Photo credit: Noriko Smallwood (Ex. C., p. 10.)

Finally, Dr. Smallwood found that “Jericho [Systems]’s analysis of occurrence likelihoods does not comport with [wildlife] database records.” (*Id.*, p. 11.) Notably, he observed, “Jericho Systems (2019) often pigeonholes species into unrealistically narrow portions of the environment, which are then implied to be absent from the site. In these cases, Jericho Systems (2019) summarily concludes the habitat on site is unsuitable.” (*Id.*) These conclusory findings are consistently refuted, however, by the findings of Ms. Smallwood’s site survey, which demonstrated the occurrence of multiple special-status species living on or near the project site.

In conclusion, Dr. Smallwood observed that “**The proposed CEQA Class 32 Categorical Exemption is founded on a purely speculative observation – lacking any evidentiary support – that the site ‘has no significant impact and no value as habitat for endangered, rare or threatened species’** (Page 63 of Planning Commission Agenda Packet, 9 November 2022). Neither does the City of Rialto (2010) General Plan support the City’s speculative conclusion, as no surveys nor database review were completed for it. Noriko’s survey refutes the City’s speculative basis for the Exemption.” (*Id.*, pp. 7-8; *emph. added.*)

CEQA requires the preparation of an EIR – including the independent development of biological resource surveys – to fully assess and more extensively mitigate these impacts. In particular, Dr. Smallwood writes, the EIR should characterize the environmental setting “along the reaches of the road to be used by the project-generated traffic” which is estimated to result in “179 daily vehicle miles travel (VMT), or an annual VMT of 65,335.” (*Id.*, p. 12.) Furthermore, Dr. Smallwood adds, “This VMT would jeopardize many wild animals with collision mortality well beyond the project building’s footprint.” (*Id.*)

Dr. Smallwood’s findings constitute substantial evidence of a fair argument that the Project will have significant adverse impacts on existing biological resources. Therefore, the use of an exemption is improper, and if approved, would violate CEQA.

## VII. CONCLUSION

The City cannot rely on a Class 32 exemption because the Project does not meet the required terms of the exemption. SAFER has presented substantial evidence, based on independent experts’ review, that the Project *will* have significant air quality and biological impacts, including cumulative impacts that will negatively impact existing sensitive receptors. An initial review of the Project also reveals possible risks related to the presence of potentially hazardous materials on the Project site.

Accordingly, the City must prepare an initial study to determine the appropriate level of environmental review required under CEQA, and thereafter, conduct the necessary environmental in accordance with applicable CEQA requirements. SAFER respectfully requests that you deny approval of the Project and direct staff to conduct further environmental review as required by state law. Thank you for considering these comments.

Sincerely,



Adam Frankel  
LOZEAU | DRURY LLP