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October 9, 2023

**VIA EMAIL**

Martin Pyne, Chair  
Nathan Iglesias, Vice Chair  
Galen Davis, Commissioner  
Daniel Howard, Commissioner  
John Howe, Commissioner  
Michael Serrone, Commissioner  
Neela Shukla, Commissioner  
City of Sunnyvale Planning Commission  
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George Schroeder, Principal Planner  
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**Re: 1150-1170 Kifer Road Project, Planning Commission Agenda Item 3 (October 9, 2023)**

Dear Chair Pyne, Vice Chair Iglesias, Honorable Members of the Planning Commission, and Mr. Schroeder:

I am writing on behalf of the **Laborers International Union of North America, Local Union 270** and its members living in the City of Sunnyvale (“LIUNA”), concerning the residential project known as 1150-1170 Kifer Road (“Project”) to be heard as Agenda Item 3 at the October 9, 2023 Planning Commission Meeting. City staff has determined that the Project is exempt from the requirement for preparation of environmental documents pursuant to Sections 15162 and 15168(c)(2) and (4) of the California Environmental Quality Act (“CEQA”), and that the Project was adequately analyzed in the 2016 Lawrence Station Area Plan Environmental Impact Report, State Clearinghouse No. 2013082030 (“2016 EIR”) and 2021 Lawrence Station Area Plan Update/Intuitive Surgical Corporate Campus Project Subsequent Environmental Impact Report, State Clearinghouse No. 2019012022 (“2021 SEIR”).

When relying on a prior EIR for a project, CEQA provides certain procedures, including required findings, prior to a determination that no new environmental documentation is required. Although no new documentation is required in certain circumstances, CEQA also mandates the circumstances in which reliance on a previous EIR still requires the preparation of an additional environmental impact report (“EIR”) or mitigated negative declaration (“MND”).

After reviewing the Final Environmental Review Checklist prepared for the Project and the 2016 EIR and 2021 SEIR that Project relies upon, we conclude that the Project does not qualify for review pursuant to a prior EIR under CEQA Guidelines sections 15162 and

Comment on 1150-1170 Kifer Road Project  
Planning Commission Agenda Item 3  
October 9, 2023  
Page 2 of 6

15168(c)(2) and (4). As evidenced by the expert comments submitted by Certified Industrial Hygienist, Francis Offermann, PE, CIH, the Project has significant indoor air quality and health risk impacts not analyzed in the 2016 EIR or 2021 SEIR. Mr. Offermann's comment and curriculum vitae are attached as Exhibit A hereto and is incorporated herein by reference in its entirety. The 2016 EIR or 2021 SEIR identified several adverse environmental impacts that would result from the Project that are significant and unavoidable, including air quality impacts and cumulative air quality impacts. However, the Project fails to implement air quality mitigation measures required by the 2016 EIR and 2021 SEIR. As such, LIUNA is requesting that the Planning Commission refrain from approval of the Project at this time until an EIR is prepared.

### **PROJECT DESCRIPTION AND BACKGROUND**

The proposed Project includes the demolition an existing surface parking lot at the rear of two existing office buildings and construction of 225 apartment units at a density of 112.5 dwelling units per acre in an eight-story building inclusive of three levels of above-ground parking located at 1150-1170 Kifer Road (APNs: 205-50-034 and 205-50-035) in the City of Sunnyvale ("City"). The project site consists of 5.82 acres and is zoned as MXD-I (Flexible Mixed-Use I). Prometheus Real Estate Group (applicant) and 1150 Kifer LP (owner) are requesting a Special Development Permit and Tentative Parcel Map.

The City has not prepared any subsequent environmental review document for this specific Project pursuant to CEQA. Rather, the City is claiming that the Project was adequately reviewed in the following documents:

- 2016 Lawrence Station Area Plan Environmental Impact Report, State Clearinghouse No. 2013082030 ("2016 EIR");
- 2021 Lawrence Station Area Plan Update/Intuitive Surgical Corporate Campus Project Subsequent Environmental Impact Report, State Clearinghouse No. 2019012022("2021 SEIR");
- September 2023 Final Environmental Review Checklist for the 1150-1170 Kifer Road Project ("CEQA Checklist")

The September 2023 CEQA Checklist was not made available to the public until October 5, 2023. Given the limited time to review this information, LIUNA requests that the Planning Commission continue the public hearing to a later date, to give the Appellant and the public sufficient time to review the documents.

### **LEGAL STANDARD**

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the fair argument standard. Under that standard, a lead agency must prepare an EIR whenever there is substantial evidence in the whole record before the agency that supports a fair argument that a project may have a significant effect on the

Comment on 1150-1170 Kifer Road Project  
Planning Commission Agenda Item 3  
October 9, 2023  
Page 3 of 6

environment. (Pub. Res. Code § 21082.2; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.)

CEQA permits agencies to ‘tier’ CEQA documents, in which general matters and environmental effects are considered in a document “prepared for a policy, plan, program or ordinance followed by narrower or site-specific [environmental review] which incorporate by reference the discussion in any prior [environmental review] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR].” (Pub. Res. Code (“PRC”) § 21068.5.) “[T]iering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous [environmental reviews].” (*Id.* § 21093.) CEQA regulations strongly promote tiering of environmental review.

Where a program EIR has been prepared, such as the 2021 EIR, “[l]ater activities in the program must be examined in light of the program [document] to determine whether an additional environmental document must be prepared.” (14 CCR § 15168(c).) The first consideration is whether the activity proposed is covered by the program. (14 CCR § 15168(c)(2).) If a later project is outside the scope of the program, then it is treated as a separate project and the previous environmental review may not be relied upon in further review. (*See Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320–21.) The second consideration is whether the “later activity would have effects that were not examined in the program.” (14 CCR § 15168(c)(1).) A program environmental review may only serve “to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project . . . .” (*Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171 [quoting *Citizens for Responsible Equitable Env'tl. Dev. v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 615].) If the program environmental review does not evaluate the environmental impacts of the project, a tiered [CEQA document] must be completed before the project is approved. (*Id.* at 1184.)

Pursuant to Guidelines sections 15162(a) and 15168(c), a project is not within the scope of a previous program EIR, and subsequent environmental review is necessary, where:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

Comment on 1150-1170 Kifer Road Project  
Planning Commission Agenda Item 3  
October 9, 2023  
Page 4 of 6

- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
  - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
  - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
  - (C) Mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
  - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

An agency's determination that none of the conditions of Section 15162 have been met and, therefore, that no subsequent EIR or MND is required for the new project must be supported by substantial evidence. (14 CCR § 15162(a); 14 CCR § 15168(c).)

### **DISCUSSION**

#### **I. The Project May Have Significant Indoor Air Quality and Human Health Impact That Were Not Analyzed as a Significant Impact in the 2016 EIR and 2021 SEIR.**

The City is relying on the 2016 EIR and 2021 SEIR for CEQA review of the Project pursuant to CEQA's subsequent review provisions, 14 CCR § 15162. However, under 14 CCR § 15162(a)(3)(A), an agency cannot avoid preparation of a subsequent or supplemental EIR or MND for a project if new information of substantial importance shows that the project will have one or more significant effects not discussed in the previous EIR or negative declaration. Here, there is new information and mitigation measures regarding the Project's significant effects that were not discussed in the 2016 EIR and 2021 SEIR, therefore the City must prepare a subsequent or supplemental EIR or MND.

Certified Industrial Hygienist, Francis Offermann, PE, CIH, has conducted a review of the proposed Project and relevant documents regarding the Project's indoor air emissions. Indoor Environmental Engineering Comments (October 9, 2023) (Exhibit A). Mr. Offermann concludes that it is likely that the Project will expose residents of the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is a leading expert on indoor air quality and has published extensively on the topic. Mr. Offermann's expert comments and curriculum vitae are attached as Exhibit A.

Comment on 1150-1170 Kifer Road Project  
Planning Commission Agenda Item 3  
October 9, 2023  
Page 5 of 6

Mr. Offermann explains that many composite wood products used in building materials and furnishings commonly found in offices, warehouses, residences, and hotels contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, “The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particleboard. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.” (Ex. A, pp. 2-3.)

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 120 per million, *even assuming* all materials are compliant with the California Air Resources Board’s formaldehyde airborne toxics control measure. (*Id.*, pp. 3-5.) This exceeds the Bay Area Air Quality Management District (“BAAQMD”) CEQA significance threshold for airborne cancer risk of 10 per million. (*Id.*, pp. 2-4.)

Mr. Offermann also notes that the high cancer risk that may be posed by the Project’s indoor air emissions likely will be exacerbated by the additional cancer risk that exists as a result of the Project’s location near roadways with moderate to high traffic (i.e., Kifer Road, Lawrence Expressway, Althea Terrace, etc.). (*Id.*, pp. 10-11.) Yet no analysis has been conducted of the significant cumulative health impacts that will result to residents living or working at the Project. Mr. Offermann provides several feasible mitigation measures to lessen the Project’s significant impacts to air quality and human health due to indoor emissions formaldehyde; none of which have been included in the 2021 FEIR or implemented by the City for purposes of this Project. (*See* Ex. A, pp. 11-13.)

The 2021 FEIR fails to disclose, analyze, or mitigate these new significant impacts. Because Mr. Offermann’s expert review is substantial evidence of a fair argument of a significant environmental impact to future users of the project, a subsequent or supplemental EIR or MND should be prepared to disclose and mitigate those impacts. As such, the City cannot rely on CEQA Guidelines sections 15162 and 5168(c)(2) and (4) and must prepare either a subsequent or supplemental EIR or MND.

**II. Because the 2016 EIR and 2021 SEIR Concluded that the Project Would Result in Significant and Unavoidable Impacts, a Tiered MND or EIR Is Required for the Project.**

A tiered EIR or MND is required for the Project due to impacts that remain significant and unavoidable. When a prior EIR, such as the 2016 EIR and 2021 SEIR, admits significant and unavoidable impacts, a later project requires its own EIR or MND and statement of overriding considerations for any impacts that remain significant and unavoidable. (*Communities for a Better Env't. v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 124-25.)

The 2021 FEIR found significant and unavoidable impacts to air quality and significant and unavoidable cumulative impacts on air quality and wastewater services. (Draft 2021 SEIR,

Comment on 1150-1170 Kifer Road Project  
Planning Commission Agenda Item 3  
October 9, 2023  
Page 6 of 6

pp. E-3, 3.2-1, 3.2-12–15, 4-5–6 (air quality impacts and cumulative air quality impacts), *id.* p. 4-22 (cumulative wastewater service impacts.) As such, these impacts will remain significant and unavoidable.

Even though these impacts were found significant and unavoidable in the 2016 EIR and 2021 SEIR and the City adopted a statement of overriding considerations at that time, the City cannot “adopt one statement of overriding considerations for a prior, more general EIR, and then avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR and statement of overriding considerations.” (*Communities for a Better Env't.*, *supra*, 103 Cal.App.4th at 124.)

Therefore, the Project requires its own subsequent EIR and statement of overriding considerations to ensure that the City “go[es] on the record and explain specifically why they are approving the later project despite *its* significant unavoidable impacts.” (*Communities for a Better Env't.*, *supra*, 103 Cal.App.4th at 125.)

### **III. The City May Not Rely on the 2016 EIR and 2021 SEIR Because It Failed to Implement Feasible Air Quality Mitigation Measures Required by the 2016 EIR and 2021 SEIR.**

The 2016 EIR and 2021 SEIR conclude that the Project will have significant and unavoidable air quality and cumulative air quality impacts. However, the City has failed to implement all of the applicable and feasible mitigation measures as is required by the 2016 SEIR and 2021 SEIR. (*See* Draft 2021 SEIR, pp. E-3, 3.2-1, 3.2-12–15, 4-5–6.) Specifically, the 2016 EIR and 2021 SEIR requires that future Projects implement 2016 LSAP Mitigation Measures 3.5.3a and 3.5.3b and 2021 LSAP Update Mitigation Measure 3.2-1. But according to the September 2023 CEQA checklist, only Mitigation Measure 3.5.3a will be implemented for the Project. (*See* CEQA Checklist, pp. 4-13 and 4-16.) As such, the City cannot rely on CEQA Guidelines sections 15162 and 15168(c)(2) and (4), and must prepare a subsequent or supplemental EIR or MND.

### **CONCLUSION**

For the above reasons, LIUNA respectfully requests that the Planning Commission refrain from approving the Project at this time. Rather, the City should prepare a new EIR for the Project that tiers from the 2016 EIR and 2021 SEIR prior to approval.

Sincerely,



Victoria Yundt  
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