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Via E-mail

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Re: Supplemental Comment in Support of LIUNA's Appeals of the City of Fresno Planning and Development Department Director's Decision to Approve the Development Permit Application No. P22-04122 and Related Environmental Assessment No. P22-04122, Including the Mitigated Negative Declaration for the Living Spaces Retail Project (October 4, 2023 Planning Commission Agenda Item VIII-A)

Dear Chairperson Vang, Vice Chair Hardie, Honorable Members of the City of Fresno Planning Commission, Director Clark, Mr. Holt, and Mr. Siegrist:

I am writing on behalf of Laborers International Union of North America, Local Union 294 and its members living in the City of Fresno ("LIUNA"), regarding the Environmental Assessment No. P22-04122 and Development Permit Application No. P22-04122, submitted by Living Spaces (the "Applicant"), and prepared for the proposed development of an approximately 104,867 square-foot Living Spaces furniture retail store and showroom and associated parking, to be located upon an approximately 8-acre site at the east side of North Abby Street between East Alluvial and East Spruce Avenues, in Fresno, California (the "Project"), which is scheduled to be heard on appeal by the City of Fresno ("City") Planning Commission on October 4, 2023.

LIUNA submitted comments on the original Initial Study and Mitigated Negative Declaration ("IS/MND" or "MND") on May 26, 2023. On July 24, 2023, Planning and Development Department Director, pursuant to Fresno Municipal Code (FMC) Section 15-5009, approved the Development Permit Application No. P22-04122 and Environmental Assessment No. P22-04122 filed by Living Spaces. On August 8, 2023, LIUNA timely appealed the Director's July 24, 2023 approval decisions.

As noted in LIUNA's May 26, 2023 comment letter and July 24, 2023 appeal, LIUNA is concerned that the IS/MND prepared for the Project is legally inadequate. After reviewing the MND, we conclude that it fails as an informational document, and that there is a fair argument that the Project may have adverse environmental impacts. Therefore, we request that the City of Fresno (the "City") prepare an environmental impact report ("EIR") for the Project pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code ("PRC") section 21000, et seq. This supplemental comment on the IS/MND has been prepared with the expert assistance of wildlife biologist Dr. Shawn Smallwood, Ph.D. Mr. Smallwood's comment and his resume are attached as Exhibit A hereto and incorporated herein by reference in their entirety.

DISCUSSION

I. The MND Fails to Adequately Analyze and Mitigate the Potential Adverse Impacts of the Project on Wildlife.

After review of the IS/MND, wildlife biologist Dr. Shawn Smallwood, Ph.D., concludes that the Project may have significant impacts on several special status species. An EIR is required to mitigate these impacts.

Dr. Smallwood's conclusions were informed by his site visits in June 2023. Dr. Smallwood visited the site for 1.75 hours from 18:25 to 20:10 hours on June 5, 2023. He visited again the next day on June 6, 2023 for 3 hours from 05:36 hours to 08:36 hours. During the site visits, Dr. Smallwood "saw and photographed osprey (Photos 3 and 4) and double-crested cormorants (Photo 5), both species of which are on California Department of Fish and Wildlife's Taxa to Watch List." (Ex. A, pp. 2-3.) He also observed "many American crows, a black-crowned night-heron and a pair of Canada geese (Photos 6-8), California scrub-jays and northern mockingbirds (Photos 9 and 10), mourning doves (Photos 11 and 12), western kingbirds (Photos 13 and 15), Anna's hummingbirds (Photo 14), California ground squirrels (Photos 16 and 17), and desert cottontails (Photo 18), among other species. Some of the species of birds were breeding on site, including California scrub-jay and killdeer (Photos 19 and 20)." (*Id.*, pp. 4-11 & Table 1.) Dr. Smallwood "detected 21 species of vertebrate wildlife at the site and another 2 species nearby, and altogether [he] detected 3 special-status species of wildlife (Table 1)." (*Id.*, p. 4.)

Additionally, based on database reviews and site visits, Dr. Smallwood found that 86 special-status species of wildlife are known to occur near enough to the site to warrant analysis of occurrence potential (*Id.*, p. 15; *see also id.*, pp. 17-20 (Table 2).) Of these 86 species, Dr. Smallwood confirmed 2 on site through his survey, "and another 46 (53%) have been documented within 1.5 miles of the site ('Very close'), 8 of which were recently reported, and another 13 (15%) within 1.5 and 4 miles ('Nearby'), and another 19 (22%) within 4 to 30 miles ('In region'). More than two-thirds (71%) of the species in Table 2 have been reportedly seen within 4 miles of the project site." (*Id.*) Therefore, Dr. Smallwood concludes that the project site "supports multiple special-status species of wildlife and carries the potential for supporting many more special-status species of wildlife based on proximity of recorded occurrences." (*Id.*, p. 15.)

A. The wildlife baseline relied upon by the MND is woefully inadequate.

Wildlife biologist Dr. Smallwood's review of the potential impacts to wildlife from the Project concluded that the Project may have significant impacts on several special-status species. An EIR is therefore required to analyze these impacts.

Dr. Smallwood reviewed the IS/MND and the Biological Resources Assessment it relies on ("BRA") and found the following issues related to the wildlife baseline that the MND and BRA relied upon:

- [The BRA] fails to report the time the survey began and how long it lasted. Without knowing the level of survey effort, the reader cannot interpret whether the survey detected the typical species or the typical number of species, or whether it detected fewer or more than the usual number of species. Without this critical information about the survey, the findings carry no comparative value. The reporting of the field survey is deficient. (Ex. A, p. 13.)
- [The BRA] reports having detected 7 species of vertebrate wildlife at the project site. This finding suggests ... [that the City's biologist] spent very little time on the site. [Dr. Smallwood] spent only 4.75 hours at the site, and detected the occurrences of 3 times the number of vertebrate wildlife species..., and...saw two more species nearby. City of Fresno needs a better accounting of how much survey effort was directed to the project site. (*Id.*, p. 14.)
- Reporting in the IS/MND is unsupported by [the BRA] field survey. For example, the IS/MND (p. 37) states, "None of the burrows observed in the project site exhibited features typical of occupied burrowing owl burrows at the time of the survey..." However, burrowing owls typically leave little to no sign of their presence at burrows that they occupy over winter. That no sign was found has no bearing on the occurrence likelihood of burrowing owls. Furthermore, no protocol-level detection surveys have been completed for burrowing owls at this site. (Ex. A, p. 14.)
- [T]he IS/MND reports "...only limited habitat for tree, shrub and ground-nesting birds exists on the project site..." In reality, the site includes expansive substrate for ground-nesting birds, and is surrounded by hedges of shrubs and trees in which birds nest. Not only is all of this nest substrate amply available, but it was in use by nesting birds while [Dr. Smallwood] surveyed the site from the site's periphery. I watched as California scrub-jays fed their begging fledglings right on the project site (Photo 19) and as killdeer nested on site (Photo 20). [He] also observed fledgling northern mockingbirds and western

kingbirds being fed on the project site by their parents. The IS/MND is inaccurate. (Ex. A, p. 14.)

- Of the 86 special-status species of wildlife that appear in [Dr. Smallwood's] Table 2, [the BRA] addresses only 3 (4%) of them, determining only one of these 3 to have "suitable habitat" on the site.... [The BRA] refers to an Appendix D, which might have been a more expansive analysis of occurrence likelihoods of special-status species, but Appendix D is missing from the copy of [the BRA] that is circulated with the IS/MND. Of the species that are analyzed in [the BRA], Swainson's hawk is assigned marginal occurrence potential and burrowing owl is assigned low potential, but both have been reported within only 1.5 miles of the project site. [The BRA] does not provide an adequate analysis of the occurrence likelihoods of special-status species. (Ex. A, p. 15.)

In conclusion, the MND's insufficient baseline fails to adequately evaluate the significance of the impacts to special-status species of wildlife. As a result, Dr. Smallwood's expert observations are substantial evidence of a fair argument that wildlife impacts may occur as a result of the Project. Thus, the Project requires an EIR to properly mitigate wildlife impacts of the Project.

B. The MND fails to address the Project's potential significant impact on loss of breeding capacity.

Neither the IS/MND nor the BRA assess the lost breeding capacity of birds that would result from the Project. (*See* Ex. A, pp. 16, 21.) In so doing, the IS/MND fails to analyze the impact of habitat loss, or the loss of productive capacity on bird species likely to nest on the ground and in trees within the 8-acre project site. (*Id.*) While habitat loss results in the immediate numerical decline of birds and other animals, it also results in a permanent loss of productive capacity. (*Id.*, p. 16.) Dr. Smallwood cites a recent study that documented a "29% decline in overall bird abundance across North America over the last 48 years," a decline which he says was "driven by multiple factors, but principally attributed to habitat loss and habitat fragmentation." (*Id.* (citing Rosenberg et al. 2019).)

Dr. Smallwood cites two studies that show bird nesting densities that were between 32.8 and 35.8 bird nests per acre, for an average of 34.3 bird nests per acre. (*Id.* (citing Young (1948) and Yahner (1982), respectively.) Assuming nesting density at the Project site is a fifth of the 34.3 average reported, then 6.8 bird nests per acre multiplied by the Project's 8 acres of habit, Dr. Smallwood predicts that 55 bird nests produce new birds at the site annually. (*Id.*) Based on an average of 2.9 fledglings per nest, the Project would prevent the production of 182 new birds per year. (*Id.*, p. 21 (citing Young (1948)).) The potential loss of 182 birds in California annually following construction of this Project easily qualifies as a significant and substantial impact that has not been analyzed. An EIR is required to fully analyze the Project's impact on lost breeding capacity, and to mitigate that impact.

C. The MND fails to address the Project's potential significant impacts on wildlife movement.

The IS/MND fails to address impacts to wildlife movement, and instead looks for impacts to a wildlife corridor. (*See* Ex. A, pp. 21-22.) Instead, the IS/MND improperly dismisses the Project's potential to significantly impact wildlife movement by reasoning that:

The project site does not possess any characteristics that would indicate a locally significant stopover point for migratory species including raptors or waterfowl. No known wildlife movement corridors occur within the project site or in the immediate vicinity. (IS/MND, p. 5.)

The project site does not contain any features that would function as wildlife movement corridors for resident or migratory wildlife species. (*Id.*, p. 39.)

However, as Dr. Smallwood points out, “[e]xactly what characteristics would indicate locally significant stopover is unidentified. Nor is it explained what qualifies as a known wildlife movement corridor.” (Ex. A, p. 21.) The IS/MND also speculates, “[a]dditionally, existing chain-link fencing surrounding the project site limits the movement of wildlife species on the site.” (IS/MND, p. 39.) But as Dr. Smallwood notes, “the chain-link fence incompletely surrounds the site and is broken in many places.” (Ex. A, p. 21.) As a result, “wildlife movement appeared to [Dr. Smallwood] to be completely unaffected by the fence.” (*Id.*)

The MND's conclusions regarding effects on wildlife movement rely on a false CEQA standard. (*Id.*) As Dr. Smallwood states, “[t]he primary phrase of the CEQA standard goes to wildlife movement regardless of whether the movement is channeled by a corridor.” (*Id.*; *see also* CEQA Guidelines, App. G, pp. 333-34 (stating that the CEQA significance threshold is whether, among other things, a project will “[i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species....”).) Impacts to wildlife movement may occur with or without the presence of a wildlife corridor. (Ex. A, p. 21.) Dr. Smallwood writes:

A site such as the proposed project site is critically important for wildlife movement because it composes an increasingly diminishing area of open space within a growing expanse of anthropogenic uses, forcing more species of volant wildlife to use the site for stopover and staging during migration, dispersal, and home range patrol (Warnock 2010, Taylor et al. 2011, Runge et al. 2014). In fact, I observed wildlife using the site as part of their travel routes, including osprey, Canada goose, American crows and black-crowned night-heron.

(Ex. A, p. 21.) Hence, the Project “would cut wildlife off from one of the last remaining stopover and staging opportunities in the project area, forcing volant wildlife to travel even farther between remaining stopover sites.” (*Id.*) Therefore, Dr. Smallwood concludes that “[t]his impact would be significant, and as the project is currently proposed, it would be unmitigated.” (*Id.*) Because the Project would interfere with wildlife movement in the region, an EIR needs to be prepared to address the Project's impacts on wildlife movement in the region.

Lastly, Dr. Smallwood notes that the BRA:

... implemented no methodology in its reconnaissance survey to determine whether or to what degree the project site might be used in support of wildlife movement in the region. There was no reported program of observation of behaviors related to movement. There was no sampling that would inform of wildlife movement at and around the project site. There was no search for sign of wildlife movement. Nothing was done that would provide information in support of the IS/MND's assertions that the project site is unimportant to wildlife movement in the region.

(Ex. A, p. 22.) Given that there is evidence that the Project could have indirect and direct impacts that may significantly affect wildlife movement, the City should prepare an EIR to address such impacts and mitigate those impacts accordingly. Dr. Smallwood recommends, at a minimum, substantial compensatory mitigation is needed in response to the Project's impacts from interference with wildlife movement, including impacts to birds and bats using the site as stop-over or staging during migration. (*Id.*, p. 27.)

D. The MND fails to address the Project's potential significant impacts on wildlife from additional traffic generated by the Project.

Dr. Smallwood identifies the serious impacts that increased traffic has on wildlife. (Ex. A, pp. 22-24.) Analyzing the potential impact on wildlife due to vehicle collisions is especially important because "traffic impacts have taken devastating tolls on wildlife," across North America. (*Id.*, p. 22 (citing Forman et al. 2003).) In the United States alone, estimates for "avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year." (*Id.* (citing Loss et al. 2014).) As Dr. Smallwood explains:

Vehicle collisions have accounted for the deaths of many thousands of amphibian, reptile, mammal, bird, and arthropod fauna, and the impacts have often been found to be significant at the population level (Forman et al. 2003).

(Ex. A, p. 22.) Furthermore, a recent study conducted on traffic-caused wildlife mortality found "1,275 carcasses of 49 species of mammals, birds, amphibians and reptiles over 15 months of searches" "along a 2.5 mile stretch of Vasco Road in Contra Costa County, California." (*Id.*, p. 23 (citing Mendelsohn et al. 2009).) Hence, as Dr. Smallwood points out, an analysis is needed to determine whether increased traffic generated by the Project would result in impacts to local wildlife. (*Id.*)

Based on the IS/MND's estimate that the Project will result in 667,848 annual VMT, Dr. Smallwood predicts that "project-generated traffic would cause 183 wildlife fatalities per year," which "would qualify as a substantial and highly significant project impact." (Ex. A, p. 24.) Therefore, he concludes that "[t]here is at least a fair argument that can be made for the need to prepare an EIR to analyze this impact." (*Id.*)

Additionally, Dr. Smallwood notes that “mitigation measures to improve wildlife safety along roads are available and are feasible,” and therefore, “need exploration for their suitability with the proposed project.” (*Id.*) Specifically, Dr. Smallwood suggests compensatory mitigation in the form of “funding research to identify fatality patterns and effective impact reduction measures such as reduced speed limits and wildlife under-crossings or overcrossings of particularly dangerous road segments,” and “donations to wildlife rehabilitation facilities.” (*Id.*, p. 27.)

The IS/MND fails to recognize at all this potential significant impact of the Project. Because a fair argument exists that the Project may have a significant impact on wildlife in the vicinity, an EIR must be prepared to assess this impact and identify appropriate mitigation.

E. The MND fails to adequately address the Project’s potential cumulative impacts on wildlife.

The IS/MND fails to adequately analyze the cumulative impacts to wildlife from the Project by improperly implying that cumulative impacts are in reality only residual impacts as a result of incomplete mitigation from project-level impacts. (Ex. A, p. 24.) For example, the IS/MND states that “[t]he proposed project’s impacts would be individually limited and not cumulatively considerable due to the site-specific nature of the potential impacts.” (IS/MND, p. 118.) However, the IS/MND’s implied standard is not the standard of cumulative effects required under CEQA. (Ex. A, p. 24.) CEQA defines cumulative impacts, and it outlines two general approaches for performing the required cumulative analysis. (*See* 14 CCR § 15130; PRC § 21083(b)(2).)

Here, the IS/MND’s cumulative “analysis” is based on flawed logic. The conclusion that the Project will have no cumulative impact because each individual impact has been reduced to a less-than-significant level relies on the exact argument CEQA’s cumulative impact analysis is meant to protect against. The entire purpose of the cumulative impact analysis is to prevent the situation where mitigation occurs to address project-specific impacts, without looking at the bigger picture. This argument, applied over and over again, has resulted in major environmental damage, and is a major reason why CEQA was enacted. As the Court stated in *CBE v. CRA*:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(*CBE v. CRA*, 103 Cal.App.4th at 114 (citations omitted).) As such, the MND misrepresented the standard and failed to perform an appropriate analysis.

The IS/MND further claims that the cumulative impacts to biological resources would be avoided through implementation of recommended mitigation measures. (IS/MND, p. 118.) Dr. Smallwood explains that “this claim is fallacious because mitigation measures for direct project impacts do not necessarily mitigate the sorts of incremental effects to other similar projects that CEQA is concerned about.” (Ex. A, p. 24.) According to Dr. Smallwood,

An example that is highly relevant to the proposed project is the site’s existing place in ongoing habitat fragmentation. Habitat fragmentation is the reduction of connectivity of remaining habitat patches on a landscape, and which can further diminish the productive capacity of wildlife in the region (Smallwood 2015). The project would further fragment habitat in an environmental setting in which the wildlife that persist are persisting on one of the very last margins of open space. The very late stage of habitat fragmentation represented at the project site warrants concern. The project’s furtherance of habitat fragmentation on such a highly fragmented landscape easily qualifies as a significant cumulative impact that has not been analyzed nor mitigated in the IS/MND.

(*Id.*) Thus, an EIR must be prepared to include an adequate, serious analysis of the Project’s cumulative impacts on wildlife.

F. The pre-construction surveys identified in the MND are not sufficient to address potential impacts to birds that may be present at the site.

Dr. Smallwood has reviewed the proposed wildlife impact mitigation identified in the IS/MND related to pre-construction surveys for nesting birds and roosting bats (i.e. **Mitigation Measures BIO-1 and BIO-2**). (*See Ex. a*, pp. 25-26.) Although Dr. Smallwood agrees with the need for pre-construction surveys for birds and bats at the Project site, he notes that pre-construction surveys will come too late either to disclose the Project’s anticipated impacts or to fully mitigate impacts to birds and bats. (*Id.*) As Dr. Smallwood explains:

Preconstruction surveys are not designed to detect the target species with anywhere close to the same likelihood as are protocol-level detection surveys, and so are intended as follow-up surveys to detection surveys, the latter of which are needed to inform the CEQA impacts analysis and to identify feasible mitigation measures to reduce the project’s significant impacts on this species (CDFW 2012).

Furthermore, den excavation and passive relocation of burrowing owl burrows would be inconsistent with the CDFW (2012) mitigation guidelines. In fact, CDFW (2012) warns that excavation and passive relocation can be interpreted as take.

(Ex. A, p. 25.) By failing to determine the actual baseline of bird’s and bat’s reliance on the site for roosting, nesting, and foraging and instead waiting within seven days prior to the start of construction to determine what roosts, nests, birds, and bats may suffer impacts from the Project,

the IS/MND fails to evaluate and mitigate the Project's potential significant impacts to nesting birds and bats.

Dr. Smallwood recommends that detection surveys be implemented for the Project before pre-construction surveys are performed. (*Id.*, p. 26.) In addition to detection surveys and preconstruction surveys being performed, an EIR should be prepared detailing how the results of preconstruction surveys will be reported.

CONCLUSION

For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,



Victoria Yundt
LOZEAU | DRURY LLP