

Letter D

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**VIA E-MAIL**

May 29, 2022

Liz Shearer-Nguyen  
 Senior Planner  
 City of San Diego  
 1222 1st Avenue  
 San Diego, CA 92101  
 Em: [Lshearer@sandiego.gov](mailto:Lshearer@sandiego.gov)

RE: Bella Mar Amendment Project Initial Study/Mitigated Negative Declaration

Dear Liz Shearer-Nguyen

On behalf of the Southwest Regional Council of Carpenters (“**Southwest Carpenters**” or “**SWRCC**”), my Office is submitting these comments on the City of San Diego (“**City**” or “**Lead Agency**”) Initial Study/Mitigated Negative Declaration (“**IS/MND**”) (SCH No. 2022040642) for the Bella Mar Amendment Project (“**Project**”).

The Southwest Carpenters is a labor union representing more than 50,000 union carpenters in six states and has a strong interest in well ordered land use planning and addressing the environmental impacts of development projects.

Individual members of the Southwest Carpenters live, work and recreate in the City and surrounding communities and would be directly affected by the Project’s environmental impacts.

SWRCC expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

SWRCC incorporates by reference all comments raising issues regarding the IS / MND submitted prior to certification of the EIR for the Project. *Citizens for Clean*

D-1

D-1

Comment noted. The comment provides background on Southwest Carpenters and their interest in the project. Further, the City will provide notice on all CEQA actions, approvals, determinations, and hearings as requested. The comment does not raise a specific issue relating to the adequacy or accuracy of the draft MND. No further response is required.

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*Energy v City of Woodland* (2014) 225 Cal. App. 4th 173, 191 (finding that any party who has objected to the Project’s environmental documentation may assert any issue timely raised by other parties).

Moreover, SWRCC requests that the Lead Agency provide notice for any and all notices referring or related to the Project issued under the California Environmental Quality Act (“CEQA”), Cal Public Resources Code (“PRC”) § 21000 *et seq.*, and the California Planning and Zoning Law (“**Planning and Zoning Law**”), Cal. Gov’t Code §§ 65000–65010. California Public Resources Code Sections 21092.2, and 21167(f) and Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency’s governing body.

D-2

The City should require the Applicant provide additional community benefits such as requiring local hire and use of a skilled and trained workforce to build the Project. The City should require the use of workers who have graduated from a Joint Labor Management apprenticeship training program approved by the State of California, or have at least as many hours of on-the-job experience in the applicable craft which would be required to graduate from such a state approved apprenticeship training program or who are registered apprentices in an apprenticeship training program approved by the State of California.

Community benefits such as local hire and skilled and trained workforce requirements can also be helpful to reduce environmental impacts and improve the positive economic impact of the Project. Local hire provisions requiring that a certain percentage of workers reside within 10 miles or less of the Project Site can reduce the length of vendor trips, reduce greenhouse gas emissions and providing localized economic benefits. Local hire provisions requiring that a certain percentage of workers reside within 10 miles or less of the Project Site can reduce the length of vendor trips, reduce greenhouse gas emissions and providing localized economic benefits. As environmental consultants Matt Hagemann and Paul E. Rosenfeld note:

[A]ny local hire requirement that results in a decreased worker trip length from the default value has the potential to result in a reduction of construction-related GHG emissions, though the significance of the reduction would vary based on the location and urbanization level of the project site.

D-2

Comment noted. The comment does not address the adequacy or accuracy of the draft MND. No further response is required.

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March 8, 2021 SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling.

Skilled and trained workforce requirements promote the development of skilled trades that yield sustainable economic development. As the California Workforce Development Board and the UC Berkeley Center for Labor Research and Education concluded:

... labor should be considered an investment rather than a cost – and investments in growing, diversifying, and upskilling California’s workforce can positively affect returns on climate mitigation efforts. In other words, well trained workers are key to delivering emissions reductions and moving California closer to its climate targets.<sup>1</sup>

D-3 Recently, on May 7, 2021, the South Coast Air Quality Management District found that that the “[u]se of a local state-certified apprenticeship program or a skilled and trained workforce with a local hire component” can result in air pollutant reductions.<sup>2</sup>

Cities are increasingly adopting local skilled and trained workforce policies and requirements into general plans and municipal codes. For example, the City of Hayward 2040 General Plan requires the City to “promote local hiring . . . to help achieve a more positive jobs-housing balance, and reduce regional commuting, gas consumption, and greenhouse gas emissions.”<sup>3</sup>

In fact, the City of Hayward has gone as far as to adopt a Skilled Labor Force policy into its Downtown Specific Plan and municipal code, requiring developments in its Downtown area to requiring that the City “[c]ontribute to the stabilization of regional construction markets by spurring applicants of housing and nonresidential developments to require contractors to utilize apprentices from state-approved, joint

<sup>1</sup> California Workforce Development Board (2020) Putting California on the High Road: A Jobs and Climate Action Plan for 2030 at p. ii, available at <https://laborcenter.berkeley.edu/wp-content/uploads/2020/09/Putting-California-on-the-High-Road.pdf>

<sup>2</sup> South Coast Air Quality Management District (May 7, 2021) Certify Final Environmental Assessment and Adopt Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions Program, and Proposed Rule 316 – Fees for Rule 2305, Submit Rule 2305 for Inclusion Into the SIP, and Approve Supporting Budget Actions, available at <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2021/2021-May7-027.pdf?sfvrsn=10>.

<sup>3</sup> City of Hayward (2014) Hayward 2040 General Plan Policy Document at p. 3-99, available at [https://www.hayward-ca.gov/sites/default/files/documents/General\\_Plan\\_FINAL.pdf](https://www.hayward-ca.gov/sites/default/files/documents/General_Plan_FINAL.pdf).

D-3 Comment noted. The comment does not address the adequacy or accuracy of the draft MND. There is no CEQA provision nor any City code that mandates the City’s requirement for the hiring or use of individual development project’s construction labor. No further response is required.

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labor-management training programs, . . .<sup>4</sup> In addition, the City of Hayward requires all projects 30,000 square feet or larger to “utilize apprentices from state-approved, joint labor-management training programs.”<sup>5</sup>

D-4 Locating jobs closer to residential areas can have significant environmental benefits. As the California Planning Roundtable noted in 2008:

People who live and work in the same jurisdiction would be more likely to take transit, walk, or bicycle to work than residents of less balanced communities and their vehicle trips would be shorter. Benefits would include potential reductions in both vehicle miles traveled and vehicle hours traveled.<sup>6</sup>

In addition, local hire mandates as well as skill training are critical facets of a strategy to reduce vehicle miles traveled. As planning experts Robert Cervero and Michael Duncan noted, simply placing jobs near housing stock is insufficient to achieve VMT reductions since the skill requirements of available local jobs must be matched to those held by local residents.<sup>7</sup> Some municipalities have tied local hire and skilled and trained workforce policies to local development permits to address transportation issues. As Cervero and Duncan note:

In nearly built-out Berkeley, CA, the approach to balancing jobs and housing is to create local jobs rather than to develop new housing.” The city’s First Source program encourages businesses to hire local residents, especially for entry- and intermediate-level jobs, and sponsors vocational training to ensure residents are employment-ready. While the program is voluntary, some 300 businesses have used it to date, placing more than 3,000 city residents in local jobs since it was launched in 1986. When needed, these carrots are matched by sticks, since the city is not shy about

<sup>4</sup> City of Hayward (2019) Hayward Downtown Specific Plan at p. 5-24, *available at* <https://www.hayward-ca.gov/sites/default/files/Hayward%20Downtown%20Specific%20Plan.pdf>.

<sup>5</sup> City of Hayward Municipal Code, Chapter 10, § 28.5.3.020(C).

<sup>6</sup> California Planning Roundtable (2008) Deconstructing Jobs-Housing Balance at p. 6, *available at* <https://cprroundtable.org/static/media/uploads/publications/cpr-jobs-housing.pdf>.

<sup>7</sup> Cervero, Robert and Duncan, Michael (2006) Which Reduces Vehicle Travel More: Jobs-Housing Balance or Retail-Housing Mixing? Journal of the American Planning Association 72 (4), 475-490, 482, *available at* <http://reconnectingamerica.org/assets/Uploads/LTCT-825.pdf>.

D-4 Comment noted. The comment does not address the adequacy or accuracy of the draft MND. There is no CEQA provision nor any City code that mandates the City require the hiring or use of construction labor. No further response is required.

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negotiating corporate participation in First Source as a condition of approval for development permits.

- D-5 The City should consider utilizing skilled and trained workforce policies and requirements to benefit the local area economically and mitigate greenhouse gas, air quality and transportation impacts.

The City should also require the Project to be built to standards exceeding the current 2019 California Green Building Code to mitigate the Project's environmental impacts and to advance progress towards the State of California's environmental goals.

- D-6 I. **THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT'**

A. Background Concerning the California Environmental Quality Act

CEQA has two basic purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 California Code of Regulations ("CCR" or "CEQA Guidelines") § 15002(a)(1).<sup>8</sup> "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.' [Citation.]" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal. App. 3d 795, 810.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. CEQA Guidelines § 15002(a)(2) and (3). *See also, Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal. 3d 376, 400. The EIR serves to

<sup>8</sup> The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, section 15000 *et seq.*, are regulatory guidelines promulgated by the state Natural Resources Agency for the implementation of CEQA. (Cal. Pub. Res. Code § 21083.) The CEQA Guidelines are given "great weight in interpreting CEQA except when . . . clearly unauthorized or erroneous." *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal. 4th 204, 217.

- D-5 The project would, at a minimum, be required to comply with the mandatory measures included in the current 2019 California Energy Code (California Code of Regulations, Title 24, Part 6) and the 2019 California Green Building Code standards. Regulatory compliance to this degree would require the project to include energy efficiency and green building standards such as solar, water efficient landscaping, construction material diversion, low-polluting construction finishing materials, and installation of electric charging stations. This is consistent with the City's General Plan Conservation Element and the City's Climate Action Plan (CAP) as detailed in the project's CAP Checklist. As specifically discussed in the draft MND, the project's compliance with all mandatory measures would ensure impacts related to energy use would be less than significant.

Significant impacts were identified to biological and historical resources and appropriate mitigation measures were identified to reduce impacts to below a level of significance. All other issue areas were determined to be less than significant or have no impact and no mitigation would be required.

As further discussed in the draft MND, the CAP Consistency Checklist demonstrates that the project would be consistent with applicable strategies and actions for reducing greenhouse gas (GHG) emissions. This includes project features consistent with the energy and water efficient buildings strategy, as well as bicycling, walking, transit, and land use strategy.

- D-6 Comment noted. The comment does not address the adequacy or accuracy of the draft MND; however, the draft MND thoroughly analyzed and disclosed the potentially significant project impacts consistent with CEQA's information disclosure mandates. No further response is required.

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provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines § 15002(a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in CEQA section 21081. CEQA Guidelines § 15092(b)(2)(A–B).

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position.’ A ‘clearly inadequate or unsupported study is entitled to no judicial deference.” *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added) (quoting *Laurel Heights*, 47 Cal. 3d at 391, 409 fn. 12). Drawing this line and determining whether the EIR complies with CEQA’s information disclosure requirements presents a question of law subject to independent review by the courts. *Sierra Club v. Cnty. of Fresno* (2018) 6 Cal. 5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102, 131. As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at 1355:

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. For the EIR to serve these goals it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. *Communities for a Better Environment v. Richmond* (2010) 184 Cal. App. 4th 70, 80 (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 449–450).

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B. Due to the COVID-19 Crisis, the City Must Adopt a Mandatory Finding of Significance that the Project May Cause a Substantial Adverse Effect on Human Beings and Mitigate COVID-19 Impacts

CEQA requires that an agency make a finding of significance when a Project may cause a significant adverse effect on human beings. PRC § 21083(b)(3); CEQA Guidelines § 15065(a)(4).

Public health risks related to construction work requires a mandatory finding of significance under CEQA. Construction work has been defined as a Lower to High-risk activity for COVID-19 spread by the Occupational Safety and Health Administration. Recently, several construction sites have been identified as sources of community spread of COVID-19.<sup>9</sup>

SWRCC recommends that the Lead Agency adopt additional CEQA mitigation measures to mitigate public health risks from the Project's construction activities. SWRCC requests that the Lead Agency require safe on-site construction work practices as well as training and certification for any construction workers on the Project Site.

In particular, based upon SWRCC's experience with safe construction site work practices, SWRCC recommends that the Lead Agency require that while construction activities are being conducted at the Project Site:

Construction Site Design:

- The Project Site will be limited to two controlled entry points.
- Entry points will have temperature screening technicians taking temperature readings when the entry point is open.
- The Temperature Screening Site Plan shows details regarding access to the Project Site and Project Site logistics for conducting temperature screening.

<sup>9</sup> Santa Clara County Public Health (June 12, 2020) COVID-19 CASES AT CONSTRUCTION SITES HIGHLIGHT NEED FOR CONTINUED VIGILANCE IN SECTORS THAT HAVE REOPENED, available at <https://www.sccgov.org/sites/covid19/Pages/press-release-06-12-2020-cases-at-construction-sites.aspx>.

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The draft MND identified potential impacts to biological and historical resource and determined that impacts would be reduced to below a level of significance with implementation of the identified mitigation. All other issue areas were determined as either no impact or less than significant. Therefore, the project would not cause a substantial adverse effect on humans, as impacts to health and safety were determined to be less than significant.

Regarding COVID-19, an Environmental Impact Report is required to identify and focus on the significant effects of a proposed project on the environment. Environment is defined as the "physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance." Cal. Pub. Res. Code § 21060.5; see also CEQA Guidelines § 15360. As such, effects that are subject to review under CEQA must be related to a change to the physical environment. CEQA Guidelines § 15358(b). This is further outlined in CEQA Guidelines § 15126.2, which states that in assessing impacts of a project on the environment, the lead agency is required to "limit its examination to changes in the existing physical conditions." Regardless, COVID-19 is not a physical condition as defined in Cal. Pub. Res. Code § 21060.5 and is outside the purview of CEQA. Further, no public health risk impacts were identified (refer to Section iii(c) of the draft MND) and therefore mitigation is not required.

In compliance with all public health mandates, the project would be required to adhere to all relevant State and local protocol and safety practices in place at the time of commencement of construction throughout the construction process.

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- A 48-hour advance notice will be provided to all trades prior to the first day of temperature screening.
- The perimeter fence directly adjacent to the entry points will be clearly marked indicating the appropriate 6-foot social distancing position for when you approach the screening area. Please reference the Apex temperature screening site map for additional details.
- There will be clear signage posted at the project site directing you through temperature screening.
- Provide hand washing stations throughout the construction site.

**Testing Procedures:**

- The temperature screening being used are non-contact devices.
- Temperature readings will not be recorded.
- Personnel will be screened upon entering the testing center and should only take 1-2 seconds per individual.
- Hard hats, head coverings, sweat, dirt, sunscreen or any other cosmetics must be removed on the forehead before temperature screening.
- Anyone who refuses to submit to a temperature screening or does not answer the health screening questions will be refused access to the Project Site.
- Screening will be performed at both entrances from 5:30 am to 7:30 am.; main gate [ZONE 1] and personnel gate [ZONE 2]
- After 7:30 am only the main gate entrance [ZONE 1] will continue to be used for temperature testing for anybody gaining entry to the project site such as returning personnel, deliveries, and visitors.



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- If the digital thermometer displays a temperature reading above 100.0 degrees Fahrenheit, a second reading will be taken to verify an accurate reading.
- If the second reading confirms an elevated temperature, DHS will instruct the individual that he/she will not be allowed to enter the Project Site. DHS will also instruct the individual to promptly notify his/her supervisor and his/her human resources (HR) representative and provide them with a copy of Annex A.

#### **Planning**

- Require the development of an Infectious Disease Preparedness and Response Plan that will include basic infection prevention measures (requiring the use of personal protection equipment), policies and procedures for prompt identification and isolation of sick individuals, social distancing (prohibiting gatherings of no more than 10 people including all-hands meetings and all-hands lunches) communication and training and workplace controls that meet standards that may be promulgated by the Center for Disease Control, Occupational Safety and Health Administration, Cal/OSHA, California Department of Public Health or applicable local public health agencies.<sup>10</sup>

The United Brotherhood of Carpenters and Carpenters International Training Fund has developed COVID-19 Training and Certification to ensure that Carpenter union members and apprentices conduct safe work practices. The Agency should require that all construction workers undergo COVID-19 Training and Certification before being allowed to conduct construction activities at the Project Site.

<sup>10</sup> See also The Center for Construction Research and Training, North America's Building Trades Unions (April 27 2020) NABTU and CPWR COVID-19 Standards for U.S. Construction Sites, available at [https://www.cpwr.com/wp-content/uploads/publications/NABTU\\_CPWR\\_Standards\\_COVID-19.pdf](https://www.cpwr.com/wp-content/uploads/publications/NABTU_CPWR_Standards_COVID-19.pdf); Los Angeles County Department of Public Works (2020) Guidelines for Construction Sites During COVID-19 Pandemic, available at [https://dpw.lacounty.gov/building-and-safety/docs/pw\\_guidelines-construction-sites.pdf](https://dpw.lacounty.gov/building-and-safety/docs/pw_guidelines-construction-sites.pdf).

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D-8 II. THE IS/MND IS INADEQUATE

A. The City Should Prepare an EIR for the Project

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the "fair argument" standard, under which an agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1602; *Friends of "B" St. v. City of Hayward* (1980) 106 Cal. 3d 988, 1002.

The fair argument test stems from the statutory mandate that an EIR be prepared for any project that "may have a significant effect on the environment." Pub. Res. Code ("PRC") § 21151; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. App. 3d 68, 75; *Jensen v. City of Santa Rosa* (2018) 23 Cal. App. 5th 877, 884. Under this test, if a proposed project is not exempt and may cause a significant effect on the environment, the lead agency must prepare an EIR. PRC §§ 21100(a), 21151; CEQA Guidelines § 15064(a)(1), (f)(1). An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may have a significant effect on the environment. *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal. App. 4th 768, 785. In such a situation, the agency must adopt a negative declaration. PRC § 21080(c)(1); CEQA Guidelines §§ 15063(b)(2), 15064(f)(3).

"Significant effect upon the environment" is defined as "a substantial or potentially substantial adverse change in the environment." PRC § 21068; CEQA Guidelines § 15382. A project "may" have a significant effect on the environment if there is a "reasonable probability" that it will result in a significant impact. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d at 83 fn. 16; *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309. If any aspect of the project may result in a significant impact on the environment, an EIR must be prepared even if the overall effect of the project is beneficial. CEQA Guidelines § 15063(b)(1). See *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544, 1580.

This standard sets a "low threshold" for preparation of an EIR. *Consolidated Irrig. Dist. V. City of Selma* (2012) 204 Cal. App. 4th 187, 207; *Nekon v. County of Kern* (2010) 190 Cal. App. 4th 252; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 928; *Bowman v. City of Berkeley* (2004) 122 Cal. App. 4th 572, 580; *Citizen Action to Serve*

D-8 Comment noted. The comment provides general guidance on CEQA and does not raise a specific issue nor address the adequacy or accuracy of the draft MND. No further response is required.

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*All Students v. Thornley* (1990) 222 Cal. App. 3d 748, 754; *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 310. If substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen v. City of Santa Rosa* (2018) 23 Cal. App. 5th 877, 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal. App. 5th 161, 183; *Stanislaus Audubon Soc’y, Inc. v. County of Stanislaus* (1995) 33 Cal. App. 4th 144, 150; *Brentwood Ass’n for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal. App. 3d 491; *Friends of “B” St. v. City of Hayward* (1980) 106 Cal. App. 3d 988; CEQA Guidelines § 15064(f)(1).

As explained in full below, there is a fair argument that the Project will have a significant effect on the environment. As a result, the “low threshold” for preparation of an EIR has been met and the City must prepare an EIR.

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B. The MND Fails to Support Its Findings with Substantial Evidence

When new information is brought to light showing that an impact previously discussed in the EIR but found to be insignificant with or without mitigation in the EIR’s analysis has the potential for a significant environmental impact supported by substantial evidence, the EIR must consider and resolve the conflict in the evidence. See *Visalia Retail, L.P. v. City of Visalia* (2018) 20 Cal. App. 5th 1, 13, 17; see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109. While a lead agency has discretion to formulate standards for determining significance and the need for mitigation measures—the choice of any standards or thresholds of significance must be “based to the extent possible on scientific and factual data and an exercise of reasoned judgment based on substantial evidence. CEQA Guidelines § 15064(b); *Cleveland Nat’l Forest Found. v. San Diego Ass’n of Gov’ts* (2017) 3 Cal. App. 5th 497, 515; *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 Cal. App. 5th 160, 206. And when there is evidence that an impact could be significant, an MND cannot adopt a contrary finding without providing an adequate explanation along with supporting evidence. *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal. App. 5th 281, 302.

In addition, a determination that regulatory compliance will be sufficient to prevent significant adverse impacts must be based on a project-specific analysis of potential impacts and the effect of regulatory compliance. In *Californians for Alternatives to Toxics v. Department of Food & Agric.* (2005) 136 Cal. App. 4th 1, the court set aside an EIR for a

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Comment noted. The comment provides general CEQA guidance and does not raise a specific issue nor address the adequacy or accuracy of the draft MND. No further response is required.

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statewide crop disease control plan because it did not include an evaluation of the risks to the environment and human health from the proposed program but simply presumed that no adverse impacts would occur from use of pesticides in accordance with the registration and labeling program of the California Department of Pesticide Regulation. *See also Ebbetts Pass Forest Watch v Department of Forestry & Fire Protection* (2008) 43 Cal. App. 4th 936, 956 (fact that Department of Pesticide Regulation had assessed environmental effects of certain herbicides in general did not excuse failure to assess effects of their use for specific timber harvesting project).

D-10

1. *The MND Fails to Support its Findings on Transportation Impacts with Substantial Evidence.*

CEQA Guidelines section 15064.3(b) requires analysis of a Project's vehicle miles traveled (VMT) impacts as part of the environmental document's transportation impacts analysis. A lead agency must support its findings with substantial evidence, which includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." CEQA Guidelines § 15384(b).

The Project claims the Project's impacts on transportation will be less than significant since the Project would generate less than 300 daily unadjusted driveway trips. However, the IS / MND merely claims that the Project would generate less than 300 daily unadjusted driveway trips without any supporting evidence.

The failure of the IS / MND to reveal the underlying data supporting its conclusions not only strongly suggests that the City does not have substantial evidence to support its conclusions, but also constitutes an omission of information. An environmental documents discussion of potentially significant effects must "provide an adequate analysis to inform the public how its bare numbers translate to create potential adverse impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further." *Sierra Club v. County of Fresno* (2018) 6 Cal. 5th 502, 521; *see also citing Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405; *see also* PRC §§ 21002.1(e), 21003(b).

D-11

2. *The IS/MND's Findings on Air Quality and Greenhouse Gases are Incomplete*

CEQA Guidelines § 15064.4 allow a lead agency to determine the significance of a project's GHG impact via a qualitative analysis (e.g., extent to which a project

D-10 The comment misstates the conclusions as detailed in the draft MND and Local Mobility Analysis (LMA) prepared for the project (Kimley-Horn 2021). Table 4-1 of the LMA provides a trip generation summary based on the proposed land uses. The table calculates unadjusted resulting trip generation as 2,280 daily trips. Therefore, it is not stated in any of the environmental documents that the project would generate less than 300 unadjusted trips.

The project was compared against initial screening criteria to determine if the project can be considered less than significant for vehicle miles travelled (VMT) impact based on project features regarding location, size, and use. The City's screening criteria for determining land development projects as less than significant for VMT are listed in the VMT CEQA Analysis (Kimley-Horn 2020) prepared for the project and Table 25 of the draft MND. Pursuant to the City's screening process, a project would have less than significant transportation impacts per CEQA if the project meets any of the screening criteria. As shown in Table 25, the project is located within a VMT Efficient Location (see, Figure 3 of the VMT CEQA Analysis). Therefore, notwithstanding the generation of trips, which is well above 300, the project is presumed to have a less than significant transportation/VMT impact. The commenter submitted no substantial evidence to the contrary. Moreover, no data was omitted from disclosure and the commenter has not identified any; the draft MND and its associated technical appendices disclose all relevant data and analysis..

D-11 See response to comment 10.

The finding that the project would have a less than significant impact on GHG is based on the project's consistency with the City's CAP as detailed in the project-specifics CAP Consistency Checklist (Carrier Johnson + CULTURE 2020). The CAP Consistency Checklist is the City's significance threshold utilized to ensure project-by-project consistency with the underlying assumptions in the CAP and to ensure that the City would achieve its emission reduction targets

D-11 (cont.)

identified in the CAP. As detailed in Section VIII(a) of the draft MND, the CAP Consistency Checklist demonstrates that the project would be consistent with applicable strategies and for reducing GHG emissions. This includes project features consistent with the energy and water efficient buildings strategy, as well as bicycling, walking, transit, and land use strategy. Based on the project's consistency with the CAP Consistency Checklist, the project's contribution of GHGs to cumulative statewide emissions would not be cumulatively considerable. Therefore, the project would have a less than significant cumulative impact regarding GHG emissions.

The air quality analysis is based on a total trip generation of 2,280 average daily trips, not 300 trips as the commenter claims. This does not account for any trip reductions that may occur due to proximity to transit and is therefore conservative. As detailed in Section III of the draft MND, the project's criteria pollutant emissions would be less than the applicable City significance level thresholds. Therefore, the project's impacts to air quality would be less than significant.

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complies with regulations or requirements of state/regional/local GHG plans), and/or a quantitative analysis (e.g., using model or methodology to estimate project emissions and compare it to a numeric threshold). So too, CEQA Guidelines allow lead agencies to select what model or methodology to estimate GHG emissions so long as the selection is supported with substantial evidence, and the lead agency “should explain the limitations of the particular model or methodology selected for use.” CEQA Guidelines § 15064.4(c).

The IS/MND concludes there would not be a significant impact on air quality and Green House Gas Emissions. However, this is based on the City’s claim there would be under 300 trips. The City has not demonstrated how it calculated it will get under 300 trips. Due to the link between Air Quality, Green House Gases and Transportation, the City cannot reach its conclusion of less than significant impact without a full analysis.

D-12

3. *The MND Defers its Biological Resources Mitigation*

CEQA mitigation measures proposed and adopted into an environmental impact report are required to describe what actions that will be taken to reduce or avoid an environmental impact. CEQA Guidelines § 15126.4(a)(1)(B) (providing “[f]ormulation of mitigation measures should not be deferred until some future time.”) While the same Guidelines section 15126.5(a)(1)(B) acknowledges an exception to the rule against deferrals, but such exception is narrowly proscribed to situations where “measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.” *Id.* Courts have also recognized a similar exception to the general rule against deferral of mitigation measures where the performance criteria for each mitigation measure is identified and described in the EIR. *Sacramento Old City Ass’n v. City Council* (1991) 229 Cal.App.3d 1011.

Impermissible deferral can occur when an EIR calls for mitigation measures to be created based on future studies or describes mitigation measures in general terms but the agency fails to commit itself to specific performance standards. *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 (city improperly deferred mitigation to butterfly habitat by failing to provide standards or guidelines for its management); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671 (EIR failed to provide and commit to specific criteria or standard of performance for mitigating impacts to biological habitats); see also *Cleveland Nat’l Forest Found. v. San Diego*

D-12 The draft MND does not impermissibly defer mitigation but rather provides a detailed set of legally compliant mitigation measures the implementation of which would reduce potentially significant biological impacts associated with the project to a less than significant level.

Burrowing Owl

The Biological Resources Report (RECON 2021a) stated that while four burrows potentially suitable for burrowing owl were observed on the site it was concluded that not only were no direct burrowing owl observations or any sign of burrowing owl discovered on-site, but the site conditions are also not conducive for burrowing owl breeding nor long-term occupation. A detailed discussion of this conclusion can be found on in the Biological Technical Report, pages 20–21. The draft MND concludes,

There is a low probability that the burrowing owls to the west of I-5 would move east of the freeway due to vehicular traffic, associated noise, distance, and lack of large areas suitable for breeding or foraging. Therefore, while there remains a moderate potential for burrowing owl to occur on the site based on protocol survey results, that located potentially suitable, but unoccupied burrows, the disturbed habitat on-site is in general not likely to support breeding burrowing owls due to the limited area of suitable foraging habitat to support occupancy. However, in the abundance of caution, impacts to burrowing owl are determined to be potentially significant.

Mitigation measures Bio-1 and Bio-2 provide specific performance criteria as provided for under CEQA that include a prescription for precautionary, educational, monitoring, and discovery measures. Taken together the mitigation measures does not merely consist of hiring experts, but rather provides a detailed process from pre- to post-construction within specific performance criteria, the

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*Ass'n of Gov'ts* (2017) 17 Cal.App.5th 413, 442 (generalized air quality measures in the EIR failed to set performance standards); *California Clean Energy Comm. v City of Woodland* (2014) 225 Cal.App.4th 173, 195 (agency could not rely on a future report on urban decay with no standards for determining whether mitigation required); *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 740 (agency could not rely on future rulemaking to establish specifications to ensure emissions of nitrogen oxide would not increase because it did not establish objective performance criteria for measuring whether that goal would be achieved); *Gny v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119 (rejecting mitigation measure requiring replacement water to be provided to neighboring landowners because it identified a general goal for mitigation rather than specific performance standard); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (requiring report without established standards is impermissible delay).

The IS/MND bases analysis of the Project's impact to biological resources on a report prepared by RECON. In its report, the City found potential for the burrowing owl to have significantly impacted by the Project. In addition, the City also found a high potential for Bell's vireo to occur to the north of the site. The City's mitigation consists of hiring experts to determine the impact to the burrowing owl. In regards to Bell's vireo, the City states that if they are present then fencing and noise level setbacks are required. However, the City does not state what those requirements are. The City should state what the requirements are as to have a baseline for its mitigation.

D-13 II. **THE PROJECT VIOLATES THE STATE PLANNING AND ZONING LAW AS WELL AS THE CITY'S GENERAL PLAN**

A. Background Regarding the State Planning and Zoning Law

Each California city and county must adopt a comprehensive, long-term general plan governing development. *Napa Citizens for Honest Gov. v. Napa County Bd. of Supervisors* (2001) 91 Cal. App.4th 342, 352, citing Gov. Code §§ 65030, 65300. The general plan sits at the top of the land use planning hierarchy (See *DeVita v. County of Napa* (1995) 9 Cal. App. 4th 763, 773), and serves as a "constitution" or "charter" for all future development. *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. App. 3d 531, 540.

General plan consistency is "the linchpin of California's land use and development

D-12 (cont.)

implementation of which would ensure that potentially significant impacts (albeit unlikely) would be reduced to a less than significant level.

Least Bell's Vireo

The Biological Resources Report (RECON 2021a) stated that least Bell's vireo have historically been recorded in the project vicinity; however, this species is not expected to occur on the project site due to lack of suitable riparian habitat. Nonetheless, following the City's MSCP-SAP specific management directives, due to the possibility of the species occur north of the site, within the riparian habitat, standard City least Bell's vireo mitigation was included. Specifically, mitigation measures Bio-1 and Bio-3 provide detailed provisions and specific performance criteria for breeding season avoidance, pre-construction surveys, noise level setbacks or attenuation measures, and use of fencing to protect potentially breeding specimens in the adjacent MHPA land. Taken together the mitigation measures do not merely consist of fencing and noise setbacks, but rather provides a detailed process from pre- to post construction, the implementation of which would ensure that potentially significant impacts (albeit unlikely) would be reduced to a less than significant level.

D-13 Comment noted. The comment provides a general CEQA summary and does not raise a specific issue nor address the adequacy or accuracy of the draft MND. No further response is required.

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laws; it is the principle which infused the concept of planned growth with the force of law.” See *DeBottari v. Norco City Council* (1985) 171 Cal. App. 3d 1204, 1213.

State law mandates two levels of consistency. First, a general plan must be internally or “horizontally” consistent: its elements must “comprise an integrated, internally consistent and compatible statement of policies for the adopting agency.” (See Gov. Code § 65300.5; *Sierra Club v. Bd. of Supervisors* (1981) 126 Cal. App. 3d 698, 704.) A general plan amendment thus may not be internally inconsistent, nor may it cause the general plan as a whole to become internally inconsistent. See *DeI’Ita*, 9 Cal. App. 4th at 796 fn. 12.

Second, state law requires “vertical” consistency, meaning that zoning ordinances and other land use decisions also must be consistent with the general plan. (See Gov. Code § 65860(a)(2) [land uses authorized by zoning ordinance must be “compatible with the objectives, policies, general land uses, and programs specified in the [general] plan.”]; see also *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal. App. 3d 1176, 1184.) A zoning ordinance that conflicts with the general plan or impedes achievement of its policies is invalid and cannot be given effect. See *Lesber*, 52 Cal. App. 3d at 544.

State law requires that all subordinate land use decisions, including conditional use permits, be consistent with the general plan. See Gov. Code § 65860(a)(2); *Neighborhood Action Group*, 156 Cal. App. 3d at 1184.

A project cannot be found consistent with a general plan if it conflicts with a general plan policy that is “fundamental, mandatory, and clear,” regardless of whether it is consistent with other general plan policies. See *Endangered Habitats League v. County of Orange* (2005) 131 Cal. App. 4th 777, 782-83; *Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors* (1998) 62 Cal. App. 4th 1332, 1341-42 (“FUTURE”).

Moreover, even in the absence of such a direct conflict, an ordinance or development project may not be approved if it interferes with or frustrates the general plan’s policies and objectives. See *Napa Citizens*, 91 Cal. App. 4th at 378-79; see also *Lesber*, 52 Cal. App. 3d at 544 (zoning ordinance restricting development conflicted with growth-oriented policies of general plan).



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D-14

1. *The MND is Required to Review the Project's Consistency with Regional Housing Plans, Sustainable Community Strategy and Regional Transportation Plans*

CEQA Guidelines section 15125(d) requires that an environmental document "discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans. *See also Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal. App. 5th 467, 543. The MND should thoroughly evaluate the consistency of this Project with the City's General Plan, City's Regional Housing Needs Assessment targets, Sustainable Community Strategy and Regional Transportation Plan. The MND fails to analyze the Project's consistency with any of these applicable plans.

D-15

III. CONCLUSION

SWRCC request that the City revise and recirculate the IS / MND for public comment to address the aforementioned concerns. If the City has any questions or concerns, feel free to contact my Office.

Sincerely,



Mitchell M. Tsai

Attorneys for Southwest Regional Council of Carpenters

Attached:

March 8, 2021 SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling (Exhibit A);

Air Quality and GHG Expert Paul Rosenfeld CV (Exhibit B); and

Air Quality and GHG Expert Matt Hagemann CV (Exhibit C).

D-14

A project is consistent with the general plan if, considering all aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. Generally, a project need not be in perfect conformity with each and every general plan policy. Overall, the project did not result in a land use impact and mitigation not required; therefore, impacts were determined to be less than significant. Specifically, whether the project would result in a conflict with relevant land use plans, policies and regulations is discussion in Section XI of the draft MND. Of note, the commenter provides no substantial evidence of any purported missing analysis, rather general, non-specific speculation. Speculation and conjecture do not constitute substantial evidence (CEQA Guidelines § 15384.)

Regional Plan

Section XI of the draft MND includes a discussion of the project's consistency with the goals of San Diego Forward; The Regional Plan, which includes both the Regional Transportation Plan and Sustainable Communities Strategy. As stated therein, the project proposes a compact, walkable communities close to transit connections and consistent with smart growth principles.

City's General Plan

The project's consistency with the City's General Plan is provided in detail in Table 10.

Housing

As stated in Table 10, the project is consistent with relevant goals and policies including assisting in reaching increased housing opportunities. With specific respect to City Regional Housing Needs Allocation targets, Section XIV of the draft MND, Population and Housing, discusses how the housing units proposed by the project would help to meet the existing and projected need for additional housing in the city, including the need for additional affordable housing.

D-15 A lead agency is required to re-circulate a MND when the document must be substantially revised after public notice of its availability has previously been given, but prior to its adoption (CEQA Guidelines § 15073.5).