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August 30, 2022

**VIA EMAIL AND HAND DELIVERY**

City of Vacaville, Planning Commission  
Brandon Kline, Chair  
Erin Morris, Planning Director  
Peyman Behvand, Planning Manager  
c/o Nancy Tillotson, Commission Staff  
650 Merchant Street  
Vacaville, California 95688

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**Re: Agenda Item 6: The Greentree Project and Final  
Environmental Impact Report (File No. 16-289; State  
Clearinghouse No. 2019049003)**

Dear Chair Kline, Commissioners, Mr. Morris, and Mr. Behvand

We write on behalf of **Napa-Solano Residents for Responsible Development** (“Napa-Solano Residents” or “Residents”) to provide comments on the City of Vacaville (“City”) Planning Commission Agenda Item 6, including the Staff Report and Final Environmental Impact Report (“FEIR”) prepared by the City for The Greentree Project, SCH No. 201904900 (“Project”), proposed by The Greentree Development Group, Inc (“Applicant”).<sup>1</sup>

On May 31, 2022, we submitted comments on the Project’s Draft EIR pursuant to the California Environmental Quality Act (“CEQA”).<sup>2</sup> Subsequently, the City released the FEIR on August 11, 2022.<sup>3</sup> The FEIR contains responses to

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<sup>1</sup> City of Vacaville, Planning Commission, Public Hearing Agenda Item 6.A, The Greentree Project (August 30, 2022) available at [https://vacaville.granicus.com/GeneratedAgendaViewer.php?view\\_id=5&event\\_id=1090](https://vacaville.granicus.com/GeneratedAgendaViewer.php?view_id=5&event_id=1090)

<sup>2</sup> Pub. Res. Code (“PRC”) §§ 21000 et seq.; 14 Cal. Code Regs (“CCR”) §§ 15000 et seq.

<sup>3</sup> City of Vacaville, Final Environmental Impact Report, The Greentree Project (August 2022) (hereinafter “FEIR”) available at <https://www.ci.vacaville.ca.us/home/showpublisheddocument/-20981/637957360958830000>

6116-006j

some of our comments. However, the City's responses to comments in the FEIR ("Responses") and the FEIR as a whole fail to resolve many of the issues we raised, as detailed below, and our comments still stand.<sup>4</sup> As a result, the FEIR still fails to adequately disclose the Project's potentially significant impacts related to noise, transportation, biological resources, and energy resources, as required by CEQA.

Furthermore, as a result of the deficiencies in the FEIR, the Planning Commission lacks substantial evidence to make the findings required under the City's Municipal Code for the required General Plan Amendment<sup>5</sup>, Specific Plan<sup>6</sup>, rezoning, subdivision map<sup>7</sup>, Green Tree Park Policy Plan Amendment<sup>8</sup>, Airport Land Use Compatibility Review<sup>9</sup>, and design review for the R7 Greentree Apartments. The Commission cannot recommend approval of the Project to the City Council at this time because the Project's potentially significant, unmitigated environmental impacts render the Project inconsistent with the findings required to approve the Project's entitlements.

These comments address the outstanding deficiencies in the FEIR's environmental analysis and proposed mitigation for the Project, and respond to new issues raised in the Staff Report. Our comments are supported by substantial evidence in the form of technical comments from qualified experts including traffic and transportation expert Daniel T. Smith Jr., P.E., of Smith Engineering;<sup>10</sup> noise expert Derek Watry of Wilson Ihrig;<sup>11</sup> and biological resources expert Shawn Smallwood, PhD.<sup>12</sup> These experts address the FEIR's failure to remedy the DEIR's analytical errors and omissions, and lack of adequate mitigation, that were described in detail in their DEIR comments.

We urge the Planning Commission to carefully consider these comments and to remand the Project to Staff to correct the errors and omissions in the FEIR and circulate a legally adequate revised DEIR for public comment before bringing the

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<sup>4</sup> We incorporate our May 31, 2022 comments, along with their attachments and exhibits, herein by reference.

<sup>5</sup> City of Vacaville Municipal Code ("VMC") § 14.04

<sup>6</sup> VMC § 14.09.340

<sup>7</sup> VMC § 14.11.020

<sup>8</sup> VMC § 14.09.340.060

<sup>9</sup> VMC § 14.09.110.070

<sup>10</sup> Mr. Smith's technical comments are attached hereto as Exhibit A.

<sup>11</sup> Mr. Watry's technical comments are attached hereto as Exhibit B.

<sup>12</sup> Dr. Smallwood's technical comments are attached hereto as Exhibit C.

Project back for a recommendation hearing. No approval recommendation can be made at this time. We reserve the right to supplement these comments at a later date, and at any later proceedings related to this Project.<sup>13</sup>

## I. STATEMENT OF INTEREST

Napa-Solano Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public impacts associated with Project development. Napa-Solano Residents includes Vacaville residents Nichole Camara, Eric Revty, Greg Simon, Alec Stouwie, Cody Stouwie, and Kurt Wheeler, as well as the **International Brotherhood of Electrical Workers Local 180, Plumbers & Steamfitters Local 343, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483**, and their members and their families, and other individuals that live and/or work in the City of Vacaville and Solano County. Napa-Solano Residents has a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members.

Individual members of Residents live, work, recreate, and raise their families in the City, in Solano County, and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

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<sup>13</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* ("Bakersfield") (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.  
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## II. LEGAL DISCUSSION

### A. The City's Responses to Public Comments on the DEIR Are Inadequate

CEQA requires that a lead agency evaluate and prepare written responses to comments in a FEIR.<sup>14</sup> Agencies are required to provide “detailed written response to comments . . . to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and the public participation in the environmental review process is meaningful.”<sup>15</sup> When a comment raises a “significant environmental issue,” the written responses must describe the disposition of each such issue raised by commentators.<sup>16</sup> Specifically, the lead agency must address the comment “in detail giving reasons why” the comment was “not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice,”<sup>17</sup> particularly in response to comments are made by agencies or experts.<sup>18</sup> Failure of a lead agency to respond to comments raising significant environmental issues before approving a project frustrates CEQA’s informational purpose and may render the EIR legally insufficient.<sup>19</sup> As the court explained in *City of Long Beach*:

The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful.<sup>20</sup>

The City’s failure to respond to Residents’ expert comments is comparable to the errors made by the City of Carmel in *Flanders Foundation*.<sup>21</sup> In that case, a city prepared a FEIR for a project involving the sale of a city-owned historic property

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<sup>14</sup> PRC § 21091(d); 14 CCR §§ 15088(a), 15132.

<sup>15</sup> *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.4th 889, 904.

<sup>16</sup> PRC §21091(d); 14 CCR §§15088(c), 15132(d), 15204(a).

<sup>17</sup> 14 CCR § 15088(c); see *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1124 (“*Laurel II*”); *The Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal. App. 4th 603, 615.

<sup>18</sup> *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367, 1371; *People v. County of Kern* (1976) 62 Cal.App.3d 761, 772).

<sup>19</sup> *Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615; *Rural Landowners Association v. City Council* (1983) 143 Cal.App.3d 1013, 1020.

<sup>20</sup> 176 Cal. App. 4th at 904.

<sup>21</sup> *Flanders Foundation*, 202 Cal.App.4th at 609.

surrounded by city-owned parkland. Its DEIR had proposed a conservation easement to mitigate for the loss of city parkland. Comments submitted on the *Flanders* DEIR recommended an alternative of selling the residence with a smaller lot in order to mitigate the potentially significant impacts from the loss of city park space. However, the FEIR failed to provide a substantive response to this comment, and instead merely reiterated the city's reliance on the same conservation easement that had been originally proposed in the DEIR as "sufficient mitigation."<sup>22</sup> Both the trial court and the Court of Appeal held that Carmel's response was legally inadequate because it had ignored the commenter's observation that a reduction in the size of the parcel would mitigate an environmental impact of the project.<sup>23</sup>

Similarly here, the FEIR fails entirely to respond to Dr. Smallwood's comments documenting significant biological resources impacts by referring to responses provided to another commenter on different issues, fails to respond to Mr. Watry's comments on significant noise impacts by simply reiterating the inadequate analysis contained in the DEIR, and fails to respond directly to comments prepared by Mr. Smith regarding the Project's significant transportation impacts by responding only to a legal summary of a subset of issues he raised. These are patently inadequate responses which fail to meet the clear legal standard articulated in the CEQA Guidelines. As the *Flanders Foundation* court explained:

Since the proposed project would have an unmitigated significant environmental impact by eliminating parkland, the comment's suggestion reasonably questioned whether that impact could be reduced by reducing the size of the parcel. The City's obligation under CEQA was to explain in the FEIR "*in detail giving reasons why*" the City was not considering the sale of the residence with a reduced parcel. The City made no effort to satisfy its obligation....The City's failure to respond to this significant comment violated its duty under CEQA, and the trial court correctly found that the City's certification of the FEIR was therefore invalid.<sup>24</sup>

The lack of a detailed response to Residents' comments fails to comply with CEQA.<sup>25</sup> The FEIR must be revised and recirculated to correct these significant omissions in the City's Responses.

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<sup>22</sup> *Flanders Foundation*, 202 Cal.App.4th at 609.

<sup>23</sup> *Id.* at 615-616.

<sup>24</sup> *Id.* at 616-17.

<sup>25</sup> 14 CCR § 15088(c); *People v County of Kern* (1976) 62 CA3d 761. 6116-006j

**III. THE FEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS TO NOISE, BIOLOGICAL RESOURCES, TRANSPORTATION, AND ENERGY RESOURCES.**

**A. The FEIR Still Fails to Accurately Disclose and Mitigate the Project's Significant Noise Impacts.**

The FEIR fails to correct the legal and factual errors in its impact analysis for the Project's construction and operational noise impacts. The FEIR does not address the substance of previous comments and instead reiterates the DEIR's faulty analysis. Previously, Resident's commented that the DEIR's construction noise will exceed the applicable threshold by more than 25 dBA and will result in significant temporary noise impacts to sensitive receptors. Additionally, Residents provided comments that showed the Project's traffic cumulative traffic noise would result in a significant impact. In response, the FEIR reiterates that the DEIR properly analyzed the construction and cumulative traffic noise impacts of the Project and does not warrant additional analysis.

**1. FEIR Still Fails to Disclose and Mitigate Significant Construction Noise Impacts**

In response to Residents' detailed comments on construction noise impacts, the FEIR references DEIR Chapter 4.15 and DEIR Appendices 4.15-1 and 4.15-2 stating that the City's General Plan establishes policies for control of noise.<sup>26</sup> Additionally, the FEIR references § 14.09.127.120 of the City of Vacaville Municipal Code, which provides quantified noise and vibration standards applicable to the Project.<sup>27</sup> While it is accurate that the City's General Plan and Municipal Code provide noise and vibration standards for construction, the FEIR's response does not resolve the underlying defects in the DEIR's noise analysis because the analysis did not use the cited City construction noise standards, and the FEIR did not revise the DEIR's noise analysis to apply the standards.<sup>28</sup>

The FEIR goes on to state that the DEIR's original analysis on pages 18-20 of Appendix 4.15-1 prepared by WJV Acoustics, May 12, 2021, "examines all phases of construction noise and vibration, including that required within 500 feet of existing sensitive receptors pursuant to the quantified standards in the City Noise

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<sup>26</sup> FEIR, p. 2-278.

<sup>27</sup> FEIR, p. 2-278.

<sup>28</sup> Watry Comments, p. 2.  
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Ordinance.”<sup>29</sup> However, as explained by Mr. Watry, while it is true that the noise analysis contained in DEIR Appendix 4.15-1 analyzed noise during the various phases of Project construction, it analyzed noise levels for individual pieces of equipment, and did not analyze noise levels for multiple pieces of equipment operating simultaneously on the entire construction site, as required by the City’s Municipal Code.<sup>30</sup> The FEIR’s construction noise analysis therefore does not correct the errors in the DEIR’s analysis, and fails to apply its own methodology from the City’s Noise Ordinance, resulting in an arbitrary and admittedly incomplete discussion of the Project’s construction noise impacts.

The FEIR next reiterates the DEIR’s unsupported conclusion that application of noise mitigation measures MM NOI-1 through NOI-5 would reduce the Project’s noise impacts to less than significant levels and that no additional mitigation is required.<sup>31</sup> This assertion fails entirely to respond to Mr. Watry’s comments on the inadequacy of measures MM NOI-1 through NOI-5 to reduce noise impacts. As previously commented, this conclusion is not supported by the evidence for three reasons. First, the DEIR’s analysis did not calculate the noise levels from the construction site as a whole, as required by the Noise Ordinance. Therefore, the DEIR could not accurately conclude the Project’s noise impacts would be less than significant because it did not perform the analysis necessary to reach that conclusion. Second, the calculations prepared by Mr. Watry demonstrated an exceedance of the standards set forth in the City’s Municipal Code, resulting in a significant impact. The FEIR fails to respond to this evidence. Third, Residents’ comments provided detailed analysis as to why MM NOI-1 through NOI-5 would not fully mitigate the significant noise impacts calculated by Mr. Watry. The FEIR fails to address any of Residents’ comments on this issue, further failing as an informational document under CEQA.

## **2. The FEIR Still Fails to Disclose Significant Cumulative Traffic Noise Impacts**

As noted in our previous comments on the DEIR, a proper cumulative analysis requires a two-step process to determine whether the Project will result in a significant impact. First, the Lead Agency must determine if there is a cumulative impact by comparing the cumulative future traffic noise levels to the existing baseline using the same threshold of significance as was used to assess the Project’s

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<sup>29</sup> FEIR, p. 2-287.

<sup>30</sup> Watry Comments, p. 2. *See also* VMC § 14.09.240.140 (C) (4) –Two standards apply to nontransportation noise sources: the hourly Leq, dBA, which is an hourly average sound level, and the maximum level, dBA.

<sup>31</sup> FEIR, p. 2-287.

impacts. Second, if there is an impact, the Lead Agency must analyze whether the Project's contribution to that impact is "considerable".<sup>32</sup> However, the DEIR and the FEIR indicate that the City's cumulative analysis has compressed the analysis of the Project's cumulative noise impacts. The FEIR's cumulative analysis uses the cumulative traffic noise without the Project as the baseline and assesses the Project's contribution to that baseline. Instead, the FEIR should have analyzed the Project in conjunction with all other foreseeable development.<sup>33</sup>

As Mr. Watry explains, the point of a cumulative impact analysis is to determine if all foreseeable development will result in a significant environmental impact even if no one individual project does.<sup>34</sup> Courts have ruled that an EIR should consider whether the cumulative noise impact would be significant when added to the existing noise level, for example, even though minor increase in noise in isolation would not be noticeable, when added to an already high noise level, it could cause a tipping point of noise problems for the general public.<sup>35</sup> The bare conclusion that the Project will not have an impact on cumulative noise impacts because it will only contribute 1 dBA to the is not supported as it fails to account for reasonably foreseeable development that would result in a cumulatively significant noise impact.<sup>36</sup>

Here, the DEIR fails to analyze the future cumulative traffic noise levels against the existing traffic noise levels.<sup>37</sup> In our previous comments on the DEIR, Residents used the DEIR's data to establish first, that there will be a cumulative impact at eight receiver areas, and second, that the Project's contribution will be significant at three of those areas. The FEIR fails to address the flaw in the DEIR's cumulative analysis, and as such fails to analyze the Project's significant impact on cumulative noise levels from Project traffic.

## **B. The FEIR Still Fails to Accurately Disclose and Mitigate the Project's Potentially Significant Biological Resources Impacts**

The FEIR fails to remedy the DEIR's deficient analysis of the potentially significant impacts to biological resources and fails to respond directly to Dr. Smallwood's detailed comments on these issues. As Dr. Smallwood explains, the FEIR responds to summaries of some of his comments that were included in

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<sup>32</sup> Watry Comments, p. 3.

<sup>33</sup> Watry Comments, p. 3.

<sup>34</sup> Watry Comments, p. 3.

<sup>35</sup> *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1123

<sup>36</sup> *Ibid.*

<sup>37</sup> Watry Comments, p. 3.



Residents' letter, and responds to comments from California Department of Fish and Wildlife ("CDFW") Bay Delta region, Assistant to the Regional Manager, Debbie Hultman, dated May 25, 2022 ("CDFW Comments"), but fails to respond directly to his 31-page comment letter.<sup>38</sup> As a result, the FEIR fails to respond to comments raising significant environmental issues related to the Project's impacts on biological resources, in violation of CEQA.<sup>39</sup>

In his review of the DEIR, Dr. Smallwood provided substantial evidence from a review of regulatory databases and his own site surveys demonstrating that:

- There are 2 to 3 times the number of nest sites used by Swainson's hawks than reported in the DEIR.
- There are significantly more species of wildlife (146 species of vertebrate wildlife), special-status species (74 special-status species), and evidence of breeding at the Project site than reported in the DEIR.
- Habitat loss caused by the project would deny California 10,718 birds per year.
- Road mortality would remove 17,905 wild animals per year.

The evidence presented in Dr. Smallwood's DEIR comments demonstrated that the DEIR's baseline data was incomplete, and that the DEIR substantially underestimated the severity of the Project's impacts on these species from the disruption and removal of habitat. These comments are entirely unaddressed in the FEIR.

Additionally, Dr. Smallwood identified errors in the DEIR's cumulative effects analysis and proposed mitigation measures, and recommended additional feasible mitigation measures to address impacts not analyzed in the DEIR. In response to these comments, the FEIR refers the reader to responses E-1 through E-6 which were prepared in response to CDFW. However, the responses to CDFW's comments do not address the same issues and substantial evidence provided by Dr. Smallwood, and are therefore deficient under CEQA.

Finally, the FEIR's reference to responses E-1 through E-6 completely disregards Dr. Smallwood's comments on the insufficient reporting of survey methodology relied upon by the DEIR. Dr. Smallwood's DEIR comments explained that the amount of time, and the time-of-day, that biological surveys are conducted factor strongly into survey outcomes, as well as the expertise of the surveyors at

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<sup>38</sup> Smallwood Comments, p. 1.

<sup>39</sup> 14 CCR § 15088(c); *Flanders Foundation*, 202 Cal. App. 4th at 615. 6116-006j

identifying relevant species. The DEIR failed to include this information, and the FEIR provides no response to this comment. The continued omission of this critical information prohibits the public from evaluating the adequacy of the City's biological baseline data, and from conducting a complete review of the Project's biological impacts.<sup>40</sup> The FEIR's failure to address this key issue limits the FEIR's effectiveness as an informational document under CEQA.

### **1. The FEIR Still Fails to Analyze Potentially Significant Impacts to Swainson's Hawks**

Dr. Smallwood's DEIR comments explained that the DEIR failed to conduct sufficient analysis of impacts to Swainson's hawks. Specifically, Dr. Smallwood demonstrated that the DEIR incorrectly underreported the acreage suitable for Swainson's hawk habitat at the Project site, thereby underestimating the severity of the Project's impacts on Swainson's hawk.<sup>41</sup> In response to these comments, the FEIR directs the reader to Response E-1<sup>42</sup>, a response to the CDFW's critique of the survey protocols for Swainson's hawk outlined in the DEIR.<sup>43</sup> However, Response E-1 does not respond to Residents' concerns regarding the characterization of suitable habitat for Swainson's hawk.

Additionally, Dr. Smallwood found that Response E-1 provides a misleading response to the comments submitted by CDFW. Response E-1 states that the DEIR follows CDFW guidance for infill sites, and as such, additional mitigation is not necessary.<sup>44</sup> However, as previously commented, this site is not surrounded by urban uses, and not qualify as "infill." The City's General Plan defines infill as "[d]evelopment that occurs on vacant or underutilized land within areas that are already largely developed."<sup>45</sup> Based on this definition, the City cannot conclude that the site is "infill development" because the Project site is bounded by a vast expanse of agricultural land to the west, demonstrating that the Project site is not within an area that is already largely developed. Additionally, the agricultural activities to the west include the cultivation of alfalfa and other crops that are particularly useful as a source of forage for Swainson's hawks.<sup>46</sup> Classification of the site as infill is inconsistent with law and ignores basic facts about the Project site, thus

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<sup>40</sup> Smallwood Comments, p. 2.

<sup>41</sup> Smallwood Comments, p. 3.

<sup>42</sup> FEIR, p. 2-291.

<sup>43</sup> FEIR, p. 2-43.

<sup>44</sup> FEIR, p. 2-43.

<sup>45</sup> Vacaville General Plan, Glossary, p. G-11. Available at

<https://www.ci.vacaville.ca.us/home/showpublisheddocument/5409/637932324718870000>

<sup>46</sup> Smallwood Comments, p. 3.

depriving the public of a proper assessment of the Project's significant impacts to biological resources. The City must conduct additional survey of the site to properly analyze the prevalence of Swainson's hawk and the Project's impacts on their habitats.

The FEIR also refers the reader to Response E-2 which responds to comments by the CDFW on the Project site's water features. This response does not have any bearing on Dr. Smallwood's comments. Similarly, responses E-5 and E-6 fail to respond to any comments submitted by Residents or Dr. Smallwood.

## **2. The FEIR Still Fails to Analyze Significant Impacts to Burrowing Owls**

Response E-3 responds to CDFW's comments regarding fluctuating burrowing owl conditions at the Project site, and states that the DEIR's study of the site provides the best available description of the environmental setting from which to evaluate the environmental impacts of the Project.<sup>47</sup> The City's analysis of this issue is fundamentally flawed. First, as previously commented, the survey conducted at the site did not meet the CDFW's standards for a proper burrowing owl detection survey and, as such, the results of the survey conducted for the DEIR cannot be relied upon to determine the prevalence of burrowing owls at the site.<sup>48</sup> Second, Dr. Smallwood explained that that by characterizing the number of burrowing owl on site based on the most recent number observed on site, the DEIR ignored the fluctuating nature of burrowing owl populations.<sup>49</sup> The FEIR fails to correct this error. The City must conduct additional survey of the Project site, taking into account the dynamic nature of burrowing owl nesting habits, in order to accurately assess the extent of the Project's impacts on burrowing owl.<sup>50</sup>

Response E-3 also states that the survey of burrowing owls at the Project site was conducted in compliance with the CDFW's 2012 *Staff Report on Burrowing Owl Mitigation*.<sup>51</sup> However, Dr. Smallwood points out that the survey conducted did not comply with the CDFW's standards. First, the survey was conducted in October, which is an unproductive time of year for burrowing owls when most have departed their breeding areas. Second, Dr. Smallwood notes that non-breeding surveys must consist of four evenly spaced surveys where the DEIR relies on only three surveys

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<sup>47</sup> FEIR, p. 2-44.

<sup>48</sup> Smallwood Comments, p. 4.

<sup>49</sup> Smallwood Comments, p. 4.

<sup>50</sup> Smallwood Comments, p. 4.

<sup>51</sup> FEIR, p. 2-45.

which were conducted on October 13, 14 and 29.<sup>52</sup> Third, a portion of the surveys was conducted from a moving vehicle, which is not consistent with any part of the CDFW's guidelines.<sup>53</sup> As a result, the FEIR's response E-3 does not contain any evidence that the surveys for burrowing owls were properly conducted. Therefore, the FEIR's subsequent conclusion regarding impacts to burrowing owls cannot be relied upon.

As previously commented, the DEIR's additional surveys between December 2020 and May 2021 are similarly deficient for several reasons. Surveys in December and January are not productive as by that time burrowing owls have left their breeding areas.<sup>54</sup> Additionally, Dr. Smallwood notes that the methodology used for the DEIR surveys improperly states that morning is the best time to conduct such surveys.<sup>55</sup> In fact, the best time to conduct burrowing owl surveys is at night when they are most active. If surveys must be conducted during the day, the survey should take place when the temperature begins to rise, not in the early morning as was done in the DEIR's surveys.<sup>56</sup> Finally, the FEIR fails to include information on the dates of the December through May surveys, therefore it is impossible to know whether the surveys were properly spaced at three weeks as required by the CDFW standard.<sup>57</sup>

Due to the deficiencies in the FEIR's survey of burrowing owl populations, the FEIR lacks supporting evidence to conclude that the proposed burrowing owl mitigation would reduce impacts to less than significant levels. For example, Response E-3 states that Mitigation Measures Bio-4 requires permanent preservation and enhancement of almost 159 acres of burrowing owl habitat of similar or better value for burrowing owl than exists on site to be consistent with CDFW recommendations.<sup>58</sup> This response is misleading for several reasons. First, it should be noted that the mitigation measure referred to should be MM Bio-3 not Bio-4. Second, the mitigation measure does not provide supporting evidence demonstrating that the land offsite would provide similar or better habitat than exists at the Project site. To the contrary, Dr. Smallwood explains that the mitigation measure term to allow mitigation credits purchased at Burke Ranch

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<sup>52</sup> Smallwood Comments, p. 5.

<sup>53</sup> Smallwood Comments, p. 5; see also, FEIR, Appendix 4.7-1, pdf. p. 10.

<sup>54</sup> Smallwood Comments, p. 6.

<sup>55</sup> Smallwood Comments, p. 6.

<sup>56</sup> Smallwood Comments, p. 6.

<sup>57</sup> Smallwood Comments, p. 6.

<sup>58</sup> FEIR, p. 2-45.

Conservation Bank is not sufficient as there is evidence that the site is predominantly wetlands, which will not support breeding populations of burrowing owls.<sup>59</sup> As such, the proposed mitigation does not effectively reduce the impacts to burrowing owls and remains deficient.

### **3. The FEIR Still Fails to Analyze Significant Traffic Impacts to Wildlife**

With regard to Dr. Smallwood's comments on wildlife mortality from traffic, the FEIR states that "[t]he findings of the DEIR analysis are integrated throughout its various chapters. Thus, for example, the project's effects on land use, air quality, transportation, etc., are accounted for in the analysis of biological resources, and vice versa."<sup>60</sup> and that "[t]he conclusion of unavoidable significance applies to all effects of the project related to increases in vehicular traffic movement, including the potential for increased effects on resources."<sup>61</sup> This is patently false. The DEIR's analysis of biological impacts does not take the Project's land use, air quality and transportation impacts into account. Furthermore, the conclusion that the Project's VMT analysis includes an analysis of impacts to wildlife is not supported. There is no discussion of impacts to wildlife in the VMT analysis, nor is the VMT analysis a proper vehicle for such study. The City must conduct a proper analysis of the Project's wildlife mortality impacts from traffic and present its findings in a recirculated DEIR.

The Responses fail to respond to Dr. Smallwood's comments on the Project's significant biological resources impacts. Dr. Smallwood concludes that the Project, as proposed, ensures that significant, unmitigated impacts to Swainson's hawks and burrowing owls will result. The City must remand the Project to staff to revise and recirculate the DEIR to correct these errors and ensure that these significant impacts are properly addressed.

### **4. The Proposed Changes to the General Plan Policy COS-P1.12 Result in Significant Impacts to Wildlife**

The DEIR and Staff Report state that because the Solano Habitat Conservation Plan ("HCP") has not been adopted yet, the City proposes the following change to the General Plan Policy COS-P1.12.:

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<sup>59</sup> Smallwood Comments, p. 7.

<sup>60</sup> FEIR, p. 2-291.

<sup>61</sup> FEIR, p. 2-292.

“Until the Solano Habitat Conservation Plan (HCP) is adopted, comply with all of the Avoidance, Minimization, and Mitigation Measures listed in the Draft Solano HCP (see Appendix A for a list of the Avoidance and Minimization Measures that are applicable to Vacaville), unless the project is an infill project, or potential project impacts are otherwise evaluated in an Environmental Impact Report. However, the City’s issuance of grading permits or other authorizations does not absolve the applicant’s obligations to comply with all other State and federal laws and regulations.”<sup>62</sup>

If the Project is considered “infill” then this amendment to the General Plan would allow the Project proponent to avoid complying with the HCP and would therefore result in evasion of the following HCP requirements:

- Mitigation for 8 burrowing owl nest sites per the Solano HCP standards of impacts and mitigation;
- Preservation of nest trees, which number at least 2 and very likely 3 such trees on the project site, but this number would increase if more nest trees used over the last 10 years are identified;
- Acting on the HCP’s Post-Construction Occupied Nest Avoidance measure; and,
- Defining habitat areas of burrowing owl and Swainson’s hawk according to the standards and definitions of habitat in the Solano HCP.<sup>63</sup>

Dr. Smallwood concludes that, if approved, the proposed amendment to COS-P1.12 will cause significant, unmitigated impacts to biological resources by allowing the Project to move forward unencumbered by the standards set forth in the HCP and would create irreconcilable inconsistencies with mandatory policies of the HCP.<sup>64</sup>

Additionally, the FEIR fails to analyze the consistency with the HCP with the addition of the phrase “...or potential project impacts are otherwise evaluated in an Environmental Impact Report.” This addition serves to distance the City from performing rigorous survey of cumulative effects to Swainson’s hawk and burrowing

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<sup>62</sup> Staff Report, pdf. pp. 5-6.

<sup>63</sup> Smallwood Comments, p. 11.

<sup>64</sup> Smallwood Comments, p. 11.

owl which the HCP requires.<sup>65</sup> Dr. Smallwood explains that if the EIR made full use of the analysis in the Solano HCP, then the EIR would be consistent with it while also presenting a proper analysis of the environmental setting of the Project site.<sup>66</sup> However, the FEIR only includes passing mention of the HCP, and the FEIR's Biological Assessment, Appendix 4.7-1, makes no mention at all of the Solano HCP in its analysis of potential impacts to burrowing owl and Swainson's hawk.

### **C. The FEIR Still Fails to Accurately Disclose and Mitigate the Project's Significant Transportation Impacts**

The FEIR largely failed to consider and respond to Mr. Smith's comments on the DEIR. Mr. Smith's detailed comments on the DEIR are responded to in Response 17-7.<sup>67</sup> As Mr. Smith notes, the City's principal tactic in the Responses is to respond to the partial summaries of his comments by Residents' attorneys without responding to the full range of comments in Mr. Smith's letter, or to respond by reference to Responses provided to other commenters.<sup>68</sup> For example, the City's response to Mr. Smith's comments is done by way of reference to a response to Residents' comment letter – Response 17-7 – which does not adequately address Mr. Smith's comments. The City's tactics allow the FEIR to evade responding to the underlying issues and evidence supporting Mr. Smith's comments.

As a result, the FEIR still fails to disclose the Project's full range of transportation impacts, and by extension, the full range of air quality and GHG emissions impacts. The FEIR also fails to respond to significant environmental issues raised by Mr. Smith regarding the Project's transportation impacts, in violation of CEQA.<sup>69</sup>

#### **1. The FEIR Still Incorrectly Characterizes the Project as Infill Development, Thereby Evading a Meaningful Analysis of the Project's VMT Impacts**

Response 17-7 states that “the project is an infill site which adjoins an established residential neighborhood (to the west) and a growing employment center (on the north side of Interstate 80).” This portion of the response fails to

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<sup>65</sup> Smallwood Comments, p. 11.

<sup>66</sup> Smallwood Comments, p. 11.

<sup>67</sup> FEIR, pp. 2-288 – 2-290.

<sup>68</sup> Smith Comments, p. 1.

<sup>69</sup> 14 CCR § 15088(c); *Flanders Foundation*, 202 Cal. App. 4th at 615. 6116-006j

address Residents' and Mr. Smith's comments on the DEIR which provided sound reasoning that the Project is not properly classified as "infill" as it will convert 185.4-acres of open-space that had previously been used for active private recreation which abuts rural residential to the east and active agricultural land to the west.<sup>70</sup> Mr. Smith explains that FEIR's incorrect assumption that the Project is "infill" development results in underestimated VMT impacts, because the FEIR assumes VMT reductions associated with common features of infill projects that do not exist at this site – urban location, mix of uses, proximity to transit and features enabling active transportation.<sup>71</sup> He further explains that the FEIR's VMT calculations incorrectly assumed large-scale internalization, active transportation use and short range vehicle trips, which are characteristics of dense urban infill sites that are unlike the Project site.<sup>72</sup>

Mr. Smith reiterates in his comments on the FEIR that the Project's residential and commercial uses do not constitute "infill" and instead represent an expansion of urban uses outward into open space and agricultural lands.<sup>73</sup> The FEIR's analysis of the Project under the assumption that it is infill leads the City to undercalculate the Project's VMT impacts. The FEIR nevertheless concludes that the Project's VMT impacts are significant and unavoidable. However, before the City can adopt a statement of overriding considerations to approve the Project, the City must require all feasible mitigation to reduce the Project's VMT impacts to the greatest extent feasible. The City cannot support a finding that the MMRP includes all feasible mitigation until the Project's VMT impacts are calculated accurately. Since the Project's actual VMT impacts are more severe than currently disclosed in the FEIR, the FEIR's existing VMT mitigation is inadequate. The City must consider and adopt additional available mitigation measures to reduce the Project's VMT impacts to the greatest extent feasible.<sup>74</sup>

## **2. The FEIR Relies on Ineffective VMT Mitigation**

Response 17-7 claims that the DEIR "contains several measures to minimize VMT" which include:

- Placement of higher density residential near local commercial services, and the City's growing high-technology manufacturing and biotechnology business park;

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<sup>70</sup> Smith Comments, p. 2.

<sup>71</sup> Smith Comments, p. 3.

<sup>72</sup> *Id.*

<sup>73</sup> Smith Comments, p. 2.

<sup>74</sup> FEIR, p. 2-290.



- Development of “complete streets” and pedestrian walkways and bicycle trails connecting the commercial and residential areas of the Project; and,
- Access to public transportation.<sup>75</sup>

The FEIR fails to address comments by Residents and Mr. Smith which refute these points. First, due to the Project’s location at the rural fringe of the San Francisco Bay Area and the Sacramento metropolitan regions the Project will generate large numbers of long commuting trips.<sup>76</sup> Features such as placement of residential areas near commercial services, pedestrian and bicycle trails and access to public transport will not reduce the number of long commute trips that the Project will generate because these features do not connect to the large job pools located in the Bay Area and Sacramento regions.<sup>77</sup>

Second, over the last ten years the City of Vacaville has experienced temperatures above 90 degrees Fahrenheit between May and September and as much as 34 inches of rain between November and March.<sup>78</sup> Extreme weather further limits the use of active transportation as it cannot be relied on as a primary mode of transportation.<sup>79</sup>

Third, the DEIR and FEIR do not specify the type of commercial services that will serve the Project, only stating that approximately 299,300 square feet of the Project would be General Commercial.<sup>80</sup> Pursuant to the City’s General Plan, the General Commercial land use designation allows for a wide range of uses including: retail stores, food and drug stores, auto sales, and businesses selling home furnishings, apparel, durable goods, and specialty items. Support facilities, such as entertainment and eating-and-drinking establishments, are also permitted.<sup>81</sup> Due to the broad range of businesses permitted in the General Commercial zone, and the proximity of the Project’s commercial development to Interstate 80, it is likely that freeway-oriented businesses will vie for space in the newly developed area. Freeway oriented businesses are not necessarily neighborhood serving and would further limit VMT reductions for the Project.

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<sup>75</sup> FEIR, p. 2-289.

<sup>76</sup> Smith Comments, p. 2.

<sup>77</sup> Smith Comments, p. 2.

<sup>78</sup> National Weather Service Forecast Office, Yearly Charts for the Years 2011-2021, Vacaville California, available at [https://www.wrh.noaa.gov/climate/temp\\_graphs.php?stn=KVCB&wfo=sto](https://www.wrh.noaa.gov/climate/temp_graphs.php?stn=KVCB&wfo=sto) (accessed August 24, 2022).

<sup>79</sup> Smith Comments, p. 2.

<sup>80</sup> DEIR, p. 3-15.

<sup>81</sup> City of Vacaville, 2035 General Plan, Land Use Element (2015) p. LU-19, available at <https://www.ci.vacaville.ca.us/home/showpublisheddocument/5416/6379323225048700006116-006j>

Fourth, the Project site is no longer served by regular public bus service via City Coach Route 1 as is claimed in the DEIR.<sup>82</sup> According to the City Coach website, only Routes 2 through 6 are offered at this time.<sup>83</sup> Route 4 which does service the northern border of the Project site, only runs once per hour, and only between the hours of 7:00 a.m. to 6:00 p.m. on weekdays and two hours less on weekends.<sup>84</sup> The lack of multiple routes, coupled with the time and location limitations of Route 4 make access to public transit less attractive to residents who have a choice in modes of transportation.<sup>85</sup> This will result in existing and future residents to use personal vehicles to complete their trips within the City.

The FEIR fails to respond to Residents' and Mr. Smith's comments on reasonably foreseeable VMT impacts of the Project that and the ineffective mitigation measures proposed. The City must adequately respond to Residents' comments on the DEIR in a revised and recirculated FEIR prior to the Planning Commission's consideration of the Project.

**D. The FEIR Fails to Accurately Disclose and Mitigate the Project's Potentially Significant Energy Impacts**

The City's analysis of the Project's construction and operational energy use impacts in the DEIR concluded that the Project will result in a less than significant energy impact. This conclusion is not supported by the evidence in the record and defies recent case law requiring quantification of a Project's energy impacts. As a result, the FEIR remains inadequate as an environmental document because it fails to properly disclose, analyze, and mitigate the Project's potentially significant impacts on energy use. The City cannot approve the Project until the FEIR is revised and recirculated to resolve these issues and comply with CEQA's requirements.

The FEIR concludes that the construction transportation energy consumption by on-road vehicles will not result in a significant impact based on two factors. First, the FEIR states that "[b]ecause it is in the contractor's economic interest to minimize fuel and maintenance costs, is anticipated that the construction

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<sup>82</sup> DEIR, p. 4.19-8

<sup>83</sup> Vacaville City Coach, Find Your Route (2022) available at <https://citycoach.com/find-your-route/> (accessed August 24, 2022).

<sup>84</sup> Vacaville City Coach, Route 4 (2022) available at <https://citycoach.com/find-your-route/route-4/> (accessed August 24, 2022).

<sup>85</sup> Smith Comments, p. 3.  
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equipment would be well maintained and meet the appropriate tier ratings per CALGreen or EPA emissions standards, so that adequate energy efficiency level is achieved.”<sup>86</sup> While this is an admirable goal, the FEIR does not set out any measures to ensure that the Project’s contractors will achieve it.

Additionally, regarding Project operational electrical energy use, the FEIR states that the Project would use 9,701,000 kWh/year, or approximately 0.03 percent of the total electricity consumption in Solano County in 2019.<sup>87</sup> The FEIR also states that the Project “would be consistent with the requirements of the Building Energy Efficiency Standards and CALGreen in place at the time of construction, it would not result in wasteful or unnecessary electricity demands.”<sup>88</sup>

Based in part on the above assumptions, the FEIR concludes that the Project will not result in potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy resources, during Project construction or operation. These conclusions are unsupported because the FEIR’s statement that it anticipates Project contractors to maintain construction equipment and meet the appropriate tier ratings per CALGreen or EPA emissions standards does not meet the requirement for an adequate analysis of the Project’s construction energy impacts under CEQA. Recent case law establishes that the City cannot rely on compliance with energy conservation measures to support a conclusion of less than significant energy consumption impacts.<sup>89</sup> The FEIR fails to quantify the Project’s transportation energy use and fails to establish a clear threshold to measure the Project’s energy use against. As a result, there is no evidence in the record that supports the City’s less than significant impact conclusion.

Similarly, the FEIR’s analysis of operational energy use impacts rely on the implementation of Building Energy Efficiency Standards and CALGreen to conclude that the Project will result in a less than significant electrical energy use impact.

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<sup>86</sup> DEIR, p. 4.9-10.

<sup>87</sup> DEIR, p. 4.9-10.

<sup>88</sup> DEIR, p. 4.9-10.

<sup>89</sup> *Ukiah Citizens for Safety First v. City of Ukiah* (“*Ukiah Citizens*”) (2016) 248 Cal.App.4th 256, 264-65; *California Clean Energy Committee v. City of Woodland* (“*CCEC*”) (2014) 225 Cal.App.4th 173, 211 (compliance with applicable regulations does not, by itself, constitute an adequate assessment of mitigation measures that can be taken to address the energy impacts during construction and operation of the project.)

The FEIR reaches this conclusion without comparing the Project's anticipated energy usage of 9,701,000 kWh/year against any identifiable threshold of significance. The FEIR's conclusion that the Project's operational energy use would be less than significant is unsupported by substantial evidence.

The City's conclusions regarding Project energy use are not supported by substantial evidence and cannot be used as justification for the conclusion that the FEIR adequately addresses the Project's potentially significant energy impacts. The City must establish a clear threshold to measure the Project's energy impact against and analyze the Project's construction and operational energy usage in view of the applicable thresholds to determine if the Project will have a significant impact on energy use.

#### **E. The FEIR Fails to Adequately Describe and Analyze the Development Agreement**

The FEIR notes that approval of a Development Agreement between the City and the Applicant would be one of the Project's required approvals. We previously commented that the City violated CEQA when it failed to attach the proposed Development Agreement to the DEIR and failed to describe its terms. Similarly, the FEIR fails to contain any analysis of the potential environmental impacts that may be caused by implementation of the Development Agreement.<sup>90</sup> Instead, the FEIR states that the "Development Agreement will be made available for review prior to consideration by the planning and legislative bodies" and "will be consistent with Specific Plan and other project entitlements evaluated in the DEIR."<sup>91</sup> In fact, the Development Agreement was released in draft form with the Staff Report to the Planning Commission for the August 30, 2022 hearing on the Project.<sup>92</sup>

When a development agreement is required to implement a project, it is considered part of the project under CEQA.<sup>93</sup> Development agreements must be enacted in accordance with the Government Code and applicable local planning codes, and must undergo environmental review at the time of adoption. Therefore, any development agreement for the Project must be described in the EIR and considered by the City's decision makers at the same time as the rest of the Project approvals.

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<sup>90</sup> FEIR, pp. 2-293 – 2-294.

<sup>91</sup> FEIR, p. 2-294.

<sup>92</sup> Staff Report, Item 6.A, Attachment H, Development Agreement, available at [https://vacaville.granicus.com/MetaViewer.php?view\\_id=5&event\\_id=1090&meta\\_id=100783](https://vacaville.granicus.com/MetaViewer.php?view_id=5&event_id=1090&meta_id=100783)

<sup>93</sup> See Gov. Code § 65864; 14 CCR §§15352(a), (b), 15378; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. 6116-006j

The draft Development Agreement contains new terms that alter the scope of the Project, including the construction of a roundabout at Yellowstone and Sequoia Drive, and installation of traffic calming improvements, consisting of two Radar Feedback Signs and one Ladder Crosswalk with Rectangular Rapid Flashing Beacon. The environmental impacts of these additional measures were not analyzed in the FEIR as is required under CEQA.<sup>94</sup> The FEIR fails to discuss any of the terms being considered for inclusion in the Development Agreement including the length of time the Development Agreement will be in effect, and fails to analyze the impacts of the Development Agreement's substantive terms. This information has only recently been published in connection with the Staff Report, depriving the public of the ability to review its contents during the public comment period and resulting in a deficient FEIR which fails to disclose the impacts of this key Project entitlement.

The FEIR must be revised to correct this omission. In particular, the public must be allowed to consider whether the proposed Development Agreement will have significant impacts in addition to the impacts disclosed in the FEIR *before* the City enters into a contract with the Applicant which could guarantee the long-term existence of those impacts during the life of the contract.<sup>95</sup>

Additionally, the public must have an opportunity to evaluate the specific public benefits conferred by the Agreement, as the City has great discretion in determining what constitutes a public benefit and must be given an opportunity to evaluate and comment on the Agreement. The City and the public must consider what public benefits would warrant providing the Applicant a guarantee on the Project's entitlements. Examples of public benefits could include community workforce or skilled and trained workforce requirements, funds or community services provided to the City to offset air quality, traffic, GHG, noise, and biological impacts associated with the Project. City residents and other members of the public must be given an opportunity to provide input to the City on what public benefits the City should require.

The City must evaluate the environmental impacts of the Project in light of the Development Agreement prior to approval of the Project. The City must also recirculate the EIR to include analysis of the environmental impacts of the Development Agreement's terms.

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<sup>94</sup> 14 CCR § 15126.4(a)(1)(D).

<sup>95</sup> 14 CCR §15088.5(a); *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112.  
6116-006j

**F. The FEIR Fails to Adequately Disclose, Analyze, And Mitigate Potentially Significant Land Use Impacts**

The City cannot make the required findings for the Project's required entitlements including the General Plan Amendment, Green Tree Park Policy Plan Amendment, Master Plan, Rezoning, and Vesting Tentative Map because the Project will conflict with land use plans, policies, and regulations adopted for the purpose of avoiding or mitigating an environmental effect, including the following policies:

- Action COS-A9.2: Continue to provide alternative fuel infrastructure throughout the city, such as electric vehicle charging stations, and conduct periodic studies to ensure that there is demand for such facilities as technologies change.<sup>96</sup>

Despite the assertion in the FEIR that the Project will install electric vehicle charging stations throughout the Project, the FEIR does not establish if the proposed infrastructure will be sufficient to support demand. Without additional study to substantiate its claim, the FEIR cannot demonstrate compliance with this policy and ensure that adequate electric vehicle infrastructure will be provided throughout the life of the Project.

- Policy COS-P1.3: Protect the existing wildlife movement corridors within the designated Vacaville-Fairfield Greenbelt area and create new wildlife corridors, including creek corridors and utility easements, where feasible, to enable free movement of animals, to minimize wildlife-urban conflicts, and to establish open space linkages.<sup>97</sup>

Dr. Smallwood demonstrates that the FEIR fails to require adequate mitigation to protect wildlife habitat and corridors that will be lost from Project construction. The FEIR therefore fails to comply with this mandatory policy.

- Policy COS-P1.5: Require new development proposals to provide baseline assessments prepared by qualified biologists. The assessment shall contain sufficient detail to characterize the resources on, and adjacent to, the

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<sup>96</sup> General Plan, p. COS-28.

<sup>97</sup> General Plan, p. COS-9.

development site. The assessment shall also identify the presence of important and sensitive resources, such as wetlands, riparian habitats, and rare, threatened, or endangered species affected by the development.<sup>98</sup>

As explained by Dr. Smallwood, the FEIR lacks adequate biological baseline studies, thus failing to comply with this policy.

The Project's failure to comply with mandatory land use plans and policies results in both significant land use impacts and significant impacts under CEQA.<sup>99</sup> The Project cannot be approved until these conflicts with mandatory land use policies are resolved.

**G. The Planning Commission Cannot Make All of the Findings Required to Recommend Approval of the Project's Requested Entitlements**

As outlined in Residents' comments on the DEIR, the Project requires several discretionary approvals from the City. The City's Municipal Code details the findings required for the following entitlements sought by the Applicant including the General Plan Amendment<sup>100</sup>, Specific Plan<sup>101</sup>, rezoning, subdivision map<sup>102</sup>, Green Tree Park Policy Plan Amendment<sup>103</sup>, Airport Land Use Compatibility Review<sup>104</sup>, and design review for the R7 Greentree Apartments.<sup>105</sup>

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<sup>98</sup> General Plan, p. COS-9.

<sup>99</sup> *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732; *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. (14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).) A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).)

<sup>100</sup> VMC § 14.04

<sup>101</sup> VMC § 14.09.340

<sup>102</sup> VMC § 14.11.020

<sup>103</sup> VMC § 14.09.340.060

<sup>104</sup> VMC § 14.09.110.070

<sup>105</sup> VMC § 14.09.290

A General Plan Amendment requires that the City Council make the following findings in order to approve the Project:

- A. The proposed amendment is internally consistent with the goals, objectives, and policies of the General Plan;
- B. The proposed amendment would not be detrimental to the public health, safety, or welfare of the community;
- C. The proposed amendment would maintain an appropriate balance of land uses within the City;
- D. The proposed amendment is consistent with the provisions of Division 1 of Title 7 of the California Government Code pertaining to the amendment, update, or adoption of General Plans; and
- E. In the case of an amendment affecting the General Plan Diagram, which designates land uses, the proposed use of the subject site is compatible with adjoining land uses.<sup>106</sup>

Finding B requires that the City determine that the proposed amendment to the General Plan would not be detrimental to the public health, safety, or welfare of the community. As detailed above, the Project's potentially significant, unmitigated impacts on biological resources, noise, transportation, and energy render the Project inconsistent with finding B above. With regard to transportation impacts, we previously provided comment that the street layout presents hazards to pedestrians and cyclists, a clear detriment to public health. Similarly, the Project's construction noise impacts will be detrimental to the welfare of the community. Finally, the City's lack of analysis of energy use during Project dodges the analysis necessary to determine that the Project will not have an adverse impact on GHG emissions which could increase the public health impacts of the Project.

Finding E requires that the City determine that the proposed use of the Project site is compatible with adjoining land uses. In this case, Residents' expert provided substantial evidence that the habitats of several species residing in the agricultural land to the west would be negatively impacts by the Project as

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<sup>106</sup> VMC § 14.04.030.040.  
6116-006j



proposed. This conflict in land uses renders the City unable to make the finding required under section E until the City implements mitigation measures that will effectively reduce these impacts to wildlife.

Similar to the findings required for a General Plan Amendment, the Municipal Code requires findings to be made in order to approve the Project's Specific Plan. The findings required are as follows:

- A. The specific plan or amendment will not be detrimental to the public health, safety, or welfare of the community;
- B. The specific plan or amendment includes provisions which ensure that adequate public facilities will be available to serve the range of development describe (sic.) in the plan;
- C. The specific plan or amendment will maintain an appropriate balance of land uses within the City, and it does not change the overall density of the applicable General Plan land use designation
- D. The specific plan or amendment proposes land uses which are compatible with existing and future surrounding uses; an
- E. The specific plan or amendment is consistent with the goals, objectives, and policies of the General Plan, the Zoning Ordinance, and the Land Use and Development Code.<sup>107</sup>

The City cannot make the findings required to approve the Project's Specific Plan for the same reasons as stated above. Namely, finding A is precluded by evidence of the Project's detrimental impacts on public health, safety and welfare of the community, and finding D is precluded by evidence of incompatibility with surrounding land uses.

The significant unmitigated impacts from the Project preclude the Planning Commission from making the findings required to recommend approval of the Project. The City must correct the errors in its analysis of the Project's impacts and implement feasible mitigation measures to reduce those impacts before it can make the findings required to approve the Project.

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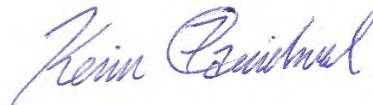
<sup>107</sup> VMC § 14.09.340.050  
6116-006j

## I. CONCLUSION

For the reasons stated herein, Napa-Solano Residents urges the Planning Commission to remand the Project to staff to prepare a revised EIR in compliance with CEQA. The City must remedy all substantial defects in the FEIR, and in the Project as a whole, before the Project may be presented to the Planning Commission for recommendation to the City Council.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink that reads "Kevin Carmichael". The signature is written in a cursive style with a large, stylized 'K' and 'C'.

Kevin Carmichael

KTC:lj1