VIA E-MAIL

April 30, 2024

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RE: City of San Jose's 865 Embedded Way Industrial Project (Project File Nos. H22-022, ER22-113)

Dear Nhu Nguyen,

On behalf of Carpenters Local Union 405 ("**Local 405**") this office is submitting these further comments regarding the Initial Study/Mitigated Negative Declaration ("**IS/MND**") for the City of San Jose's ("**City**") 865 Embedded Way Industrial Project ("**Project**"), and the City's written responses to prior written comments submitted on the Project.

The Project proposes a Site Development Permit (File No. H22-022) to allow the construction of a one-story, 121,400-square-foot industrial/manufacturing warehouse on a vacant 10.17-acre project site located at 865 Embedded Way in San Jose, California 95138 (APN 679-01-020) ("**Site**"). The Project also includes a connection to an existing 26-foot-wide drive aisle that extends from the eastern Embedded Way driveway through the adjacent eastern industrial property at 875 Embedded Way and currently terminates at the southeastern boundary of the Site. A total of 300 parking spaces would be provided in a surface parking lot surrounding the proposed building. The Project requires the removal of 11 trees on-site, two of which are ordinance-size.

Local 405 represents thousands of union carpenters in San Jose and has a strong interest in well-ordered land use planning and in addressing the environmental impacts of development projects. Individual members of Local 405 live, work, and

recreate in the City and surrounding communities and would be directly affected by the Project's environmental impacts.

Local 405 expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearing or proceeding related to the Project. Gov. Code, § 65009, subd. (b); Pub. Res. Code, § 21177, subd. (a); see *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1203; see also *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

Local 405 incorporates by reference all comments related to the Project or its California Environmental Quality Act ("**CEQA**") review, including the IS/MND. See *Citizens for Clean 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, Local 405 requests that the City provide notice for any and all notices referring or related to the Project issued under CEQA (Pub. Res. Code, § 21000 *et seq.*) and the California Planning and Zoning Law ("**Planning and Zoning Law**") (Gov. Code, §§ 65000-65010). California Public Resources Code sections 21092.2 and 21167(f) and California 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.

I. THE CITY SHOULD REQUIRE THE USE OF A LOCAL WORKFORCE TO BENEFIT THE COMMUNITY'S ECONOMIC DEVELOPMENT AND ENVIRONMENT.

Local 405 reiterates that the City should require that the Project be built by contractors who participate in a Joint Labor-Management Apprenticeship Program approved by the State of California and make a commitment to hiring a local workforce.

Community benefits such as local hire 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 Site can reduce the length of vendor trips, reduce greenhouse gas ("**GHG**") emissions, and provide localized economic benefits.

Workforce requirements promote the development of skilled trades that yield sustainable economic development. Furthermore, workforce policies have significant

environmental benefits given that they improve an area's jobs-housing balance, decreasing the amount and length of job commutes and the associated greenhouse gas (GHG) emissions. In fact, on May 7, 2021, the South Coast Air Quality Management District found that that the "[u]se of a local state-certified apprenticeship program" can result in air pollutant reductions.[1]

Locating jobs closer to residential areas can have significant environmental benefits. Moreover, local hire mandates and skill-training are critical facets of a strategy to reduce vehicle miles traveled ("**VMT**"). As planning experts Robert Cervero and Michael Duncan have noted, simply placing jobs near housing stock is insufficient to achieve VMT reductions given that the skill requirements of available local jobs must match those held by local residents.[2] Some municipalities have even tied local hire and other workforce policies to local development permits to address transportation issues.

Recently, the State of California verified its commitment towards workforce development through the Affordable Housing and High Road Jobs Act of 2022, otherwise known as Assembly Bill No. 2011 ("**AB2011**"). AB2011 amended the Planning and Zoning Law to allow ministerial, by-right approval for projects being built alongside commercial corridors that meet affordability and labor requirements.

The City should consider utilizing local workforce policies and requirements to benefit the local area economically and to mitigate GHG emissions, improve air quality, and reduce transportation impacts.

II. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

A. Background Concerning the California Environmental Quality Act.

[1] 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.

[2] 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/UTCT-825.pdf.

The California Environmental Quality Act is a California statute designed to inform decision-makers and the public about the potential significant environmental effects of a project. 14 California Code of Regulations ("**CEQA Guidelines**"), § 15002, subd. (a)(1).[3] At its core, its purpose is to "inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

1. Background Concerning Environmental Impact Reports.

CEQA directs public agencies to avoid or reduce environmental damage, when possible, by requiring alternatives or mitigation measures. CEQA Guidelines, § 15002, subds. (a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Board of Port Comes* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights Improvement Assn.*, 47 Cal.3d at p. 400. The EIR serves to 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, subd. (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 Public Resources Code section 21081. See CEQA Guidelines, § 15092, subds. (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. *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (quoting *Laurel Heights Improvement Assn.*, 47 Cal.3d at pp. 391, 409 fn. 12) (internal quotations omitted). A clearly inadequate or unsupported study is entitled to no judicial deference. *Id.* 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. County of Fresno* (2018) 6 Cal.5th 502,

[3] 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. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 217.

515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102, 131. As the court stated in *Berkeley Jets*, 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. 91 Cal.App.4th at p. 1355 (internal quotations omitted).

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. *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). 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. *Id.* 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. *Id.*

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 EIR must be prepared 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." PRC, § 21151; see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.App.3d 68, 75; accord *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, subd. (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.*, 13 Cal.3d at p. 83 fn. 16; see *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 Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 207; *Nelson 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 All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *Sundstrom*, 202 Cal.App.3d at p. 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,* 23 Cal.App.5th at p. 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 183; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491; *Friends of "B" St.*, 106 Cal.App.3d 988; CEQA Guidelines, § 15064(f)(1).

2. Background Concerning Initial Studies, Negative Declarations and Mitigated Negative Declarations.

CEQA and CEQA Guidelines are strict and unambiguous about when an MND may be used. A public agency must prepare an EIR whenever substantial evidence supports a "fair argument" that a proposed project "may have a significant effect on the environment." Pub. Res. Code, §§ 21100, 21151; CEQA Guidelines, §§ 15002, subds. (f)(1)-(2), 15063; *No Oil, Inc.*, 13 Cal.3d at p. 75; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112.

Essentially, should a lead agency be presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. CEQA Guidelines, §§ 15064, subds. (f)(1)-(2); see *No*

Oil Inc., supra, 13 Cal.3d at p. 75 (internal citations and quotations omitted). Substantial evidence includes "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines, § 15384(a).

The fair argument standard is a "low threshold" test for requiring the preparation of an EIR. *No Oil Inc.*, *supra*, 13 Cal.3d at p. 84; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579. It "requires the preparation of an EIR where there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial[.]" *County Sanitation*, *supra*, 127 Cal.App.4th at p. 1580 (quoting CEQA Guidelines, § 15063(b)(1)). A lead agency may adopt an MND only if "there is no substantial evidence that the project will have a significant effect on the environment." CEQA Guidelines, § 15074(b).

Evidence supporting a fair argument of a significant environmental impact triggers preparation of an EIR regardless of whether the record contains contrary evidence. *League for Protection of Oakland's Architectural and Historical Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905. "Where the question is the sufficiency of the evidence to support a fair argument, deference to the agency's determination is not appropriate[.]" *County Sanitation*, 127 Cal.App.4th at 1579 (quoting *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-1318).

Further, it is the duty of the lead agency, not the public, to conduct the proper environmental studies. "The agency should not be allowed to hide behind its own failure to gather relevant data." *Sundstrom*, 202 Cal.App.3d at p. 311. "Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." *Id*; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1382 (lack of study enlarges the scope of the fair argument which may be made based on the limited facts in the record).

Thus, refusal to complete recommended studies lowers the already low threshold to establish a fair argument. The court may not exercise its independent judgment on the omitted material by determining whether the ultimate decision of the lead agency would have been affected had the law been followed. *Environmental Protection Information Center v. Cal. Dept. of Forestry* (2008) 44 Cal.4th 459, 486 (internal citations

and quotations omitted). The remedy for this deficiency would be for the trial court to issue a writ of mandate. *Id.*

Both the review for failure to follow CEQA's procedures and the fair argument test are questions of law, thus, the de novo standard of review applies. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435. "Whether the agency's record contains substantial evidence that would support a fair argument that the project may have a significant effect on the environment is treated as a question of law. *Consolidated Irrigation Dist.*, 204 Cal.App.4th at p. 207; Kostka and Zischke, Practice Under the Environmental Quality Act (2017, 2d ed.) at § 6.76.

In an MND context, courts give no deference to the agency. Additionally, the agency or the court should not weigh expert testimony or decide on the credibility of such evidence—this is one of the EIR's functions. As stated in *Pocket Protectors v. City of Sacramento* (2004):

> Unlike the situation where an EIR has been prepared, neither the lead agency nor a court may "weigh" conflicting substantial evidence to determine whether an EIR must be prepared in the first instance. Guidelines section 15064, subdivision (f)(1) provides in pertinent part: if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. Thus, as *Claremont* itself recognized, [c]onsideration is not to be given contrary evidence supporting the preparation of a negative declaration.

124 Cal.App.4th 903, 935 (internal citations and quotations omitted).

In cases where it is not clear whether there is substantial evidence of significant environmental impacts, CEQA requires erring on the side of a "preference for resolving doubts in favor of environmental review." *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332. "The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

As explained below, the IS/MND fails to make certain essential findings. Further, for a number of findings that the IS/MND does make, it fails to support such findings

with sufficient analysis and substantial evidence, or it fails to incorporate adequate mitigation measures. Therefore, there is a fair argument that the Project will have a significant effect on the environment, triggering the "low threshold" standard for preparation of an EIR.

B. The City's Responses to Comments Misconstrue and Misapply the Substantial Evidence Standard.

In its April 2024 Responses to Comments (the "**Responses**"), the City repeatedly asserts that the comments provided by Local 405 (and other commenting parties) "[do] not provide substantial evidence of [their] own supporting a fair argument that the identified mitigation measures are inadequate to reduce project impacts to a less than significant level." This boilerplate dismissal of Local 405's comments ignores the proper substantial evidence standard that applies to a commenting party challenging the adequacy of environmental review under CEQA. Indeed, a commenting party need not provide "its own" substantial evidence to support a fair argument that a project will have a significant impact. Rather, that evidence can be contained in any of the documents associated with and prepared for a project (including CEQA environmental documents), as is the case here.

Again, 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 CA4th 1597, 1602; *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 1002. Here, Local 405 has commented regarding the MND and the data and information set forth therein, and has raised arguments regarding the Project's perceived significant environmental impacts based on that information and documentation. The City is not at liberty to summarily dispose of those comments simply because its analysis has led it to differing conclusions regarding the Project's impacts. The MND constitutes a significant component of the "evidence in the record," and to the extent that other fair arguments regarding the Project's environmental impacts can be drawn from the information presented therein, Local 405 (and other commenting parties) are not required to supply any additional evidence in support of those fair arguments. More importantly, the City, as the lead agency for the Project, cannot simply dismiss other fair arguments regarding environmental impacts that arise from the evidence in the record, and it is the City's obligation to instead carefully weigh and consider any other such arguments before making a determination as to whether further environmental review is warranted.

C. There Is a Fair Argument that the Project May Have a Significant Traffic Impact.

To dispose of the need to prepare an EIR, the IS/MND relies on mitigation measure MM TRAN-1.1 to support its contention that the Project would have a less than significant impact with mitigation incorporated as it pertains to CEQA Guidelines Section 15064.3 and its required VMT evaluation of a project's transportation impacts. IS/MND, p. 161. Yet, mitigation measure MM TRAN-1.1 is inadequate for an EIR, given that it is unenforceable, illusory, and infeasible. It also improperly delegates the City's affirmative duty to ensure the reduction of traffic impacts onto the Project's Applicant and further improperly delegates the approval of any traffic mitigation plans to the City's Public Works department, rather than the elected decision-makers. MM TRAN-1.1 also improperly defers mitigation.

CEQA's standard under Public Resources Code section 21064.5 requires an IS/MND to show that:

> (1) [R]evisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.

In addition to its prior comments on this issue, Local 405 reiterates that the proposed mitigation measures are illusory given they only require that the Project Applicant submit plans at some future point which the City may then review. These measures further place the burden on the Applicant to "ensure" that the proposed changes result in a reduction of VMT. Simply put, there is no definitive and measurable commitment to mitigation at all. Even under the EIR-related CEQA Guidelines section 15126.4(a)(1)(B), this is improper since, *inter alia,* the City does not commit to mitigation but rather relies on the Applicant to mitigate. As a result, the public is being denied the opportunity to assess the City's analysis behind the claimed adequacy of the proposed mitigation measures, as the specific plans for implementing the mitigation measures have not yet been prepared. The City's April 2024 Responses to Public Comments fail to cure these material defects.

Indeed, the proposed mitigation measures are improperly deferred and vague as they defer the formulation of mitigation measures or final design thereof to a later time, shift that burden to the Applicant, and further do not adequately explain how removing the pork-chop islands or installing raised median islands will improve pedestrian safety and calm traffic to such a degree that such measures will "clearly" reduce VMT to the requisite level of insignificance, as required for an IS/MND.

As stated previously, the IS/MND fails to meet CEQA's pre-conditions and requirements even in the case of an EIR. CEQA forbids deferred mitigation. CEQA Guidelines, § 15126.4, subd. (a)(1)(B). CEQA allows deferral of details of mitigation measures only "when it is impractical or infeasible to include those details during the project's environmental review." *Id.* CEQA further requires that the lead agency:

> (1) [C]ommits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard[.]

CEQA Guidelines, § 15126.4, subd. (a)(1)(B).

Here, Local 405 maintains that the City has failed each of these preconditions and requirements, as the IS/MND fails to show why the development of the traffic calming plans or pedestrian improvements could not be developed before the issuance of the IS/MND, what impacts they will have individually or cumulatively, if such plans would indeed be feasible, and the specific performance criteria that Applicant will have to meet.

Moreover, the revisions that the City has proposed to the IS/MND in its April 2024 Responses to Public Comments only further compound the City's deferment of mitigation by expanding upon the City's withdrawal from the impact mitigation process. Specifically, the Responses propose the following revisions to MM-TRAN-1.1, in relevant part:

> The multi-modal infrastructure improvements shall be part of a Public Improvement Plan prepared by the project applicant that demonstrates how the multi-modal improvements will be implemented and the schedules for completing the improvements. Prior to issuance of any certificates of occupancy, the project applicant shall submit ~~T~~the Public Improvement Plan ~~shall be reviewed and approved by~~ to the Director of Public Works or the Director's designee. The implementation of the

> multi-modal improvements shall be verified by the Director of Public Works or the Director's designee for review and approval.

See April 2024 Responses to Public Comments at p. 52.

These revisions to the mitigation measure indicate that the City is removing itself from the process of approving the Public Improvement Plan prior to the Applicant's implementation of any multi-modal infrastructure improvements. To that end, the mitigation measure now vests the Applicant with all of the discretionary authority over the contents of the Public Improvement Plan. According to the revised mitigation measure, the only role the City will now play with regard to the Public Improvement Plan is verifying the Applicant's implementation of the multi-modal improvements that the Applicant determined were appropriate for incorporation into the Project.

Furthermore, the City has simply no justification for the deferment of the Public Improvement Plan until after the conclusion of the environmental review process for the Project, seeing as the IS/MND's determination of "less than significant impacts with mitigation" is entirely contingent upon the establishment and implementation of that Public Improvement Plan.

Lastly, the IS/MND improperly fails to provide any analysis whatsoever of the potential environmental impacts that would result from the implementation of the proposed mitigation measures, including the multi-modal infrastructure improvements that the mitigation measure demands. In the absence of providing that requisite analysis, and by deferring and delegating away aspects of the mitigation measure, the City has improperly denied the public of the requisite opportunity to fully evaluate the environmental impacts of the Project prior to a final agency determination being made.

For the reasons set forth previously and hereinabove, Local 405 maintains that the IS/MND fails to prove that the Project's traffic impacts will be mitigated to a less than significant level with the incorporation of the proposed mitigation measures. In fact, the IS/MND suggests the opposite, necessitating the preparation of an EIR. The City's responses to comments and revisions to the proposed mitigation measures fail to address the concerns previously raised by Local 405.

D. There Is a Fair Argument that the Project May Have Significant Air Quality, GHG Emission, Water, Noise, Hazards, Human Health, and

Wildlife/Biological Impacts, and Cumulative Impacts, Requiring Mandatory Findings of Significance and the Preparation of an EIR.

Again, given that the Project may have significant traffic impacts that are not accurately disclosed or mitigated against in the IS/MND, then its traffic-related impacts are also derivatively understated and may be significant, thereby requiring the preparation and circulation of an EIR.

There is an acknowledged direct correlation between the increase in traffic impacts and an increase in the associated air quality, GHG emission, and noise impacts. See e.g., *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 413 ("it is reasonable to assume" that a project enabling physical residential development would have reasonably foreseeable indirect air and other impacts).

As stated in the Office of Planning Research's ("**OPR**") technical advisory in 2018:

> VMT and Greenhouse Gas Emissions Reduction. Senate Bill 32 (Pavley, 2016) requires California to reduce greenhouse gas (GHG) emissions 40 percent below 1990 levels by 2030, and Executive Order B-16-12 provides a target of 80 percent below 1990 emissions levels for the transportation sector by 2050. The transportation sector has three major means of reducing GHG emissions: increasing vehicle efficiency, reducing fuel carbon content, and reducing the amount of vehicle travel.

Similarly, there is an acknowledged nexus between the increase in traffic and in related air quality, GHG impacts, noise, water/flooding impacts, and impacts on human health and the natural environment, including wildlife and waterways. As described in the 2018 OPR Technical advisory:

> VMT and Other Impacts to Health and Environment. VMT mitigation also creates substantial benefits (sometimes characterized as "co-benefits" to GHG reduction) in both in the near-term and the long-term. Beyond GHG emissions, increases in VMT also impact human health and the natural environment. Human health is impacted as increases in vehicle travel lead to more vehicle crashes, poorer air quality, increases in chronic diseases associated with reduced physical activity, and worse mental health. Increases in vehicle travel also negatively affect other road users, including pedestrians, cyclists, other motorists, and many transit users. The natural environment is impacted as higher VMT leads to more

> collisions with wildlife and fragments habitat. Additionally, development that leads to more vehicle travel also tends to consume more energy, water, and open space (including farmland and sensitive habitat). This increase in impermeable surfaces raises the flood risk and pollutant transport into waterways.

As such, there is a fair argument that the Project here may have significant GHG emissions, air quality, energy, water, noise and other impacts, including impacts on human beings and the natural environment.

1. GHG Emissions and Air Quality Impacts

Local 405 reiterates that the IS/MND fails to analyze, to any degree sufficient to constitute compliance with CEQA, the Project's potential GHG emissions impacts, and instead offers a conclusory statement that because construction emissions would occur over a certain period and result in a certain tonnage of CO2, that the Project will not result in a significant impact with regards to GHG emissions. Consequently, the IS/MND requires substantial revisions or an EIR must be prepared.

For purposes of the Project's operational emissions, the IS/MND leans too almost entirely on the Project's consistency with the General Plan land use designation for the Site and planned growth from build out of the General Plan and that "the project's GHG emissions are accounted for in the citywide GHG emissions inventory addressed in the GHGRS, *provided the project complies with applicable GHG reduction measures identified in the GHGRS*." IS/MND, p. 99. However, Local 405 maintains that the IS/MND's reliance on the Project's consistency with the City's 2030 GHG Reduction Strategy ("**GHGRS**"), i.e., the hope that the Project "complies with applicable GHG reduction measures," cannot constitute as mitigation nor a determination that the Project will have less than significant impacts for purposes of CEQA compliance. The Project's compliance with municipal planning and GHGRS is not a substitute for performing a detailed analysis of the Projects GHG impacts, as required by CEQA.

In sum, the MND's findings of no impacts, including but not limited to impacts in air quality and GHG emissions, are clearly erroneous, and an EIR is required to not only disclose the Project's respective impacts, but also relate those to the adverse health impacts and impacts to the human beings that the Project may have. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502.

2. Wildlife and Biological Impacts

Based on the known potential for occurrence of special-status species on or near the project site, Local 405 reiterates that additional site surveys must be completed prior to the Project's building phase to adequately determine whether and to what extent protected species may be present on the Site. Moreover, despite the position detailed in the City's Responses to Comments, the Santa Clara Valley Habitat Plan (and the Applicant's payment of fees associated therewith) cannot and does not act as a CEQA-compliant substitute for implementation of necessary mitigation measures pertaining to biological resources impacted by the Project. Rather, the appropriate course for mitigation of any potential adverse impacts of the Project on sensitive biological resources would be the establishment of mitigation measures that would include comprehensive and seasonally appropriate biological surveys prior to and during the construction of the project.

Again, the IS/MND acknowledges that the "Bay checkerspot butterfly and Crotch's bumble bee … may occasionally forage or breed on the site and, therefore, the species cannot be deemed absent." IS/MND at p. 50. It also notes the potential for yellow warblers and white-tailed kites to occur at the site. *Id.* Given the potential for occurrence of these special-status species on or near the Project site, CEQA requires that the IS/MND, at minimum, be revised to craft specific mitigation measures aimed at ensuring a reduction in Project impacts to such species to the maximum extent possible.

3. Noise Impacts

As stated in CEQA, Guidelines section 15126.4(a)(1)(B), "[c]ompliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards." See also *Californians for Alternatives to Toxics v. Department of Food & Agric.* (2005) 136 Cal.App.4th 1 (the court set aside an EIR for a 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); *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).

Here, the IS/MND relies on the Project's "implementation of GP Policy EC-1.7, Municipal Code requirements, and the City's Standard Permit Conditions" to conclude that the Project's "temporary construction noise impacts would be reduced to a less-than-significant level." However, based on the authority outlined above, Local 405 maintains that it is improper for the IS/MND to merely rely on Applicant's compliance with regulatory measures to conclude that the Project will have less than significant impacts for a number of reasons. Again, noise regulations do not capture all the noise impacts of the Project, including construction and operation. Moreover, the regulatory measures are not Project-specific and are focused on the Project itself—as such, they fail to consider issues specific to the Project, such as location, size, proposed mitigation measures, as well as the Project's *cumulative* impacts along with other related projects. Further, as discussed previously, the IS/MND's traffic impacts are understated, and therefore traffic noise impacts have not been fully accounted for.

Further still, the Project's reliance on regulatory compliance with the referenced regulations is misplaced because there is no evidence that such ordinances were to control noise outside of the building's envelope, such as, for example, traffic noise or increase in ambient noises due to the Project's construction and operation. *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 (the building codes do not address the question of whether the Project is even *safe* to build, "whether a building should be constructed at all, how large it should be, where it should be located, whether it should incorporate certain resources, or anything else external to the building's envelope.")

Accordingly, Local 405 maintains that there is a fair argument that the Project may have a significant noise impact and as such, the Project's potential noise impacts should be thoroughly analyzed and evaluated in an Environmental Impact Report pursuant to CEQA. At a minimum, Local 405 submits that the IS/MND must be revised and recirculated with respect to the Project's noise impacts to reflect greater analysis beyond applying the Project's regulatory compliance as a substitute for sufficient mitigation of noise impacts.

III. THE CITY MUST, AT THE VERY LEAST, REVISE AND RECIRCULATE THE IS/MND.

Section 15073.5 of the CEQA Guidelines provides that a negative declaration must be recirculated whenever the document must be substantially revised. A substantial revision includes the identification of new, avoidable significant effects requiring mitigation measures or project revisions to be added to reduce the effect to less than significant levels or upon the agency determining that a proposed mitigation measure or project change would not reduce a potential impact to insignificance.

Additionally, when new information is brought to light showing that an impact previously discussed in an IS/MND and found to be insignificant with or without mitigation in the IS/MND's analysis has the potential for a significant environmental impact supported by substantial evidence, the IS/MND 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.

Here, in light of the IS/MND's failure to substantiate all of its findings, provide adequate mitigation measures, and fully assess all relevant factors, Local 405 resubmits that the Project requires significant revisions and resolution of conflicts in evidence. Therefore, at a minimum, the City must revise and recirculate the IS/MND if it does not prepare an EIR.

A. The IS/MND Fails to Mitigate the Project's Significant Impacts.

If a project has a significant effect on the environment, an 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." CEQA Guidelines, § 15092, subds. (b)(2)(A)-(B).

CEQA mitigation measures proposed and adopted are required to describe what actions will be taken to reduce or avoid an environmental impact. CEQA Guidelines, § 15126.4, subd. (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, such exception is narrowly proscribed to situations where it is impractical or infeasible to include those details during the project's environmental review. Moreover, CEQA

allows deferral of details of mitigation measures only "when it is impractical or infeasible to include those details during the project's environmental review." *Id.* CEQA further requires "that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard[.]" CEQA Guidelines, § 15126.4, subd. (a)(1)(B).

As discussed above, the Project fails to mitigate its significant impacts, improperly defers critical aspects of proposed mitigation measures, and fails to analyze the impacts associated with its proposed mitigation measures. Therefore, at minimum, the IS/MND must be revised or otherwise an EIR prepared.

IV. CONCLUSION

Based on the foregoing, Local 405 resubmits that the City should prepare an EIR for the Project given that there is a fair argument that the Project will result in significant environmental impacts. However, at the very least, the City must revise the IS/MND to address the aforementioned concerns and those previously raised. Should the City have any questions, please do not hesitate to contact this office.

Sincerely,

Jeremy H. Herwitt
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